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## DIGEST

OF THE CASES REPORTED IN

### ANNOTATED CASES

(American and English)

1916 С то 1918 В

WITH TABLE OF CASES REPORTED

AND

INDEX OF THE ANNOTATIONS

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OF

# THE CASES REPORTED

IN

# ANN. CAS.

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#### ABANDONMENT.

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#### ABBREVIATIONS.

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#### ABDUCTION.

1. An indictment, drawn under section 1 of Act La. No. 134 of 1890, p. 175, which statute provides for the punishment of any person who entices, abducts, induces, decoys, hires, engages, employs, or takes any woman of previous chaste character from her father's house, or from any other place where she may be, for the purpose of prostitution, or for any unlawful sexual intercourse, at a house of ill fame, or at any other place of like character, or elsewhere, and which charges a person with having taken such woman from her father's house "unto the public highway for the purpose of having unlawful sexual intercourse with her, and did unlawfully have sexual intercourse with her," is sufficient. State v. Sanders (La.) 1916E-105.

2. The words "any unlawful sexual intercourse" means unlawful sexual intercourse "to any extent; in any degree; at all"; and they cover a single act of sexual intercourse. State v. Sanders (La.) 1916E-102. (Annotated.)

#### ABORTION.

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2. Parties to Offense, 2.

3. Evidence, 2.

As element of damage, see Breach of Promise of Marriage, 15.

Conviction of attempted abortion on indictment for first degree murder, see Homicide, 8, 13.

Three years and one thousand dollars for administering drugs, sustained, see Sentence and Punishment, 17.

### 1. NATURE AND ELEMENTS.

1. Administering Harmless Drug. Under N. C. Revisal 1905, § 3619, specifying the punishment for procuring a pregnant woman to take a drug with intent to procure

(1)

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a miscarriage, where a drug is furnished for the purpose of producing a miscarriage, it is immaterial that it is not noxious or capable of producing the intended effect. State v. Shaft (N. Car.) 1916C-627.

2. As Including Assault. Procuring an unlawful abortion upon any woman always involves an assault in law, even when it is done with her consent and connivance, because no one can consent to an unlawful act. State v. Farnam (Ore.) 1918A-318.

# PARTIES TO OFFENSE.

3. Victim as Accomplice. A pregnant woman, procured by defendant to take a drug with intent to procure a miscarriage, is not an accomplice in a legal sense. State v. Shaft (N. Car.) 1916C-627. (Annotated.)

#### Note.

Woman upon whom abortion is committed as accomplice. 1916C-629.

## 3. EVIDENCE.

- 4. Evidence as to Intercourse. Where, on a trial for procuring a pregnant woman to take a drug with intent to procure a miscarriage, the pregnancy of the woman is undisputed, evidence as to sexual intercourse on her part is immaterial and its admission is harmless. State v. Shaft (N. Car.) 1916C-627.
- 5. Expert Evidence. On a trial for procuring a pregnant woman to take a drug with intent to procure a miscarriage, where there is evidence that a capsule, some of which was administered, contained aloes, experts are properly permitted to testify as to the effect of such drug on pregnancy, when administered in large doses. State v. Shaft (N. Car.) 1916C-627.

#### ABSENCE.

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#### WHEN IN-DEPOSITS ACCEPTING SOLVENT.

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#### ACCESSION.

Automobile. Added to 1. Fittings Where the purchaser of an automobile. title to which was retained by the seller, fitted the machine with tire casings, and the seller on nonpayment retook the machine, title to the tire casings passes to the seller, the seller of the casings not having retained title, for such is the rule of "accession," which denotes the right of the owner of corporeal property, real or personal, to any increase thereof from any cause, either actual or artificial. Blackwood Tire, etc. Co. v. Auto Storage Co. (Tenn.) 1917C-1168. (Annotated.)

## ACCIDENT.

Meaning within Workmen's Compensation Act, see Master and Servant, 194-202.

#### ACCIDENTAL MEANS.

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#### ACCIDENT INSURANCE.

1. The Contract in General, 2.

2. Statutory Regulations, S.

3. Warranties and Representations, 4.

4. Cause of Injury, 4.

5. Extent of Injury, 5.
6. Notice and Proof of Injury, 5.
7. Waiver of Provisions, 5.

8. Action on Policy, 5.

a. Evidence, 5.

b. Instructions, 6.

c. Questions for Jury, 6. d. Defenses, 6.

# THE CONTRACT IN GENERAL.

- 1. Construction Against Insurer. Where the language of an accident policy is ambiguous, it must be construed most favorably to the insured; the policy being drawn by defendant. Berry v. United Commercial Travelers (Iowa) 1918A-706.
- 2. "Immediate" Disability. An accident policy, providing for payment of death claim, declared that if death should result independently of all other causes within ninety days from the accident, though not necessarily causing immediate and continuous disability, the death benefit should be paid, while if injuries should, independently of all other causes, immediately, continuously, and wholly disable and prevent insured from performing all

duties pertaining to his occupation, the death benefit should be paid in case of death occurring within 200 weeks of the date of the accident. Insured, a dentist, injured his finger with a burr, contracting blood poisoning in the wound, though for several days before he was forced to retire, he was able to go to his office and perform part of his ordinary duties. After a month in bed, he returned to his office and for over three months performed all of his regular duties, dying suddenly at the end of that period. It is held that insured's disability was immediate and continuous during the time between the infliction of the wound and the development of infection, and so recovery cannot be defeated on the ground that there was no continuous disability. Doyle v. New Jersey Filedity, etc. Ins. Co. (Ky.) 1917D-851. (Annotated.)

- 3. "Burning of Dwelling." The word "dwelling" alone is not commonly used with exactly the same meaning as the words "dwelling house." As that word is used in a policy of accident insurance covering injuries caused by the burning of a dwelling, it is capable of being understood to mean, "home or place of habitation." If the insured did so understand, and the insurer had reason to suppose he so understood it, that meaning must prevail. Neb. Rev. St. 1913, § 7909. Hamilton v. North American Accident Ins. Co. (Neb.) 1917C-409. (Annotated.)
- 4. Approval by Insurance Commissioner. Where a form of an accident policy had been approved by the insurance commissioner, it will be presumed that policies issued by the insurer followed the approved form. Lundberg v. Interstate Business Men's Acc. Assoc. (Wis.) 1916D-667.
- 5. Hernia Clause. Where an accident policy under the by-laws of the company insured against bodily injury through external, violent, and accidental means, which would prevent the insured from the prosecution of any business pertaining to his occupation, but excepted damage resulting from hernia and injuries not the proximate cause of the disability, the assignee of the insured is entitled to recover for loss of time resulting from a fall which produced hernia, whereby he was confined in the hospital and was rendered unable to perform his usual work; hernia being a consequence, and not the proximate cause, of the injury. Berry v. United Commercial Travelers (Iowa) (Annotated.)
- 6. Validity of Contract Limitation. A provision in a contract of insurance, to the effect that no action at law or suit in equity shall be commenced before three months, nor after six months, from the date on which affirmative proof of acci-

dent must be furnished to the company, is repugnant to the provisions of section 3321, Idaho Rev. Codes, which provides that every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings and the ordinary tribunals, or which limits the time in which he may enforce his rights, is void. Douville v. Pacific Coast Casualty Co. (Idaho) 1917A-112.

- 7. Time to Sue. A provision in an accident policy requiring suit to be brought, if at all, within one year from the date of the accident on which the suit is predicated is valid. Bates v. German Commercial Acc. Co. (Vt.) 1916C-447.
- 8. Reduction of Benefits. An accident policy provided that, in the event of disability due wholly or in part to or resulting directly or indirectly from hernia commencing or appearing after the policy had been in force for 60 days preceding, the limit of the company's liability should be one-third of the amount that would otherwise be payable under the policy. Held, that such clause, construed most strongly against the insurance company, provided no limitation in case hernia resulted within the 60-day period, in which case the company was liable for full indemnity. Bates v. German Commercial Acc. Co. (Vt.) 1916C-447.

## Notes.

Construction of hernia clause in accident insurance policy. 1918A-710.

Construction of sunstroke clause in accident insurance policy. 1918A-523.

Construction of provision in accident insurance policy relating to injury "caused by burning of building" or similar phrase. 1917C-410.

Construction of clause in accident insurance policy excepting death caused by

disease. 1917C-463.

# 2. STATUTORY REGULATIONS.

9. Standard Policy Law. St. Wis. 1913, § 1960, subsec. 1, declares that no accident policy shall be issued until a copy thereof and the classification of risks and premium rates shall have been filed with the commissioner of insurance and approved. Subsection 2 declares that in such policies any provision purporting to reduce any indemnity shall be printed in bold-faced type with greater prominence than any other portion of the text of the policy, while subsection 9 declares that a policy issued in violation of the act shall be valid, but the rights of the beneficiary shall be governed by the act. An accident policy, providing that there should be no recovery on account of bodily injury caused by the discharge of firearms unless the accidental character of the discharge should be established by an eyewitness, was issued with the approval of the insurance commissioner. Held that, in view of the scope of the commissioner's authority, the provision could not be questioned on the ground that it was not in bold-faced type. Lundberg v. Interstate Business Men's Acc. Assoc. (Wis.) 1916D-667.

#### Note.

Construction of statute requiring standard health or accident insurance policy. 1916D-670.

## 3. WARRANTIES AND REPRESENTA-TIONS.

- 10. Representation as to Receipt of Previous Indemnity. Misrepresentation that the insured had never claimed or received indemnity for any accident cannot as a matter of law be held a material misrepresentation, where the accident for which he received indemnity was in no way connected with the one causing his death. Rathman v. New Amsterdam Casualty Co. (Mich.) 1917C-459.
- 11. Representation as to Physical Condition. A representation in an application for an accident policy that insured was in sound condition and had not been disabled or received medical or surgical attention within the past five years is an affirmative warranty. Rathman v. New Amsterdam Casualty Co. (Mich.) 1917C-459.
- 12. Occupation of Insured Notice to Company. A statement in the schedule of warranties in an accident policy that insured, a sales agent, had "supervising duties, not setting up or testing machinery," is sufficient to put the insurer on inquiry as to the nature of insured's supervision of the installation of gas engines sold by him, and having made no inquiry, it is precluded from claiming, after an accident, that his employment was extrahazardous. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.

## 4. CAUSE OF INJURY.

13. Illness of Insured as Proximate Cause. An accident policy declared that loss of life should be deemed to mean death from bodily injuries not intentionally self-inflicted, which independently of all other causes are effected solely by accidental means. The insured, who was suffering from nephritis and was delirious part of the time, either fell or jumped overboard from an ocean steamer upon which he was returning home. It appeared that he left his berth to which he had been confined, and that his wife discovered him outside of the railing, but her grasp was torn away before a steward could be called. It is held that, whether

the death was intentional or the result of an accident, the illness which rendered insured less able to take care of himself must be construed as the proximate cause, and the insurer was not liable. Rathman v. New Amsterdam Casualty Co. (Mich.) 1917C-459. (Annotated.)

- 14. Result of Intentional Act. An injury is not produced by accidental means, within the terms of a policy, where it is the natural result of an act or acts in which the insured intentionally engages, and is caused by a voluntary, natural, ordinary movement, executed as was intended. Stone v. Fidelity, etc. Co. (Tenn.) 1917A-86. (Annotated.)
- 15. Complainant, who attended a football game on a cool day when the ground was damp, and contracted a cold, resulting in lumbago, and who after medical treatment and the debility resulting from a purgative, and while lying in bed, had a paper brought, reached for it, and raised it suddenly above his head, when his strong blood pressure caused a rupture of the retina, destroying the sight of one eye, cannot recover on a policy insuring him against bodily injury through "accidental means," since, while the result was not foreseen, the cause producing the result was not accidental, but an ordinary natural movement, executed as intended. Stone v. Fidelity, etc. Co. (Tenn.), 1917A-86. (Annotated.)
- 16. Injury Received While Fighting. Where an accident policy insures against an injury effected exclusively by accidental means, insured, who assaulted a third person, and was attacked and knocked down, breaking his leg, cannot recover under the policy, though insured intended by a single blow to render the third person unable to defend himself, for an effect which is the natural and probable consequence of an act or a course of action is not produced by "accidental means." Hutton v. State Accident Ins. Co. (Ill.) 1916C-577.

  (Annotated.)
- 17. Sunstroke as Accident. Where an accident policy insured against death or disability through external, violent, and purely accidental means, provided that, if sunstroke should result independently of all other causes in the death of insured, the insurer would pay the indemnity, a sunstroke, while it may by medical experts be deemed a disease, is to be deemed a form of personal injury; it being considered such in common parlance, and, if a disease, not being an appropriate matter for accident insurance. Bryant v. Continental Casualty Co. (Tex.) 1918A-517. (Annotated.)
- 18. In such case, the term "means," in the phrase "due to accidental means," is used in the sense of "cause," and the in-

surer is liable for the death of the insured, caused by exposure to sun and humid atmosphere on a hot day, while pursuing his usual vocation in an ordinary way. Bryant v. Continental Casualty Co. (Tex.) 1918A-517. (Annotated.)

#### Notes.

Right to recovery under accident insurance policy for injuries received while fighting. 1916C-579.

Intentional exertion as "Accidental Means" of injury within accident insurance policy. 1917A-88.

# 5. EXTENT OF INJURY.

19. "Loss" of Hand. An accident policy, which binds insurer to pay a specified sum on insured suffering accidental injuries resulting in the "loss of a hand" by removal at or above the wrist, makes insurer liable where insured was accidentally shot in the hand, necessitating amputation of the hand, except a part apparently worthless; the amputation beginning at the wrist. Moore v. Aetna Life Ins. Co. (Ore.) 1917B-1005.

(Annotated.)

#### Note.

What constitutes loss or severance of limb or member within meaning of accident insurance policy. 1917B-1008.

#### 6. NOTICE AND PROOF OF INJURY.

20. Waiver. In an action on an accident policy, held, that the whole course of dealing by the defendant company shows that it recognizes a local agent as an agent in receiving oral notice and proof of the accident, and so acted upon such information as to waive a strict compliance with the giving of written notice of such accident. Douville v. Pacific Coast Casualty Co. (Utah) 1917A—112. (Annotated.)

#### 7. WAIVER OF PROVISIONS.

21. An accident policy was issued October 19, 1908, and two days thereafter plaintiff suffered accidental injuries which were the basis of the suit. He seasonably filed proofs of injury which were rejected, and nothing further was done until October 26, 1911, when defendant, at the suggestion of the State Insurance Commissioner, requested full information concerning the nature of the accident, stating that on receipt of the same the company would open the case. This request was complied with, and plaintiff continued from time to time to furnish other papers and proofs until on November 9, 1911, when defendant sent plaintiff a check for \$25 in full settlement, which he promptly returned and brought suit. Held, that

defendant's acts constituted a waiver of the policy provision requiring suit to be brought, if at all, within a year after the date of the accident on which the suit was predicated. Bates v. German Commercial Acc. Co. (Vt.) 1916C-447. (Annotated.)

22. Waiver of Limitation. A provision in an accident policy requiring suit to be brought within a year, if at all, is matter for the benefit of the company and may be waived. Bates v. German Commercial Acc. Co. (Vt.) 1916C-447. (Annotated.)

#### Notes.

Waiver of provision in accident insurance policy limiting time to bring suit thereon. 1916C-449.

Waiver of provision in accident insurance policy requiring notice of injury or death to be given within certain time. 1917A-114.

## 8. ACTION ON POLICY.

#### a. Evidence.

- 23. Parol Evidence. A warranty, in an application for accident insurance, that insured's connection with certain machinery was as "supervising" agent only is not so definite in its meaning as to exclude parol evidence to show what were the duties of a supervising agent. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.
- 24. Proof of Failure to Defend Action, Where an accident policy, conditioned to save a motorist harmless from action from injuries caused by her car, required the motorist to, in good faith, co-operate with the insurer in defending actions, a finding by the jury that the motorist failed to comply with such conditions, by failing to set up contributory negligence of a guest of the motorist, suing for injuries received in an action against the motorist, is held to be warranted by the evidence. Collins' Exections v. Standard Accident Ins. Co. (Ky.) 1917D-59. (Annotated.)
- 25. Requirement of Proof by Eye Witness. A witness, who saw deceased while rowing in a boat before the shot was fired, heard it and then found deceased dead and his rifle discharged, is not an "eyewitness" within an accident policy declaring that there should be no recovery for injuries caused by discharge of firearms unless the accidental discharge be established by an eyewitness, where she could not see deceased when the shot was fired. Lundberg v. Interstate Business Men's Acc. Assoc. (Wis.) 1916D-667.
- 26. Cause of Death—Burden of Proof. It being shown in an action on a policy insuring against death from external, violent, and accidental means that death came from external and violent means, and this in connection with the presump-

tion against suicide, making a prima facie case, instructing that plaintiff did not have to prove death did not result from suicide is not error. Aetna L. Ins. Co. v. Taylor (Ark) 1918B-1122.

(Annotated.)

#### b. Instructions.

27. Quantum of Proof. In an action on an accident policy, a request by defendant for an instruction that the jury must be satisfied, "beyond a reasonable doubt," of enumerated facts before they could find for plaintiff is properly refused. Shoop v. Fidelity, etc. Co. (Md.) 1916D—954.

#### c. Questions for Jury.

28. As insured discharged all the duties of his profession as a dentist during the three months before he met his death, the accident cannot be held to have caused continuous and immediate disability up to the time of death, and therefore the question should not be submitted to the jury. Doyle v. New Jersey Fidelity, etc. Ins. Co. (Ky.) 1917D-851. (Annotated.)

#### d. Defenses.

29. Duty of Insured to Assert Defenses. That the owner of an automobile allowed a guest to give some directions to the chauffeur as to the place they should be carried did not make the chauffeur the agent of the guest instead of the owner, and the chauffeur's negligence was not imputable to the guest, so, in an action by the owner on an accident policy, the guest having been injured and having recovered against her, it is no defense that the owner, though obliged to defend action, refused the requests of the insurer to make the defense of imputed negligence. Collins' Executors v. Standard Accident Ins. Co. (Ky.) 1917D-59. (Annotated.)

### ACCOMMODATION INDORSERS.

Notice of dishonor to, see Bills and Notes, 34.

ACCOMMODATION MAKER. See Bills and Notes, 41-45.

# ACCOMPLICE.

Victim a party to abortion, see Abortion, 3.

## ACCORD AND SATISFACTION.

- 1. In General,
- 2. Part Payment.

a. Effect of Receipt in Full,

b. Conditioned to Operate as Payment in Full.

## 1. IN GENERAL.

1. Evidence, in action to recover interest on city warrants, the principal and

part of the interest on which had been paid, held insufficient to establish an accord and satisfaction. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

2. Failure to Perform in Full. Plaintiff having been injured in a railroad crossing accident, defendant's claim agent offered him a draft for \$50 in settlement, agreeing also to pay plaintiff's aftorney. Plaintiff testified that he took the draft because the agent told him he would never get anything else, but had no intention to cash it and did not do so. The railroad company made no attempt to settle with plaintiff's attorney and sought to excuse itself by stating that, suit having been begun on the same day the settlement was effected, it concluded that no settlement with him could be made. Held, that such facts were insufficient to establish an accord and satisfaction. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317.

# 2. PART PAYMENT.

## a. Effect of Receipt in Full.

3. Part Payment of Liquidated Claim With Receipt in Full. Va. Code 1904, § 2859, provides that part performance of an obligation, either before or after breach, when expressly accepted by the creditor in satisfaction, and under an agreement for that purpose, though without any new consideration, shall extinguish the obligation, promise, or undertaking. Held, that where on completion of plaintiff's contract to construct certain houses for defendant, there was no claim on his part that the entire balance of the contract price was not payable in full, but he refused to pay unless plaintiffs deducted \$450.54 from their bill, which they were compelled to do because they were in financial straits and had to have the money, for which they executed a receipt in full, there was no acceptance of the lesser amount in satisfaction within the statute sufficient to preclude a recovery of the amount so deducted. Thomas v. Brown (Va.) 1917A-128, (Annotated.)

# b. Conditioned to Operate as Payment in Full.

4. Acceptance in Full Settlement. To constitute an accord and satisfaction the sum less than the amount actually due must have been accepted in full settlement of the disputed claim. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

#### Note.

Part payment with receipt in full as satisfaction of liquidated and undisputed debt. 1917A-130.

## ACCOUNTS AND ACCOUNTING.

See Costs, 5.

Accounting for assets, see Bankruptcy, 9. Failure to account, see Embezzlement, 1. Book entries, admissibility, see Evidence,

Of executors and administrators, see Executors and Administrators, 47-56.
Of guardian, see Guardian and Ward, 20-28.

Action of account, counterclaim for wrongful enhancement, see Monopolies 23

Between partners, see Partnership, 13-15. By managers of Soldiers' Home for money improperly collected, see Pensions, 2, 3.

Between cotenants, see Tenants in Common, 9.

Accounting by trustee, see Trusts and Trustees, 30-32.

For proceeds of damaged goods, see Warehouses, 5.

1. Sufficiency of Petition. The petition of an administratrix in an action on open account for goods sold to defendant, and charged to him by decedent in the usual course of business, also for advances and loans of money by decedent to defendant, which defendant agreed to repay, alleging that plaintiff could not furnish an itemized account because the books, accounts, and memoranda of decedent had been destroyed by fire without decedent's fault, claiming a lump sum, states a cause of action. Givens v. Pierson's Administratrix (Ky.) 1917C-956.

#### Note.

Necessity that book of accounts offered in evidence be book of original entry. 1917C-961.

ACCRUAL OF CAUSE OF ACTION. See Limitation of Actions, 14-32.

#### ACKNOWLEDGMENTS.

1. Who may Take Acknowledgment.

2. Sufficiency.

3. Evidence Requisite to Impeach.

Of conveyance of homestead by wife, see Homestead, 11.

Sufficiency to remove bar, see Limitation of Actions, 43.

Stockholder as attesting notary for corporate mortgagee. See Mortgages and Deeds of Trust.

#### 1. WHO MAY TAKE ACKNOWLEDG-MENT.

1. Officer of Corporate Mortgagee. Where a deed of trust is executed to secure an indebtedness to a corporation without fraud, coercion, or undue advantage, its validity is not affected by

the fact that the notary who takes the acknowledgment is a stockholder in the corporation. Davis v. Hale (Ark.) 1916D-701. (Annotated.)

#### Note.

Stockholder or officer of corporation interested in instrument as disqualified to take acknowledgment thereof. 1916D-705

#### 2. SUFFICIENCY.

- 2. Signature of Notary. Kirby's Ark. Dig., § 746, provides that every officer who shall take the acknowledgment of any conveyance of real estate shall grant a certificate thereof, to be indorsed on the deed, and that the certificate shall be signed by the officer and sealed, if he has a seal of office. Held that, where a certificate of a notary public attached to a deed of trust bore a seal with the notary's name thereon, but the certificate was not subscribed by the officer, it was void. Davis v. Hale (Ark.) 1916D-701.
- 3. Acknowledgment Presumption in Favor of Certificate. The certificate of acknowledgment to a deed is prima facie proof of its execution. Houlihan v. Morrissey (Ill.) 1917A-364.

# 3. EVIDENCE REQUISITE TO IMPEACH.

4. While the certificate of acknowledgment to a deed, as between the parties, may be impeached for fraud, collusion, or imposition, yet to overcome it clear and satisfactory proof is required, more than the unsupported testimony of the grantor. Houlihan v. Morrissey (III.) 1917A-364.

(Annotated.)

### Note.

Evidence requisite to impeach acknowledgment. 1917A-368.

#### ACQUIESCENCE.

Estoppel to object to nuisance, see Nuisances, 17.

### ACROSS.

Meaning, see Telegraphs and Telephones, 5.

# ACTIONABLE PER SE.

Words, see Libel and Slander, 6, 16-21, 24-36.

#### ACTIONABLE WORDS.

See Libel and Slander, 6, 16-21, 24-36.

#### ACTION PENDING.

See Actions and Proceedings, 8.

# ACTIONS AND PROCEEDINGS.

- 1. Definitions and Right of Action.
- 2. Nature and Form of Action.
- 3. Pendency of Action.
- 4. Joinder of Causes of Action.
- 5. Splitting Causes of Action.
- Abatement and Revival.
   a. Criminal Prosecution Awaited.
   b. Death of Party.
- See Dismissal and Nonsuit; Limitation of Actions; Lis Pendens; Parties to Actions; Removal of Gauses; Specific Performance, 7-11; Trespass, 4-12.

For attorney's fees, see Attorneys, 33-35. Disbarment proceeding not civil action, see Attorneys, 50.

To recover bank deposit, see Banks and Banking, 54.

Nature of bastardy proceeding, see Bastardy, 1.

For benefits, see Beneficial Associations, 28-33.

Offer to marry no bar, see Breach of Promise of Marriage, 2, 3.

Nature of action for causing death, see Death by Wrongful Act, 1-6.

Inheritance of chose in action, see Descent and Distribution, 3.

By executors and administrators, see Executors and Administrators, 71-85. For personal injury, survival, see Executors and Administrators, 77-81.

Against executors and administrators, see
Executors and Administrators, 86-92.
For deceit, see Fraud, 8-14.

Nature of habeas corpus, see Habeas Cor-

pus, 4.
Proceedings in juvenile courts, see Infants, 26-38.

fants, 26-38. Restraining prosecution of action, see In-

junctions, 24-26.
Independent action for recovery of in-

terest, see Interest, 1, 2.
Proceedings under mulct law, see Intoxi-

cating Liquors, 33.
Action to fix appropriation rights, see

Irrigation, 2-10.
Special proceeding, termination, see Judg-

ments, 1.
Actions for rent, see Landlord and Ten-

ant, 36-40. Statutory action, effect of bar, see Limi-

tation of Actions, 1, 6.
Action against railroad for violating ordinance, criminal, see Municipal Cor-

porations, 102.

Continuation of action by the others on death of firm member see Partner.

death of firm member, see Partnership, 31.

Suit by receiver in foreign jurisdiction, see Receivers, 9. Election of remedies, see Release and Dis-

charge, 6. Against school districts, see Schools, 5-8. Against state, see States, 9, 10.

Actions on relation, see States, 11.

Effect of repeal of statute on pending action, see Statutes, 125.

Proceedings for special assessment, see Taxation, 131-144.

Taxpayer's actions, see Taxation, 201-203. By one co-tenant for injury to the common property, see Tenants in Common, 11-12.

For incidental injury to third person, see Torts. 1.

Transitory actions, see Venue, 1, 2.

Actions by and against alien enemies, see War, 11.

Proceedings under Workmen's Compensation Act, 284-305.

# 1. DEFINITIONS AND RIGHT OF ACTION.

- 1. Action Definition. An action is "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Greenleaf v. Minneapolis, etc. R. Co. (N. Dak.) 1917D-908.
- 2. Proceeding Definition. The term "proceeding" includes the form and manner of considering judicial business before a court or judicial officer, and regular and ordinary proceedings in form of law, including all possible steps in an action from its institution to the execution of the judgment. Greenleaf v. Minneapolis, etc. R. Co. (N. Dak.) 1917D-908.
- 3. Effect of Statute. An existing common-law right of action is not taken away by statute, unless by direct enactment or necessary implication. King v. Viscoloid Company (Mass.) 1916D-1170.
- 4. Novel Cause of Action. That the action is novel, and there is no precedent, does not lead to a conclusion that there is no remedy for the alleged wrong. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726.
- 5. Moot Question. A case in which a party asks to have determined an abstract question which does not arise on existing facts, or involve conflicting rights so far as he is concerned, presents a moot inquiry, which will not be considered. Sherod v. Aitchison (Ore.) 1916C-1151.

# 2. NATURE AND FORM OF ACTION.

- 6. Legal or Equitable. A complaint presenting an action at law is not changed by the fact that equitable defenses have been interposed or equitable rights suggested. Smith v. Barnes (Mont.) 1917D-330.
- 7. Moot Case What Constitutes. A moot case is one which seeks to determine an abstract question, not resting upon existing facts or rights, and such case will

not be determined by the court merely to determine who is liable for costs. Postal Telegraph-Cable Co. v. Montgomery (Ala.) 1918B-554. (Annotated.)

#### Note.

What constitutes moot case. 1918B-558.

#### 3. PENDENCY OF ACTION.

8. When Deemed Pending. An action is deemed to be pending at common law so long as a judgment remains unsatisfied. Sweetser v. Fox (Utah) 1916C-620.

## 4. JOINDER OF CAUSES OF ACTION.

- 9. Several Torts. It is improper to join in one declaration counts alleging joint torts by two defendants with counts alleging several torts by each of them. Tanner v. Culpeper Construction Co. (Va.) 1917E-794.
- 10. Actions Requiring Different Places of Trial. Under N. Y. Code Civ. Proc., § 484, providing that two causes of action may be joined if it appears that they arose out of the same transaction, and do not require different places of trial, where a complaint alleged the destruction of a milling plant and personal property in the building and on the premises, there is a misjoinder, although the separate causes of action are not well stated, as it does not appear that they do not require different places of trial. Jacobus v. Colgate (N. Y.) 1917E-369.
- 11. Consolidation of Causes. The refusal to compel an election between causes of action for false imprisonment and for damages for unlawfully shackling a convict laborer is not prejudicial, in view of Acts Ark. 1905, p. 798, providing that the court may consolidate causes of like nature when it appears reasonable to do so. Weigel v. McCloskey (Ark.) 1916C-503.
- 12. Rights Arising from Same Transactions. Under Rem. & Bal. Wash. Code, § 296, subd. 8, permitting plaintiff to unite several causes of action in the same complaint when they arise out of the same transaction, a complaint alleging a cause of action upon a breach of contract and upon defendants' wrong in rendering performance by another party impossible, so as to prevent the earning of a commission, from that party, is not demurrable on the ground that two causes of action are improperly joined. Littlefield v. Bowen (Wash.) 1918B-177.

## 5. SPLITTING CAUSES OF ACTION.

13. Separate Actions on Note and Mortgage. Under the express terms of Iowa Code, § 3428, an action may be brought on a note alone without regard to the mortgage given as security, and so an action

may be brought on the mortgage alone, unless either is prevented by stipulation in the note or mortgage; but under the express terms of section 4288 when separate actions are brought on the note and mortgage in the same county, the plaintiff must elect between them, and the other will be discontinued. Des Moines Savings Banks v. Arthur (Iowa) 1916C-498.

# 6. ABATEMENT AND REVIVAL.

#### a. Criminal Prosecution Awaited.

14. Civil Action for Crime. Proceedings in a civil action based on a felony will be stayed until the offender has been prosecuted criminally. Smith v. Selwyn (Eng.) 1916C-844. (Annotated.)

15. Action on Judgment — Effect of Right to Appeal from Judgment. When the purpose of an action is merely to enforce a judgment, the plea of another action pending cannot be interposed in the action upon the judgment merely because the time to appeal has not passed; the only plea available being that the judgment has been suspended by supersedeas bond. Sweetser v. Fox (Utah) 1916C-620.

#### Note.

Merger or suspension of civil action predicated on commission of felony. 1916C-847.

#### b. Death of Party.

16. Death of Defendant. Pub. Acts Conn. 1903, c. 193, provides that no civil action shall abate by the death of any party, but may be continued by or against the administrator and Gen. St. 1902, § 343, provides that no suit shall be brought, except as stated, against the executor of an insolvent estate in the course of settlement, and that no execution shall issue on any judgment rendered against the executor before the estate was represented insolvent, and, if judgment has not then been rendered, the suit shall abate. Held that, where an action was brought against defendant in his lifetime, it might be continued by scire facias against his executor or administrator, though the estate is represented insolvent, unless the action is wholly excepted from the operation of the act. Craig v. Wagner (Conn.) 1917A-160.

17. Substitution of Personal Representative. Where, on defendant's death, plaintiff moved to have defendant's executrix made a party within the next term after her appointment, when objection was made and erroneously sustained that plaintiff could not proceed with scire facias because of the insolvency of decedent's estate, the delay in moving for a scire facias cannot be charged to plaintiff so as to preclude him from continuing the action by scire facias against the executrix. Craig v. Wagner (Conn.) 1917A-160.

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18. The time within which plaintiff is required to bring in defendant's executrix should not run from defendant's death, but from the appointment of the executrix. Craig v. Wagner (Conn.) 1917A-160.

#### ACT OF GOD.

Effect on delay, see Carriers of Goods, 4. Action of tides as vis major, see Warehouses, 3.

## ACTUAL.

Meaning, see Eminent Domain, 13.

#### ACTUAL WASTE.

Defined, see Waste, 1.

#### AD DAMNUM CLAUSE.

See Pleading, 9, 10.

#### ADDITIONAL SECURITY.

Taking, as waiver of right to lien, see Mechanics' Liens, 31, 33, 34, 38. Taking by mortgagee, effect, see Mortgages and Deeds of Trust, 34.

#### ADDITIONS TO STOCK.

See Chattel Mortgages, 19-24.

## ADJOINING LANDOWNERS.

- 1. Right to Lateral Support.
- 2. Party Walls.
- 3. Line Trees.
- 4. Improvement on Adjoining Land.
- 5. Action for Injury.
- 6. Damages.

## See Easements.

Division fence, duty to maintain, see Fences, 1, 2.

Rights in subterranean waters, see Waters and Watercourses, 30.

Rights as to surface waters, see Waters and Watercourses, 34.

# 1. RIGHT TO LATERAL SUPPORT.

1. Deprivation of Subjacent Support. One mining under such a reservation is liable for failure to leave sufficient support to prevent the strata overlying the coal from breaking or falling and thereby causing drying up of springs on the land, since this is a "surface" right. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

#### 2. PARTY WALLS.

2. The erection of a party wall by one of two adjoining owners is not a taking of property for private use but amounts only to the establishment of an easement. Fowler v. Koehler (D. C.) 1916E-1161.

- 3. Acquiescence in Unauthorized Construction. If an owner without authority builds a party wall on the adjoining premises and the adjoining owner allows the construction to proceed without protest he estops himself to complain of the trespass. Fowler y. Koehler (D. C.) 1916E-1161.
- 4. Contribution Toward Cost. A land-owner making use of a party wall erected by the adjoining owner is bound to contribute to the cost thereof though the wall was not erected under an agreement to contribute. Fowler v. Koehler (D. C.) 1916E-1161. (Annotated.)
- 5. A person who builds a party wall and then conveys the premises reserving in his deed the right to use the party wall, reserves thereby the personal right to recover contribution from an adjoining owner thereafter using the wall. Fowler v. Koehler (D. C.) 1916E-1161.

(Annotated.)

6. Party Walls—Establishment. There are but two ways in which a party wall can be established, by contract or by the force of a statute. Fowler v. Koehler (D. C.) 1916E-1161.

## Note.

Liability of adjoining landowner for use of party wall in absence of agreement to contribute. 1916E-1165.

## 3. LINE TREES.

- 7. Overhanging Tree Right to Cut to Line. When the base of a tree is wholly on the land of one owner, the whole tree is his without reference to its ramifications, the word "trunk" meaning the body of the tree at and above the surface of the soil; but where a tree stands wholly on the ground of one any part overhanging the land of an adjoining owner may be cut off by the latter at the division line, if done without a trespass; but the rule is different where the tree stands on a division line and is one in which both the adjoining landowners have an interest. Cobb v. Western Union Tel. Co. (Vt.) 1918B-1156. (Annotated.)
- 8. Trees Near Boundary Ownership. Where a person has planted hedge trees on her own land and cultivated and cared for them, they are her property; and, although they are growing near the boundary line of a neighbor, such neighbor has no property in them, and unless the trees are doing him an injury, he may be enjoined from meddling with them. Wideman v. Faivre (Kan.) 1918B-1168. (Annotated.)

#### Note.

Rights of adjoining landowners with respect to tree on or overhanging boundary line. 1918B-1157.

# 4. IMPROVEMENT ON ADJOINING LAND.

- 9. Excavation. Where one in improving his own property fails to exercise the ordinary care, prudence, and skill reasonably dictated by the situation and circumstances as due for the protection of a building standing on an adjoining lot, and thereby injures the same, he is liable for the injury, whether caused by affecting the lateral support of the soil of the adjoining lot or otherwise. Vocckler v. Stroehmann's Vienna Bakery (W. Va.) 1917A-350. (Annotated.)
- 10. Duty of Adjoining Owner to Protect His Property. In such case, the owner is required to do whatever is reasonably necessary to protect his property from injury and cannot permit the injury and then claim full damages, when he might have prevented it or lessened its effect by a reasonable expenditure. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 11. Though one in improving his own property employs therefor a competent architect and a skilled contractor, if the work remains under his control and the architect and the contractor merely represent him as to the means of doing the same, he is not by their employment absolved from liability for injury to adjoining property caused by failure to exercise care for its protection. Voeckler v. Stroehmann's Vienna Bakery (W. Va.) 1917A-350. (Annotated.)

### Note.

Liability of landowner excavating on his own premises for resulting injury to adjoining building. 1917A-352.

#### 5. ACTION FOR INJURY.

- 12. Evidence. Evidence that in that region it would be impossible, although mining according to usage and custom, to mine any coal without more or less of the overlying strata falling in, tending to dry up surface springs, was irrelevant. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60
- 13. Jury Question. In trespass action for injury to surface soil by withdrawing proper supports in mining thereunder, whether the evidence sustained plaintiff's contention that such mining dried up springs in his land is held to be for the jury. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

## 6. DAMAGES.

14. Right of Purchaser as to Previous Damage. No recovery could be had for drying up of a spring, prior to the time of plaintiff's purchase of the land. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

- 15. Proof of Damage. In such action it is error to admit evidence of a crack in adjoining surface, where there was no evidence that the crack extends into plaintiff's land or could have causal connection with the alleged injury. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.
- 16. Speculative Damages. In such action the owner could not recover damages for decrease in the value of his land for residence and other purposes, upon testimony that the land was close enough to town to be subdivided for lots; such damage being too remote and speculative for jury consideration. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.
- 17. Remote Damages. In an action for injury to surface by mining the plaintiff, owner of the surface of two tracts of land formerly constituting one tract, is not entitled to damages to one tract caused by the drying up of a spring on the other by such mining, although the ownership of the tracts had been so reunited in him before the injury; the drying up of the spring on the latter tract being the only damage the evidence tended to prove. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

#### ADJUSTMENT OF LOSS.

Penalty for failure to adjust, see Carriers of Goods, 7.

# ADMINISTRATION.

Of trusts, see Trusts and Trustees, 34-36.

#### ADMINISTRATOR DE BONIS NON.

Collection of assets by, see Executors and Administrators, 20½.

#### ADMINISTRATORS.

See Executors and Administrators.

# ADMINISTRATOR WITH WILL ANNEXED.

See Executors and Administrators, 20.

#### ADMIRALTY.

1. Exclusiveness of Federal Authority. State legislation changing, modifying, or affecting the general maritime law which contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of such general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations, is invalid as being repugnant to U. S. Const., art. 3, \$2 (9 Fed. St. Ann. 74), extending the judicial power of the United States to all

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cases of admiralty and maritime jurisdiction, U. S. Const., art. 1, § 8 (8 Fed. St. Ann. 674), giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the federal government, and U. S. Judicial Code, §§ 24, 256 (4 Fed. St. Ann. (2d ed.) 838; 5 Id. 921), giving the federal district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. Southern Pacific Co. v. Jensen (U. S.) 1917E-900.

- 2. Jurisdiction, Restoration of Illegal Prize. The admiralty courts of the United States have jurisdiction to order restitution to the private owners of a vessel and cargo brought into a port of the United States by a prize crew of a belligerent nation, for the purpose of laying her up there indefinitely, in violation of the rights of the United States as a neutral. The Steamship Appam (U.S.) 1917D-442.
- 3. Effect of Decision of Foreign Prize Court. The institution in a prize court of the captor nation of proceedings for the condemnation as a prize of a vessel brought into a port of the United States by a prize crew, for the purpose of lay-ing her up there indefinitely, cannot oust the jurisdiction of an admiralty court of the United States to order restitution of the vessel and cargo to the private owners for such a violation of the rights of the United States as a neutral. The Steamship Appam (U.S.) 1917D-442.

# ADMISSIBILITY OF EVIDENCE.

See Evidence, 20-36.

#### ADMISSIONS AND DECLARATIONS.

1. Self-serving Declarations, 12.

Admissions and Declarations Against Interest, 12.
 Person by Whom Made, 12.

a. Agents or Corporate Officers, 12.

b. Grantor, 13.c. Deceased Persons, 13.

- d. Defendant in Criminal Case, 13. e. Statements of Principal to Surety, 13.
- 4. Manner of Making, 13.
  - a. Admissions in Pleading, 13.

b. Res Gestae, 13.

c. Dying Declarations, 14.

d. Exculpatory Statements, 14. 5. Explaining and Contradicting Declarations, 14.

Declarations of agent as binding principal, see Agency, 20-24.

Erroneous exclusion of evidence cured by admissions, see Appeal and Error, 277.

Declarations as to ownership of car, see Automobiles, 41.

Admission no bar to discovery, see Discoverv. 4.

Admissions as affecting judicial notice, see Evidence, 2.

Of deceased, see Homicide, 36, 37, Dying declarations, see Homicide, 39. Declarations of co-defendant, see Homicide, 42.

Declarations of third persons, see Homicide, 43-47.

testator as affecting testamentary capacity, see Wills, 72-74.

## 1. SELF-SERVING DECLARATIONS.

1. Conversations had by the defendants with third parties were not admissible, as they were self-serving declarations. Hammett v. State (Okla.) 1916D-1148.

(Annotated.)

Declarations made by a defendant in his own favor, unless a part of the res gestae. or of a confession offered by the prosecution, are not admissible for the defense. State v. Klasner (N. Mex.) 1917D-824.

3. In an action against a surgeon for amputating plaintiff's leg without her consent, evidence as to declarations by plaintiff to another doctor about the amputation, and what was said between them relative thereto, and whether the witness knew that defendant sent such doctor to tell plaintiff about her condition is properly excluded, as statements made or things done in the absence of defendant and not brought to his knowledge can have no bearing on his exercise of due care and skill. Barfield v. Seuth Highlands Infirmary (Ala.) 1916C-1097.

# 2. ADMISSIONS AND DECLARATIONS AGAINST INTEREST.

4. In a suit by a father to compel the admission of his children, who were excluded from the white school as mixed bloods, evidence of declarations by the father that he had married a negress is admissible only to impeach his testimony that the children were white; he not being such a party in interest that his declara-tions would be substantive evidence as admissions against interest. County Board of Education Medlin v. (N. Car.) 1916E-300. (Annotated.)

# 3. PERSON BY WHOM MADE.

- a. Agents or Corporate Officers.
- 5. Acts and Declarations of Agent. The fact of agency cannot be shown by the mere acts and declarations of the alleged agent. First National Bank v. Bertoli (Vt.) 1917B-590.
- 6. Evidence—Telephone Conversation—Necessity of Identifying Speaker. A

telephone conversation with a person claiming to represent a party cannot be received against the party unless the identity and authority of the speaker are shown. Carroll v. Parry (D. C.) 1916E-971. (Annotated.)

7. Declaration by Servant — Admission of Negligence. Evidence that declarant was a foreman in charge of laborers engaged in handling lumber and piling it in the yard and dock does not show authority on his part to admit liability of his master, and it was error to admit evidence that, several days after the accident, he stated that it was his fault in that he did not warn the man. Marks v. Columbia County Lumber Co. (Ore.) 1917A-306.

## b. Grantor.

8. Declarations of Grantor as to Delivery. Declarations of a grantor, made after he has parted with his title and in disparagement of it, are inadmissible when made in the absence of the grantee. Williams v. Kidd (Cal.) 1916E-703.

(Annotated.)

### c. Deceased Persons.

- 9. Declarations of deceased, made in a perfectly natural manner, on the evening of the homicide, that she was about to meet accused are admissible to show that what she intended to do was probably done and did not violate Ore. L. O. L., § 705 or § 727, subd. 4, as to declarations, or any other Code section. State v. Farnam (Ore.) 1918A-318. (Annotated.)
- 10. Declaration of Deceased as to Intention to Meet Defendant. Admission of testimony of a girl friend of deceased that she (deceased) had told her that she would stay home because accused was coming to see her that evening is not prejudicial, where without objection there remained in the record, upon answer to cross-examination, a statement of a state's witness that deceased had told some girls that she had received a letter from accused, and could not go out with them because accused was coming to see her that evening. State v. Farnam (Ore.) 1918A-318.

# d. Defendant in Criminal Case.

- 11. Admissions of Accused. Declarations by defendant, both before and after the commission of the homicide with which he is charged, tending to connect him with it, are admissible as evidence against him. Brindley v. State (Ala.) 1916E-177.
- 12. Declaration of Co-conspirator. On a trial for a conspiracy by milk dealers to raise the price, the testimony of a witness that he had heard defendants say, after

the agreement to raise the price was signed, that they sold milk thereafter at the higher price agreed on is admissible. State v. Craft (N. Car.) 1917B-1013.

# e. Statements of Principal to Surety.

13. In an action against a widow on a note executed by her to pay the balance of a debt which she had incurred as surety to plaintiff for her husband since deceased, statements made by him not in the presence of any of the officers of plaintiff bank by way of inducement to secure the witness' signature to the original note with his wife are hearsay and not admissible on the theory that the husband was the bank's agent to secure the note from his wife. First National Bank v. Bertoli (Vt.) 1917B-590.

# 4. MANNER OF MAKING.

# a. Admissions in Pleading.

14. In such suit where there is no denial of the averment that a reasonable attorney's fee was in excess of \$75, the question of reasonableness is settled by the admission of the pleadings. Samuels v. Ottinger (Cal.) 1916E-830.

# b. Res Gestae.

- 15. Declaration in Answer to Question. Declarations of plaintiff's intestate, when living with defendant, prompted by inquiries of the overseer of the poor, that she was boarding with defendant, are not admissible on the issue of whether she was living with him under a contract for board or a contract for support, in consideration of her property, on which depended title to the property, they being mere narrative, and not arising naturally and spontaneously from the act of living there, so as to be part thereof and derive credit therefrom. Comstock's Administrators v. Jacobs (Vt.) 1918A-465.
- 16. Subsequent Declarations in Delirium, Statements of deceased while in hospital suffering from delirium tremens some hours after alleged accident as to nature of accident are not admissible as res gestae, but are narratives of past events. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.
- 17. Scope of Res Gestae Generally. The doctrine of res gestae, as applied to exclamations, should have its limits determined, not by the strict meaning of the word "contemporaneous," but rather by the causal, logical, or psychological relation of such exclamations with the primary facts in controversy. State v. Lasecki (Ohio) 1916C-1182.
- 18. This doctrine applies equally to participants, bystanders and persons incompetent to be witnesses. State v. Lasecki (Ohio) 1916C-1182.

- 19. Declaration of Street Railway Employee. The self-serving explanation of a street-car conductor as to how an accident happened, made after it occurred, is not res gestae and is inadmissible in an action for the death of a passenger. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.
- 20. Declaration of Bystander at Accident. After the explosion of the locomotive boiler in question the conductor came forward and found the engineer dead and pulled the fireman, then unconscious, from the place where he lay, and about five minutes thereafter came back to him, whereupon the fireman regained consciousness and quickly stated to the conductor that the water glass showed about half full when the explosion occurred, gave his home address, and asked to have his overclothes taken off, as they were burning him. He appeared to be suffering. Held, that under the circumstances his statement as to the water glass was competent as part of the res gestae in an action by the administrator of the engineer against the railroad company. Denver v. Atchison, etc. R. Co. (Kan.) 1917A-1007. (Annotated.)

# c. Dying Declarations.

- 21. Foundation. To make statements of deceased admissible as a dying declaration, preliminary questions to her as to anticipation of death should not be put in a perfunctory manner, as merely formal and unimportant, but so as to make sure that she understands them. People v. Kane (N. Y.) 1916C-685.
- 22. Admissibility-Expectation of Death. A declaration made by deceased after his attending physician had told him that he could not recover is not admissible, where there is nothing to show that deceased understood that he was then about to die. Reeves v. State (Miss.) 1917A-1245.
- 23. Declaration Showing Malice and Revengeful Spirit. Dying declarations by deceased are not admissible, where they clearly show that he was actuated by malice and desired accused to be punished, but only on the theory that the near approach of death frees the declarant from the ordinary motives for falsification. Reeves v. State (Miss.) 1917A-(Annotated.)
- 24. Hope of Recovery. The rule, as to dying declarations, that it must be shown they were not made in answer to interrogatories calculated to lead deceased to make a particular statement, applies to the statements in regard to hope of recovery. People v. Kane (N. Y.) 1916C-685.

### Note.

Admissibility of dying declaration as affected by malice or desire for revenge on part of declarant. 1917A-1247.

- Exculpatory Statements.
- 25. Exculpatory Statements of Accused Admissibility for Prosecution. Statements made by a defendant, charged with homicide, subsequent to the commission of the offense, that he was not in the city where the homicide was committed, are admissible on behalf of the state in a prosecution, where defendant's witnesses testified that he was in the city where the homicide was committed, but at a different place in that city, since exculpatory statements are not confessions and need not be shown to have been voluntarily made. Mason v. State (Tex.) 1917D-1094.

# (Annotated.)

### Note.

Admissibility of prior exculpatory statement by accused to contradict evidence given by him or on his behalf at trial. Ĭ917**B**–1101.

# 5. EXPLAINING AND CONTRADICT-ING DECLARATIONS.

- 26. Receipt of Telegram Failure to Notify of Nonreceipt. Where a witness had testified to sending a cablegram to defendant, followed by a letter stating that he had sent the message, his testimony that he was never notified that the message was not received is relevant as tending to show an admission by defendant of its receipt. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.
- 27. Ante Mortem Statement. An ante mortem statement of a witness purporting to give what the plaintiff in a suit for damages for a personal injury said to him as to how she was injured, tending to contradict her testimony on the stand in the trial, is not competent evidence. Florida East Coast R. Co. v. Carter (Fla.) 1916E-

ADMISSIONS IN PLEADINGS. See Pleading, 11, 12.

ADMISSION TO THE BAR. See Attorneys, 3, 5.

# ADOPTION OF CHILDREN.

- 1. Proceedings.
- Rights of Inheritance.
   a. By Adopted Child.
  - b. From Adopted Child.

# 1. PROCEEDINGS.

1. Validity of Parol Adoption. adoption of a child cannot be affected by parol; the only method of adoption being by petition to and decree of the court of common pleas, pursuant to Act May 4, 1855 (Pa. P. L. 431) § 7, as re-enacted by Act May 19, 1887 (P. L. 125) § 1, or by

(Annotated.)

deed duly executed and recorded pursuant to Act April 2, 1872 (P. L. 31) § 1. Benson v. Nicholas (Pa.) 1916D-1109.

(Annotated.)

- 2. The courts of Mississippi are not required to recognize rights flowing from the status of adoption created in Kentucky, with reference to the inheritance of land in Mississippi by children adopted in Kentucky; the laws of which state on the subject are inconsistent with those of Mississippi governing the same matter. Fisher v. Browning (Miss.) 1917C-466.
- 3. Enforcement of Contract. Where plaintiff prayed only for specific performance of a contract for adoption and not for damages for its breach, and sought to be allowed to participate in an estate as a distributee, the jurisdiction to determine the merits of her claim was vested exclusively in the orphans' court. Benson v. Nicholas (Pa.) 1916D-1109.

### Note.

Validity of contract or proceeding of adoption not made in conformity with statute. 1916D-1110.

# 2. RIGHTS OF INHERITANCE.

# a. By Adopted Child.

- 4. What Law Governs—Adoption in Foreign State. Since the descent of lands in Mississippi is governed by the laws of that state, under which an adopted child may not inherit from foster parents unless so specified in the petition for adoption, where a child was legally adopted in Kentucky, where she could inherit real property from her foster parents, under a petition which did not give her such right in Mississippi, where her foster parents resided, she has no interest in the land of her foster father in Mississippi, which on his death without natural children descends to his widow. Fisher v. Browning (Miss.) 1917C-466.
- 5. Right to Inherit from Foster Parent. An adopted child cannot take property by descent from its adoptive parents, except under Miss. Code 1906, \$542, providing that an adopted child shall be entitled to all the benefits proposed by the petitioner to be granted and conferred in the petition for adoption. Fisher v. Browning (Miss.) 19170-466.
- 6. Inheritance by Adopted Child—What Law Governs. Where a child was adopted in Kentucky, under whose laws it inherits land from its foster parent, and upon its decease in infancy without issue the land so inherited reverts to the next of kin of such foster parent, such inheritance rules do not violate the constitution or public policy of Mississippi, and will be applied to lands there situated. Brewer v. Browning (Mass.) 1918B-1013. (Annotated.)

# b. From Adopted Child.

- 7. Inheritance from Adopted Child. Colo. Rev. St. 1908, § 526, provides that after a decree of adoption the person adopted shall be entitled to inherit as if he had been the petitioner's child born in holy wedlock. Section 529 declares that the adopted child shall be to all intents and purposes the child and legal heir of the person adopting him, while section 7042 also declares that adopted children shall be legalized and entitled to inherit as legitimate children. Held, that an adopted child and his adopters do not, except in so far as provided by statute, assume the relation of parent and child, and where, after the death of the adopters, the adopted child died leaving no issue, his relatives by blood take in preference to the children of the adopting parents. Russel v. Jordan (Colo.) 1916C-760.
- 8. Property Derived from Foster Parents. Property inherited by an adopted child from its foster parents goes to it in fee, and on its death descends according to the law of descent and distribution to its blood relatives to the exclusion of the parents. Fisher v. Browning (Miss.) 1917C-466. (Annotated.)
- 9. Inheritance from Adopted Child. Decedent was duly adopted by his mother's sister, after his father had abandoned his family, under Laws N. Y. 1873, c. 830, providing that the adopted child should sustain the legal relation of a child, and which as amended by Laws N. Y. 1887, c. 703, gave the right of inheritance, previously denied, and declared his "next of kin" to be the same as if he was the "legitimate child" of the person adopting him. After the death of his foster mother, leaving a brother and two sisters, decedent, while in defendant's employ, was killed, dying intestate and unmarried. N. Y. Code Civ. Proc., §§ 1902-1905, provides a recovery for wrongful death for the benefit of decedent's "next of kin," defined by reference to include all those entitled under the law relating to the distribution of personal property. Domestic Relations Law (Consol. Laws, c. 14) § 114, provides that a foster parent and an adopted minor child sustain the legal relation of parent and child, with rights of inheritance from each other, extending to the child's heirs and "next of kin," as if he were the "legitimate child" of the person adopting him. Decedent Estate Law (Consol. Laws, c. 13) § 98, subd. 7, provides that the father of an adopted child, dying intestate, unmarried, and without children, takes all the unbequeathed assets. Held, that the law in force at decedent's death controlled; that the right of inheritance which passed to decedent's next of kin was not merely the right to inherit from his foster parent; that the

term "legitimate child," used in the established meaning of a child born in lawful wedlock, made decedent the next of kin, as though the adopted parent were his natural parent; and hence that the brother and sisters of his deceased adopted mother, and not his natural father, were the "next of kin" entitled to substantial damages. Carpenter v. Buffalo General Electric Co. (N. Y.) 1916C-754. (Annotated.)

### Notes.

Right of inheritance from adopted child as between natural parents and adoptive parents or their descendants. 1916C-757.

Succession to estate inherited from foster parent by adopted child who dies without issue. 1916C-762.

### ADULTERATION.

See Food, 4, 5.

# ADULTERY.

- 1. Nature of Offense.
- 2. Indictment.
- 3. Defenses.

Appointment of decedent's mistress as executrix, see Executors and Administrators, 6.

One act insufficient for alienation, see Husband and Wife, 55.

Gist of action for criminal conversation, see Husband and Wife, 68.

### 1. NATURE OF OFFENSE.

- 1. Persons Capable of Committing. Under Vt. P. S. 5881, making adultery punishable, and not defining the offense, except by referring to it by name, construed with reference to the common-law offense, and with reference to section 5882, making it adultery for an unmarried woman to commit an act with a married man which would be adultery if she were married, a single man who has unlawful intercourse with a married woman is guilty of adultery. State v. Bigelow (Vt.) 1917A-702. (Annotated.)
- 2. Necessity of Joint Criminal Intent. One party to an illicit intercourse may be guilty of adultery and the other innocent thereof; it not being essential to the commission of such offense that there be a joint criminal intent. State v. Ayles (Ore.) 1916E-738.

### Note.

Persons capable of committing crime of adultery. 1917A-703.

### 2. INDICTMENT.

3. An indictment for adultery need not allege that the prosecution was instituted by the injured spouse, as required by Ore. L. O. L., § 2072. State v. Ayles (Ore.) 1916E-738.

### 3. DEFENSES.

4. Connivance of Injured Spouse. That the husband of the woman connived with and abetted defendant in the commission of the act of adultery constitutes no defense. State v. Ayles (Ore.) 1916E-738. (Annotated.)

### Note.

Connivance or procurement by other spouse as defense to prosecution for adultery. 1916E-741.

### AD VALOREM TAX.

Power of state to levy, see Taxation. 22.

# ADVANCEMENTS.

See Liens, 1.

Reimbursement for, see Executors and Administrators, 53.

- 1. Meaning of Term. An "advance-ment" as defined by N. Dak. Rev. Codes 1905, §§ 5197, 5199, 5200, does not involve an indebtedness. Stenson v. H. S. Halvorson Co. (N. Dak.) 1916D-1289.
- 2. Right to Charge Estate. An administrator with the will annexed, who paid only \$618 of probated demands and received in cash twice that amount, who built a family dwelling house on the land, and advanced to the widow and children large sums of money, so that the money expended exceeded that received by \$2,038, is not entitled to a judgment and a lien against the realty; since such expenditures were neither debts of the decedent nor expenses of administration authorizing the probate court or any court to order a sale of the land. Stuckey v. Stephens (Ark.) 1917A-133. (Annotated.)

# ADVERSE POSSESSION.

1. Necessary Elements, 17.

a. Actual Possession, 17.

b. Hostile Possession, 17. c. Continuous Possession, 18.

d. Tacking Possession, 18.

e. In Mining Property, 18. 2. What Constitutes Color of Title, 18.

3. Extent of Possession, 18.

4. Who may Acquire Title by Adverse Possession, 19.
5. Against Whom Title may be Acquired, 19.

6. Evidence, 19.

a. Admissibility, 19.

b. Sufficiency, 19.

c. Questions of Law and Fact, 20.

7. Nature of Title Acquired, 20.

8. Purchase of Outstanding Title, 20.

By bailee, see Bailment, 6. Of grantor of minerals as to access thereto, see Mines and Minerals, 3.

Adverse user of street, see Streets and Highways, 21.

As between cotenants, see Tenants in Common, 6, 7.

# 1. NECESSARY ELEMENTS.

### a. Actual Possession.

- 1. What Constitutes Actual Possession. Before one can acquire an actual possession to land to which he has no title and to which he has only a color of title, he must enter upon the land with the intention of holding it, and, if without color of title, must claim it to well marked and defined boundaries. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 2. One entering under a deed, patent, or other written instrument evidencing title, with the intention of possessing the land to the extent of the boundaries described in his deeds, etc., is in the actual possession to the extent of his boundary, or to the extent his boundary is not in the actual possession of another, or unless the boundary described in his color of title embraces a lap upon a senior grant, in which instance he will not be in the actual possession of the part embraced in the conflict unless he actually enters thereon. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 3. Necessity of Actual Possession. A possession, which if continued for the statutory period of fifteen years will ripen into title, must in the first instance be an actual possession. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 4. Where a grantee enters land to a part of which the vendor's title was valid and to a part of which it was invalid and covered by another's valid title and occupies the part to which he has a good title, he does not have adverse possession of the part to which he has not a good title, unless he actually enters and subjects it to such use as will be notice to the true owner; though a different rule applies where his title to all the land embraced in the deed is invalid. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 5. One owning and residing upon a tract who acquires an inferior title to an adjoining tract, in which another has a constructive possession, does not acquire an actual possession of the tract to which he holds a color of title, and before he obtains adverse possession of it he must enter and take physical possession of it. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 6. Without actual possession of some part of a tract of land, there can be no constructive possession of any part by one without title or one having a mere color of title under a deed, patent, etc., which makes an inferior title. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

7. Scope of Possession by Owner. One having the title to land and the actual possession thereof, and who acquires the title to contiguous tracts with the intention of holding possession to the extent of the boundaries of all the tracts, is in the actual possession of all, as, having already the constructive possession by reason of his title, the law waives the necessity of an entry upon each of the newly acquired tracts, and the actual possession of the tract contiguous to them is extended over all of them by operation of law. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

# b. Hostile Possession.

- 8. What Constitutes Hostile Possession. One without color of title may create an actual possession in himself, by construction, to parts of a tract of land, by entering thereon and using and occupying a part and claiming it to a well marked and defined boundary, which either already exists or which he places there, and he is then in actual possession of the part which he incloses and uses, and in actual possession by construction to the extent of his boundary, unless the land is in the actual or constructive possession of another, in which case his actual possession only extends to his inclosures. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 9. Necessity of Hostility. While an adverse title may be acquired through possession by a tenant, whether the claimant acts in person or through a tenant, he must show a disseisin and unequivocal assertion of title in himself, and hence adverse possession of a portion of a street occupied by a fruit stand operated by complainant under a lease from the owner of the adjoining property was not established in the absence of proof of notice of the adverse claim to the city. Pastorino v. Detroit (Mich.) 1916D-768.
- 10. Permissive Use. When such right of way is only an easement, occupation by inclosure and cultivation of a part of it by the owner of the servient estate, until it is needed for the operation of the railroad, is presumed to be permissive and not adverse, and the statute of limitations will begin to run only from the time the railroad company has notice of the occupier's hostile claim. Dulin v. Ohio River R. Co. (W. Va.) 1916D-1183.
- 11. Mental Intention. Possession to create title does not consist of mental intentions but must be based on the existence of physical facts, such as making an improvement upon the land or the doing of other acts upon it which openly evince a purpose to hold dominion over it in hostility to the title of the real owner, and such as will give notice of such hostile intent, which adverse holding must continue for the statutory period of fifteen

years. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

# c. Continuous Possession.

- 12. Sufficiency of Adverse Possession. Adverse possession must be based upon some physical acts done upon the land which will give the true owner notice that another is in possession of his land, and the acts necessarily must be such as to enable the owner to maintain an action of ejectment or trespass against the intruder. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 13. Notoriety of Claim. One having an easement over the land of another cannot change the character of his right to an adverse holding of the land itself, unless he either gives the true owner actual notice, or his acts and declarations of a hostile claim are so open and notorious as to leave no doubt in the mind of the true owner; and the fact that one having an easement of way inclosed it, occasionally locked the gate and would not permit others to use it, and often allowed his stock to pasture on the way, is not sufficient to apprise the owner of the land that the owner of the easement is asserting a hostile title to the land itself. O'Banion v. Cunningham (Ky.) 1917A-1017.

#### Note.

What constitutes notice to railroad company of adverse possession of its property. 1917A-1274.

### d. Tacking Possession.

- 14. When the grantee of an adverse possessor takes possession, he may unite his subsequent possession with his grantor's prior possession to make out adverse possession for the seven-year period. Northcut v. Church (Tenn.) 1918B-545.
- 15. Where the grantee of mineral rights of an adverse possessor takes immediate and appropriate possession thereof, he may unite his subsequent possession with his grantor's prior possession to make out statutory title by adverse possession. Northeut v. Church (Tenn.) 1918B-545.

### e. In Mining Property.

16. Under Ky. St. § 2366a, providing that, whenever the mineral rights appurtenant to land shall pass from a claimant in possession of the surface the continuity of the possession of such mineral rights shall not be broken, a vendor in possession of surface when he sells the minerals, by thereafter remaining in possession for the statutory period, gives the purchaser of the minerals a valid title; but if, before the statutory period expires, the vendor abandons the possession or is evicted by paramount title, the title of the purchaser

- fails. Tennis Coal Co. v. Sackett (Ky.) 1917E-629. (Annotated.)
- 17. Plaintiff claiming title under a patent should have recovered a tract not embraced by any other patent, unless defendant had title by adverse possession, or it was in the adverse possession of defendant's vendors when the deed to plaintiff from the patentee's devisees was executed. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 18. Acts of possession required for the surface and those for the minerals are different; the latter requiring some form of mining or activities directly related thereto. Northcut v. Church (Tenn.) 1918B-545.

# 2. WHAT CONSTITUTES COLOR OF TITLE.

- 19. Deed of Life Tenant. In a suit to quiet title, where it appeared that the one under whom defendant claimed was in possession under a quitclaim deed from a life tenant until the life estate fell in, in 1896, and that the remaindermen were barred by the ten-year statute of limitations, complainant from that date having been in the adverse possession under claim of ownership, there is no title in defendant's predecessor superior to that of the complainant. Vidmer v. Lloyd (Ala.) 1917A-576.
- 20. In an action to quiet title against defendant, claiming under actual prior possession of one R. under color of title, complainant, who while in possession of the property knew that R. only had a deed from one claiming a life estate and could not convey good title, and who entered into a contract with R.'s husband, while his wife was alive, whereby he was to acquire a clear title and convey it to complainant, and who paid the full purchase price prior to R.'s death and received a deed from the surviving husband, has a perfect equity under such contract of purchase, and his possession begins to run against R. in her lifetime. Vidmer v. Lloyd (Ala.) 1917A-576.

# 3. EXTENT OF POSSESSION.

- 21. One having color of title may have an actual possession, by construction, to parts of a tract by entering thereon with the intention to take and hold possession to the extent of the boundaries of his deed, etc., and is then in actual possession of the part which he occupies and in actual possession, by construction, of the remainder, when not in the possession of another. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 22. Adverse Possession Under Overlapping Grants. Where a junior grant laps upon a senior grant, and although the

senior patentee has never entered upon any part of his patent, and has only the constructive possession of it, which the law vests in him, and the junior patentee enters upon his grant, but without the lap, with the intention of holding to the extent of his boundaries, he is not in the possession of the lap either actually or constructively, because his possession of it would only be constructive and would not displace the senior patentee's constructive possession. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

23. Separate Tracts. Generally, where title is claimed by adverse possession as to two separate pieces of land against the same claimant, an adverse holding of each must be made out by circumstances relating to possession of each respectively, and possession of one will not extend constructively to the other. John L. Roper Lumber Co. v. Richmond Cedar Works (N. Car.) 1917B-992.

24. Constructive Possession of Owner. One having no actual possession of the land embraced within his deed, by a fiction of law, is in the constructive possession of all the land embraced therein which is not in the actual possession of another. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

# 4. WHO MAY ACQUIRE TITLE BY ADVERSE POSSESSION.

25. Necessity of Surrender of Leasehold. One who enters into possession of land as a tenant cannot, while retaining possession, assert against his lessor an afteracquired title, which he deems superior to that of the lessor. Lawrence v. Eller (N. Car.) 1917D-546. (Annotated.)

26. Hunting Club. It is not sufficient basis to support a claim of title by adverse possession to a tract of 27,000 acres, that the grantees in a deed of the right to hunt and fish thereon, have a clubhouse thereon, and two or three acres fenced, have successfully maintained a suit in the federal court enjoining nonmembers from hunting and fishing there, and have keepers and wardens for ejecting nonmembers, and fishing and hunting equipments, and houses for employees, and have posted notices forbidding trespassing. Stokes v. State (Ark.) 1917D-657.

27. Person Precluded by Judgment from Asserting Title. During the fifteen years necessary to hold land in order to create a title by adverse possession, after an adverse judgment, although possession might be sufficient under the statute of limitations, one estopped by the judgment to deny the title of the owner has no such adverse possession as will make a sale and conveyance by the owner void as against the champerty statute. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

# 5. AGAINST WHOM TITLE MAY BE ACQUIRED.

28. Railroad Right of Way. The doctrine of adversary possession is applicable to land acquired by a railroad company for its right of way. Dulin v. Ohio River R. Co. (W. Va.) 1916D-1183.

(Annotated.)

29. Grantee not Entitled to Possession. Neither limitations nor prescription may run against a grantee invested with an estate in fee, but not entitled to possession before the grantor's death, until after grantor's death. (Phillips v. Phillips (Ala.) 1916D-994.

30. What Will Divest Owner's Constructive Possession. Parties having constructive possession of lands embraced within certain patents could not be divested of such possession, except by an actual possession in fact, or by such acts as vested in another an actual possession by construction. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

#### Note.

Acquisition of title to land within right of way of railroad by adverse possession or prescription. 1916D-1186.

### 6. EVIDENCE.

# a. Admissibility.

31. Notice to Agent. Where by the rules of a railroad company, its station agent was under no duty to report encroachments by abutting owners upon its right of way in a suit by the road to recover possession of part of its right of way encroached upon by defendant, evidence is inadmissible contradicting the agent's denial that he had requested defendant to move her fence off the right of way, and that defendant denied it was misplaced. Atlantic Coast Line R. Co. v. Dawes (S. Car.) 1917A-1272.

(Annotated.)

32. Adverse User—Notice—Admissibility of Evidence. In an action by a railroad company to recover possession of land condemned by it in which defendant claimed that the company had abandoned its easement, a letter written by the company by a person acting for the then owner of the property offering it for sale to the company is admissible in connection with the company's reply asking for a sketch of the property to show notice to the company that a third party was then claiming the property. New York, etc. R. Co. v. Cella (Conn.) 1917D—591.

# b. Sufficiency.

33. Evidence Insufficient. In a suit to establish ownership of various tracts of land conveyed to plaintiff by the devisees

under the will of the original patentee, and to the coal and minerals thereunder, the evidence is held to be insufficient to show adverse possession in the vendors of defendant coal company. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

(Annotated.)

# c. Questions of Law and Fact.

34. Question for Jury. In a suit to establish the ownership of a tract of land embraced in a patent under which plaintiff claimed, it is held that the questions of the adverse possession of the defendant's vendors, and of champerty, were for the jury. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

35. Instruction Improper. The charge of the court in respect to prescriptive title was an inaccurate statement of the law. Bunger v. Grimm (Ga.) 1916C-173.

# 7. NATURE OF TITLE ACQUIRED.

36. Acquirement of Title. The actual possession of land sued for by one, claiming it as his own, for about forty years, without recognition of any claim, right, or title of another, operates as an absolute repose under the doctrine of prescription. Vidmer v. Lloyd (Ala.) 1917A-576.

# 8. PURCHASE OF OUTSTANDING TITLE.

37. Effect. One in possession of land under color of title may purchase an outstanding title without thereby breaking the adverse nature of his holding under the first title, though the period for perfecting title under the first holding has not expired. John L. Roper Lumber Co. v. Richmond Cedar Works (N. Car.) 1917B-992. (Annotated.)

38. Where plaintiff has held adversely for six and one-half years under color of title constituted by a deed from a stranger, he does not abandon or relinquish such holding or the right to complete title thereunder by the purchase of an outstanding interest which was contended to be the interest of a tenant in common of defendants, where there is no intention by plaintiff to abandon the color of title. John L. Roper Lumber Co. v. Richmond Cedar Works (N. Car.) 1917B-992.

(Annotated.)
ADVERTISING.

Misnomer in sheriff's advertisement, effect, see Judicial Sales, 1.

Use of walls by tenant, see Landlord and Tenant, 11.

Of city contracts, see Municipal Corporations, 130.

1. Validity of Regulations. The erection of any billboard or signboard over twelve square feet in area in any block in which

one-half of the buildings on both sides of the street are used exclusively for residence purposes, without first obtaining the written consent of the owners of a majority of the frontage on both sides of the street in such block, may be prohibited in the exercise of the state's police power, and such prohibition works no denial to a corporation engaged in outdoor advertising of either the due process of law or equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution (9 Fed. St. Ann. 416, 538). Thomas Cusack Co. v. Chicago (U. S.) 1917C-594.

(Annotated.)

2. A municipal ordinance passed under authority delegated by the state legislature to regulate or control the construction and maintenance of billboards is a valid exercise of the police power unless it is clearly unreasonable and arbitrary. Thomas Cusack Co. v. Chicago (U. S.) 1917C-594. (Annotated.)

3. An ordinance requiring the consent of the majerity of residence owners according to frontage to the erection of a billboard in a residence block is not unreasonable because it requires the consent of a majority of the owners of property on both sides of the street where the billboard is to be erected. Thomas Cusack Co. v. Chicago (Ill.) 1916C-488.

(Annotated.)

- 4. An ordinance requiring the consent of the majority of residence owners according to frontage to the erection of a bill-board in a residence block is not unreasonable in view of the liability of fire, the liability of a use by disorderly persons for unlawful and immoral purposes, and the difference between fire and police protection in residence districts and other districts. Thomas Cusack Co. v. Chicago (Ill.) 1916C-488. (Annotated.)
- 5. An ordinance requiring the consent of residence owners to the erection of a bill-board in a residence block is not discriminatory in that there is no difference between fences, buildings, and billboards. Thomas Cusack Co. v. Chicago (Ill.) 1916C-488. (Annotated.)
- 6. A city has power to enact an ordinance requiring the consent of a majority of the residence owners to the erection of a billboard in a residence block, under Hurd's Ill. Civ. St. 1913, c. 24, § 696, giving cities power to regulate the location of billboards, etc., upon vacant property and upon buildings. Thomas Cusack Co. v. Chicago (Ill.) 1916C-488. (Annotated.)
- 7. On a question of the reasonableness of a city ordinance requiring the consent of the majority of the residence owners in accordance with frontage, evidence tending to show that the erection of bill-boards is productive of fire, and that residence districts are not so well protected

as the business district, is admissible. Thomas Cusack Co. v. Chicago (Ill.) 1916C-488. (Annotated.)

8. On the question of the reasonableness of a city ordinance requiring the consent of residence owners as a condition to the erection of a billboard in a residence block, evidence that such boards offered a protection to disorderly and lawbreaking persons, and that residence districts were not so well policed as other districts, is admissible. Thomas Cusack Co. v. Chicago (Ill.) 1916C-488.

(Annotated.)

# Note.

Municipal regulation of billboards and signs. 1916C-491.

# ADVICE OF COUNSEL.

establishing probable cause, see Malicious Prosecution, 11-13.

# ADVISORY OPINIONS.

See Courts, 35.

As precedents, see Stare Decisis, 11.

# AFFIDAVIT OF DEFENSE.

See Pleading, 23.

### AFFIDAVITS.

Bill of exceptions to include affidavits, see Appeal and Error, 63.

Verification of indictment, see Indictments and Informations, 3, 7.

Verification of juvenile court complaint, see Infants, 28.

Of jurors to show misconduct, see Jury,

41, 42. Verification of removal petition, see Jus-

tices of the Peace, 3. In notice of claim of lien, see Mechanics' Liens, 28.

Sufficiency on motion for new trial, see New Trial, 20, 23, 31-34.

Verification of pleadings, see Pleading, 107. On motion for change of venue, see Venue,

Of jurors to impeach verdict, see Verdicts, 13.

1. Under Ore. L. O. L., § 829, requiring a witness in all affidavits to speak in the first person, an affidavit by V. charging that he has missed cattle, that S. has now beef in his or his family's possession, and that "I, V., believe his animals" have been butchered and the beef, etc., may be found on the premises of S. does not state any offense known to the law. Smith v. McDuffee (Ore.) 1916D-947.

# AGE.

Competency of witness to testify to, see Witnesses, 2.

### AGENCY.

1. Creation and Existence of Relation, 22.

a. Evidence, 22.

- b. Termination of Relation, 22.
- 2. Rights and Liabilities Inter Se, 22. a. Principal to Agent, 22.
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- (3) Compensation of Agent, 22. b. Del Credere Agents, 22. c. Purchase of Property for Principal by Agent, 22.
- 3. Rights, Duties, and Liabilities as to Third Persons, 23.
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- b. Evidence of Authority, 23.
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  - (1) By Accepting Benefits, 24. (2) Evidence, 24.

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f. Notice to Agent as Notice to Principal, 25.

g. Limitations Known to Third Party,

### See Attorneys.

Proof of agency, see Admissions and Declarations, 5-7.

Authority of auctioneer, see Auctions and Auctioneers, 2.

Liability for chauffeur's acts, see Automobiles, 23, 32–35.

Only principal liable for concealment of assets, see Bankruptcy, 32.

Bank not agent of depositor, see Banks and Banking, 26.

Authority to find buyer not authority to sell, see Brokers, 2.

Depositary agent of both parties, see Escrow, 5.

Authority to answer letter, presumed, see Evidence, 1451/2.

Agent's right to insure his own property, see Fire Insurance, 2, 3.

Authority to sell land, see Frauds, Statute

Insurance agents, see Insurance, 1-8.

Withdrawal of joint principal after creation of agency, see Joint Adventures.

Sufficiency of designation of agency, see Landlord and Tenant, 47.

Tenant as agent of owner in making improvements, see Mechanics' Liens, 3-8.

# 1. CREATION AND EXISTENCE OF RELATION.

# a. Evidence.

- 1. Sufficiency. Agency and consequent liability for negligence may be found from the evidence as a whole and facts and circumstances, notwithstanding the categorical answers to the contrary of the alleged principal and agent, the only witnesses on the issue. Rosenberg v. Dahl (Ky.) 1916E—1110.
- 2. Ownership of Bank Deposit. In garnishment proceedings against a bank, the evidence is held to warrant a finding that the judgment debtor held the funds in the bank as agent of the intervener in the proceedings. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143.

# b. Termination of Relation.

3. Death of Principal. Where, though a lease was signed by the lessor before her death, it was not delivered to nor signed by the lessee during the lessor's lifetime, being in the hands of her agent at her death for that purpose, it cannot be delivered by the agent after her death, since her death revoked the agency. Streit v. Wilkerson (Ala.) 1917E-378.

(Annotated.)

#### Note.

Revocation of agency by death of principal. 1917E-380.

# 2. RIGHTS AND LIABILITIES INTER SE.

# a. Principal to Agent.

- (1) Damages for Breach of Contract.
- 4. Recovery for Loss of Profits. In an action for the breach of a contract, in which plaintiff acted as sales agent for defendant's automobiles on commission, but which gave no exclusive agency for a definite period, the profits derived by the plaintiff from such sales were clearly contemplated by the parties; but where the only proof of damage was that defendant discharged plaintiff before he could consummate sales to his prospective customers, and there was nothing to show that sales were made or could have been made to more than four customers, a verdict for plaintiff for commissions on the amount of sales to all the prospective customers is properly set aside by the trial court. Mc-Ginnis v. Studebaker Corporation (Ore.) 1917B-1190. (Annotated.)
- 5. Alleged loss of opportunity to sell to prospective purchasers listed by plaintiff is held to be the pith of his complaint for termination of his employment to sell defendant's automobiles on commission. McGinnis v. Studebaker Corporation (Ore.) 1917B-1190. (Annotated.)

#### Note.

Illegal contracts as to compensation by agents of vendor or vendee. 1917A-511.

# (2) Reimbursement of Agent.

- 6. That the traveling expenses of a salesman are incidental to the work for which he is employed does not bring the incurring of such expenses on the principal's credit within the scope of the salesman's apparent authority. Oxweld Acetylene Co. v. Hughes (Md.) 1917C-837.
  - (Annotated.)
- 7. Evidence in an action against a company, engaged in manufacturing and selling lighting equipments, for the amount of bills contracted by its salesman, is held to be insufficient to show that the company had recognized the salesman's right to impose on it any liability for his expenses. Oxweld Acetylene Co. v. Hughes (Md.) 1917C-837. (Annotated.)

### Note.

Power of agent to bind principal for traveling expenses. 1917C-840.

# (3) Compensation of Agent.

8. Sale of Land by Person not Broker—Measure of Compensation. Where one not engaged in the real estate business is employed to procure a purchaser of real estate without any agreement as to the commission to be paid, a recovery for procuring a purchaser must be limited to the fair value of the services, but in determining that fact the amount customarily charged by real estate agents in the neighborhood can be considered, but it cannot be made a governing factor. Morehouse v. Shepard (Mich.) 1916E-305. (Annotated.)

## Note.

Amount of compensation of person other than real estate broker for effecting sale of land where contract fails to fix compensation. 1916E-306.

# b. Del Credere Agents.

9. Liability to Principal. A del credere agent, though he sells to an undisclosed buyer, is hable to his principal only as a guarantor for the buyer and is not subject to an action by the principal to litigate disputes arising on the contract of sale. Gabriel v. Churchill (Eng.) 1916C-1087. (Annotated.)

# Note.

Nature and extent of liability of del credere agent to principal. 1916C-1091.

- c. Purchase of Property for Principal by Agent.
- 10. Proceeds of Property Charged With Trust. Where a party furnished the pur-

chase price of land to his agent, title being taken in such agent's name for convenience under agreement that when the land was sold the proceeds should belong to the principal, such proceeds, though deposited by the agent in bank in his own name, belong to the principal. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143.

- 3. RIGHTS, DUTIES, AND LIABIL-ITIES AS TO THIRD PERSONS.
  - a. Authority of Agent in General.
- (1) Duty to Ascertain Extent of Agent's Authority.
- 11. Parties dealing with an agent assuming to have authority to sell land are put upon inquiry to ascertain the extent of his authority. Springer v. City Bank, etc. Co. (Colo.) 1917A-520.

# (2) Implied Authority.

12. Employing Physician for Injured Servant. As a general rule, the superintendent of a mercantile corporation has no implied authority to engage a physician to attend an employee of the corporation injured while at work. Ward v. J. Samuels & Bro. (R. I.) 1918A-783.

(Annotated.)

- 13. Proof of Implied Authority. In a suit to determine an adverse interest in realty, evidence held sufficient to show that the owner of land knowingly permitted intending purchasers to believe that the printed plat thereof shown to them by his agent had been duly recorded, and also that he held out such agent as his general agent in negotiating sales. Nicholas v. Title, etc. Co. (Ore.) 1917A-1049.
- 14. Holding Out. The authority of an agent to bind his principal in contracts with a third party is measured, not only by the agent's express delegation of power, but also that which he is held out by the principal as possessing, provided the third party had reason to believe and did believe the agent was acting within his authority, and such party would sustain a loss if the contract were not binding upon the principal. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.
- 15. Apparent Authority of Agent. The liability of a principal for debts incurred by his agent is determined, not merely by what was the apparent authority of the agent, but by what authority the person extending the credit was justified in the exercise of reasonable care and prudence, in believing that the principal had conferred on the agent. Oxweld Acetylene Co. v. Hughes (Md.) 1917C-837.
- 16. Implied Power of Agent—Binding Principal for Traveling Expenses. In an action against a company, engaged in the manufacture and sale of acetylene light-

ing equipments, for meals, lodging, and automobile service furnished to the company's salesman, plaintiff's testimony that the salesman had assured him that the company would pay such bills, and that another salesman of the company had told him that the company paid the traveling expenses of its agents, is inadmissible; it being essential that the liability of a principal for a debt contracted by a special agent beyond the scope of his authority be sustained, if at all, on the basis of the principal's conduct, and not merely on the agent's misrepresentations. Oxweld Acetylene Co. v. Hughes (Md.) 1917C-837.

(Annotated.)

# Note.

Implied authority of officers, agents, or servants to contract for medical, surgical, or other attendance or supplies for sick or injured persons. 1918A-791.

- (3) Authority to Employ Others.
- 17. Amusement Contracts Power of Theatrical Manager Making Written Contract. The act of reducing a contract of employment to writing is within the apparent authority of the general manager of a theatrical enterprise. Ferguson v. Majestic Amusement Co. (N. Car.) 1917C—389. (Annotated.)
  - (4) Estoppel to Deny Authority.
- 18. Estoppel of Principal. Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person held out as an agent. Ferguson v. Majestic Amusement Co. (N. Car.) 1917C-389.

# b. Evidence of Authority.

- 19. Burden of Proof. A petition in the usual form by the indorsee of a negotiable note bearing the purported indorsement of the payee, "By J. D. M., Agt.," was answered by a verified denial that such note was not sold and delivered by the payee company or any one for it with authority so to do. Held, that the burden of proof was upon the plaintiff to establish authority in the agent to make the indorsement. First National Bank v. Robinson (Kan.) 1916D-286.
- 20. Declarations of Agent—Scope of Agency. Where by the rules of plaintiff railroad company, its roadmaster's duties were limited to ascertaining the boundary lines of the company's property and reporting encroachments thereon, evidence that he had been asked by defendant's agent to fill a certain hole, and that he had replied that it was not on the rail-

road's right of way, but on her own property, is inadmissible on behalf of defendant in a suit by the railroad to establish title to such part of the right of way, a principal not being bound by the declaration of the agent without authority in the premises. Atlantic Coast Line R. Co. v. Dawes (S. Car.) 1917A-1272.

21. Purchase by Agent from Principal. The mere fact that a company selling automobiles buys them of the producer does not prove that he is not the producer's sales agent. Studebaker Corp. v. Hanson (Wyo.) 1917E-557. (Annotated.)

22. Automobile Dealer as Agent of Manufacturer. Evidence in an action involving the question of liability for breach of warranty in the sale of an automobile to defendant is held to be sufficient to sustain a finding that the company which made the sale, instead of being a dealer in automobiles, and, as such, making the sale, was a sales agent of the producer, of which plaintiff was the successor, and, as such, made the sale. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.

(Annotated.)
23. Proof of Agency—Declarations of Alleged Agent. It is not an attempt to prove agency by declarations of the agents, where sufficient independent circumstantial evidence is introduced for that purpose, and their declarations introduced are confined to admissions of a defective condition of an article. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.

24. Admission of one's declaration of agency was harmless, there being sufficient independent proof thereof, and no attempt to disprove it. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.

### Note.

Nature and construction of automobile sales agency contracts. 1917E-568.

- Liability of Principal for Unauthorized or Wrongful Acts of Agent.
- 25. Contract of Agent—Responsibility of Principal. Where money is left by a principal with an agent to be loaned, and the agent takes usury, but without the knowledge of the principal or her receiving any fruits of the transaction, the principal is not chargeable with the effects of the agent's misconduct. Brown v. Johnson (Utah) 1916C-321. (Annotated.)
- 26. The rule that when a creditor accepts the obligation of an agent he cannot thereafter pursue the principal rests on the assumption that credit has been given to the agent, and hence does not apply where no such credit was given and the principal used the agent's name to represent its own contract and evidence its own liability. Dexter Horton Nat. Bank v. Seattle Homeseekers' Co. (Wash.) 1917A-685.

(Annotated,)

### Note.

Act of agent in entering into usurious contract as binding principal. 1916C-327.

- d. Ratification of Act of Agent.
  - (1) By Accepting Benefits.
- 27. A mercantile corporation, although its superintendent is without actual authority to engage a physician to attend an employee injured while at work, may have so represented such agent's authority, by payment for previous like services, so as to have estopped itself to disavow the act. Ward v. J. Samuels & Bro. (R. I.) 1918A-783.

# · (2) Evidence.

28. In an action by a physician against a corporation for his attendance on an injured employee, the evidence is held to be sufficient to justify a finding that the act of the superintendent in engaging such physician had been ratified. Ward v. J. Samuels & Bro. (R. I.) 1918A-783.

29. In an action by a physician against a corporation for his services in attending an injured employee, the evidence is held to be sufficient to justify a finding that such employer was liable by estoppel to deny its superintendent's authority to hire. Ward v. J. Samuels & Bro. (R. I.) 1918A-783.

### (3) Question for Jury,

30. Ratification or Estoppel. Whether the unauthorized act of the superintendent of a mercantile corporation in engaging a physician to attend an employee injured while at work has been ratified by the employer, is a question of fact. Ward v. J. Samuels & Bro. (R. I.) 1918A-783.

# e. Undisclosed Agency.

31. Election. Where a person, without knowing it, deals with one who is in fact acting as agent for another, he may elect, upon a disclosure of the principal, to hold either him or the agent on the contract, but cannot hold both. Horton v. Southern R. Co. (N. Car.) 1918A-824.

32. An election, by one dealing with the agent of an undisclosed principal, to hold either the principal or agent, may appear, by any words or acts on his part tending to show a definite purpose or an unequivocal and final determination, to depend solely upon the liability of one and abandon his right to proceed against the other. Horton v. Southern R. Co. (N. Car.) 1918A—824.

33. Undisclosed Principal — Right of Agent to Sue in Own Name. Plaintiff, who contracted for the benefit of a telephone company, agreed with defendant to purchase and furnish the necessary materials for the construction of sixteen sections of telephone. Plaintiff ordered

the materials, and paid for them himself, not disclosing to defendant the fact of his agency. Held, that plaintiff, who had an interest in the contract besides his payment for the materials, it appearing that he was to receive compensation for erecting the line, might maintain an action on the contract for defendant's breach in his own name, his principal being undisclosed, notwithstanding the general rule that only a principal may sue upon a contract. Camp v. Barber (Vt.) 1917A-451.

(Annotated.)

34. Rights in Warranty to Agent. A warranty on which sale is made to one in fact acting as agent inures to the benefit

of the undisclosed principal. Pacific Power, etc. Co. v. White (Wash.) 1918B-125. (Annotated.)

# Note.

Warranty to agent as inuring to benefit of undisclosed principal. 1918B-130.

Right of agent of undisclosed principal to sue on contract made in his own name. 1917A-454.

- f. Notice to Agent as Notice to Principal.
- 35. Agent Acting in Hostility to Principal. The knowledge of an agent is imputed to his principal, in the absence of actual knowledge by the principal upon the presumption that the agent will divulge his knowledge to his principal; but, when the agent is engaged in a transaction where his interests are hostile to those of his principal, or is trying to defraud the principal, it will not be presumed that he has communicated his knowledge to his principal, and hence the principal is not charged therewith. Taulbee v. Hargis (Ky.) 1918A-762.
- 36. Where the superintendent of a mercantile corporation knew that plaintiff physician was treating an injured employee and intending to continue such treatment as long as required, and would regard the treatment as rendered on account of the employer, and to be charged to it, such notice to the superintendent being imputable to the employer, to escape liability for such medical services, it is necessary for the employer to notify the plaintiff it will not pay for complete treatment, and that its superintendent's authority has been limited to securing first aid to the injured. Ward v. J. Samuels & Bro. (R. I.) 1918A-783.
- 37. In an action by a physician against a corporation for attendance on an injured employee, where the superintendent of the defendant is empowered to attend employees and to engage physicians for their treatment to a limited extent, at least, notice to such superintendent of the conduct and claims of a physician employed by him is notice to the defendant. Ward v. J. Samuels & Bro. (R. I.) 1918A-783.
- 38. Knowledge of Agent Imputed to Principal. Where a widow had dower as-

signed to her in certain land of her deceased husband, if the person who was the administrator upon the estate, was also the agent of the widow, and, while acting within the scope of his authority as such, he took advantage of his position as administrator to obtain fraudulently from the court of ordinary an order for the sale of land, including the land in which a dower had been granted, and as to which there was a reversionary interest in the heirs, without any necessity so to do in order to pay debts, but for the purpose of getting rid of the interest of the other heirs and vesting the entire title in the dowress, and carried this purpose into effect, the fact that the same person who was the agent of the dowress was also the administrator of the estate would not prevent application of the ordinary rule that a principal is bound by the knowledge of his agent while acting within the scope of his authority; nor would the fact that as administrator he gave a bond for the proper performance of his official duties have that result.

- (a) The charges complained of in the eighteenth, nineteenth, and twentieth grounds of the motion for a new trial were not absolutely accurate in expression. Sutton v. Ford (Ga.) 1918A-106.
- 39. Presumption. In an action for wrongful discharge of a company of actors without two weeks' notice provided for in the written contract of employment made by defendant's general manager, defendant is presumed by law to have knowledge of the contract under which the plaintiffs were playing at his theater. Ferguson v. Majestic Amusement Co. (N. Car.) 1917C-389.
- 40. Agent Acting Contrary to Instructions. Where an employee was acting solely in his own interest and contrary to the interests of plaintiff, for whom he was agent, as well as defendant, in whose service he was, defendant is not charged with knowledge of the employee's wrongful acts. Carlisle v. Norris (N. Y.) 1917A-429.
- g. Limitations Known to Third Party.
- 41. Act in Excess of Authority. One who deals with an agent assuming to act for his principal, and who knows the limitations of the agency, cannot bind the principal by any act in excess of such authority. Salene v. Queen City Fire Ins. Co. (Ore.) 1916D-1276.

# AGREEMENTS.

See Contracts.

# AGRICULTURE.

- 1. In General, 26.
- 2. Farm Loan Act, 26.
- 3. Pure Seed Law, 27.

Impracticability of labeling, judicial notice of, see Evidence, 19.

### 1. IN GENERAL.

- 1. Burns Ind. Ann. St. 1908, §§ 5524, 5525, requiring railroads to remove noxious weeds on lands occupied by them, and providing that, on the refusal of any railroad so to do, it shall be liable to a penalty of \$25, prosecuted for in action of debt by any person feeling himself aggrieved, imposes a penalty for a violation of a statutory duty, and a company is not deprived of its property without due process of law and without compensation, in violation of Const. art. 1, § 21, and Const. U. S. Amend-14, when the penalty is recovered by a private individual who has suffered no damages. Chicago, etc. R. Co. v. Anderson (Ind.) 1917A-182. (Annotated.)
- 2. The proposition that, though all the orange groves in the state may, in the meanwhile, be destroyed by citrus canker, defendant should be allowed to maintain that disease in his grove, upon the chance that he may discover, and until he does discover, a remedy for it which may be less drastic than the burning of the trees, is untenable. The owners of the other groves are entitled to protection now before the destruction emanating from defendant's place overtakes their groves. Louisiana State Board v. Tanzmann (La.) 1917E-217. (Annotated.)
- 3. Destruction of Diseased Fruit Trees. The destruction by legislative authority of orange trees affected by a disease for which no cure has been discovered and which is highly contagious and infectious is not a taking of private property for a public purpose without previous adequate compensation, nor a taking of such property without due process of law, but is a competent exercise of the police power of the state. Louisiana State Board v. Tanzmann (La.) 1917E-217.

(Annotated.)

4. Noxious Weeds. A complaint for the statutory penalty for the failure of a railroad to cut noxious weeds on its property, as required by Burns Ind. Ann. St. 1908, § 5524, 5525, need not aver that any actual damages have been sustained by plaintiff. Chicago, etc. R. Co. v. Anderson (Ind.) 1917A-182. (Annotated.)

### Notes.

Duty of owner to destroy noxious weeds on his land. 1917A-183.

Validity of statute providing for destruction of diseased fruit trees, fruit or vegetables. 1917E-220.

### 2. FARM LOAN ACT.

5. Attack on Statute. A citizen and taxpayer suing to enjoin the state treasurer from issuing bonds under the Mont. Farm Loan Act (Laws 1915, c. 28) may not complain of references in the bonds to a guaranty fund, since such references can

- have no effect prejudicial to him, or of the invalid exemption of mortgages thereunder from the recording fee, when he cannot be affected thereby. Hill v. Rae (Mont.) 1917E-210.
- 6. Validity. Mont. Farm Loan Act (Laws 1915, c. 28), creating a department of farm loans to formulate and receive application for loans on farm property, to require and pass upon proof of title, to formulate all mortgages securing such loans, to issue and offer for sale the bonds intended as evidence of such loans, and to collect all loans and pay the bonds as they mature, prescribing the character of farm property and the form of the bond, and appropriating a sum for administrative purposes and for a guaranty of the bonds, though excluding farmers having only chattel security or no security from its provisions, is not unconstitutional as a denial of the Hill v. Rae equal protection of the laws. (Mont.) 1917E-210. (Annotated.)
- 7. Mont. Const. art. 12, § 12, forbidding appropriations for a longer term than two years, operates as an automatic limit, so that an appropriation under the Mont. Farm Loan Act (Laws 1915, c. 28), if otherwise valid, and though not limited as to time, will expire at the end of two years, and is not void ab initio. Hill v. Rae (Mont.) 1917E-210. (Annotated.)
- 8. Mont. Farm Loan Act (Laws 1915, c. 28), creating a department of farm loans, and incidentally making an appropriation for administrative expenses and as a guaranty of the bonds evidencing the loans, does not violate Const. art. 5, § 33, providing that appropriations other than for the ordinary expenses of the legislative and other departments, etc., shall be by separate bills each embracing but one subject, since, while it applies when the appropriation constitutes the entire purpose, it does not apply if the appropriation is incidental to a larger, though single, subject of legislation. Hill v. Rae (Mont.) 1917E-210. (Annotated.)
- 9. Mont. Farm Loan Act (Laws 1915, c. 28), which appropriated the sum of \$25,000, \$5,000 of which was to start the administration of the department of farm loans created by the act, and the remainder of which was to serve as a guaranty fund to assure lenders on mortgage security that the interest on the bonds evidencing the loans would be promptly met, whether the mortgagors had made their payment or not, as to such guaranty, is an appropriation and a credit assurance, which, though the purposes of the Farm Loan Act falls fairly within the term "industrial," violated Mont. Const. art. 5, § 35, forbidding appropriations for industrial purposes to any person not under the absolute control of the state, and art. 13, § 1, declaring that the state shall not give or loan its credit, and the fact that the guaranty fund was to be

recouped as used did not save it, because, whether used or not, it stands as a guaranty for the benefit of lenders under the act. Hill v. Rae (Mont.) 1917E-210.

(Annotated.)

10. Loan of Public Funds. A citizen and taxpayer of a county may sue to enjoin the state treasurer from issuing, negotiating, or selling bonds pursuant to Laws Mont. 1915, c. 28, commonly called the Mont. Farm Loan Act, on the ground of unconstitutionality and expenditure of state money. Hill v. Rae (Mont.) 1917E-210.

#### Note.

Validity of Farm Loan Statute. 1917E-216.

# 3. PURE SEED LAW.

11. Validity. The courts cannot judicially know that no means or process exist for cleaning seeds so as to exclude weed seeds from being present therein in quantities not more than one in 10,000. State v. McKay (Tenn.) 1917E-158.

(Annotated.)

- 12. The Tenn. Pure Seed Law is not a violation of the due process of law clause of Const. U. S. Amend. 14, because section 11 of the law contains a proviso that no one shall be convicted under the act if he is able to show that weed seeds named in section 3 are present in quantities not more than one in 10,000, and that due diligence has been used to find and remove them; such provision not showing palpable capriciousness or mere arbitrary usurpation of power. State v. McKay (Tenn.) 1917E—158. (Annotated.)
- 13. The Tenn. Pure Seed Law is not invalid as arbitrary and unjust, because section 1 thereof requires labels on packages of agricultural seeds to set forth the locality where the seed was grown. State v. McKay (Tenn.) 1917E-158.

(Annotated.)

14. The Tenn. Pure Seed Law (Acts 1909, c. 395) is not unconstitutional class legislation violating the equal protection clause of the Fourteenth Amendment because of exemption from its operation, by subsection 5 of section 8 thereof of the farmer grower, in selling seeds, since such exemption is closely limited to seeds grown by the seller and sold and delivered by him on his own premises to a purchaser for seeding by the purchaser himself, and the differentiation of such sale from open market sales cannot be considered arbitrary, in view of the greater opportunity for deception in selling in open market. State v. McKay (Tenn.) 1917E-158.

(Annotated.)
15. Tenn. Pure Seed Law is not invalid
as an unwarrantable burden on interstate
commerce in violation of United States
Const., its burden on such commerce by
reason of the exemption in section 8, sub-

section 5, of the farmer grower being inconsiderable, remote, incidental, and not designed. State v. McKay (Tenn.) 1917E-158. (Annotated.)

### Note.

Validity of statute regulating sale of seed. 1917E-167.

### AIDER AND ABETTOR

Meaning, see Torts, 10.

### AIDING AND ABETTING.

Of concealment of assets, no offense, see Bankruptcy, 32, 34.

### ALCOHOL.

See Intoxicating Liquors.

### ALIBI.

Sufficiency of proof, see Criminal Law, 74.

### ALIENATION OF AFFECTIONS.

Action for by wife alone, see Husband and Wife, 14, 48-65.

### ALIEN ENEMY.

See War, 7, 10-17.

### ALIENS.

1. Who are Aliens, 27.

2. Privileges and Disabilities, 28.

a. In General, 28.

b. Inheritance of Land, 28.

- c. Employment on Public Work, 28.
- 3. Naturalization, 28.
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- 4. Expatriation of Citizen, 29.
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Right to sue, see Death by Wrongful Act,

Exclusion from hunting rights, see Fish and Game, 3-8.

Importation of contract labor, see Labor Laws, 2.

Nonresident alien as beneficiary under Workmen's Compensation Act, see Master and Servant, 265.

Internment of alien enemies, see War, 7.

### 1. WHO ARE ALIENS.

1. Presumption of Alienage. The facts that a man was an alien, that at the age of twenty he married, and through twelve succeeding years resided in Russia before he came to the United States two years before his death, that his family continued until his death to reside in Russia and receive there their support from him, and were aliens, created a presumption that he

was a citizen of Russia, since the relation is presumed to have continued until a change of citizenship is proved. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.

2. Declaration of Alienage. A person born in England of alien parents cannot on arriving at his majority make a declaration of alienage, where a state of war exists with the nation of his father's birth, and he has during his minority been enrolled in the British army. Rex v. Commanding Officer (Eng.) 1917E-480.

(Annotated.)

### 2. PRIVILEGES AND DISABILITIES.

### a. In General.

- 3. Classes of Aliens Excluded. Where a Chinese person, who lawfully entered the United States as the minor son of a merchant, thereafter became a laborer, such fact will not deprive him of his right to remain in the country. Lam Fung Yen v. Frick (Fed.) 1917C-232. (Annotated.)
- 4. Discriminations in Inheritance Tax. A citizen of a foreign country, residing therein, has, in the absence of express treaty right, no reason to complain that his inheritance is taxed more than that of a fellow alien who resides in the United States, but not in the state where the deceased resided or of the probate of the will. Moody v. Hagen (N. Dak.) 1918A-933.

# b. Inheritance of Land.

- 5. Statutes which change the common law and which allow aliens to take by will or to inherit are not to be looked upon in the light of a recognition or extension of any previously existing right belonging to such aliens, but rather as a fresh grant or a right or a statute of grace which the state chooses to confer. Moody v. Hagen (N. Dak.) 1918A-933.
- 6. Right to Take by Descent. The alien, in the absence of permissive legislation, has never been allowed, as against the sovereign state, to take by descent or even by will. Moody v. Hagen (N. Dak.) 1918A-933.
- 7. Article 6 of the treaty of amity and commerce between the United States and the kingdom of Norway (7 Fed. St. Ann. 828) is only applicable to the estates of decedents who were citizens of Norway leaving property in the United States and citizens of the United States, leaving property in Norway, and those inheriting from them, and is not applicable to the estates of decedents who were citizens of the United States. Moody v. Hagen (N. Dak.) 1918A-933.

# c. Employment on Public Work.

8. The freedom to contract secured by U. S. Const. 14th Amend. (9 Fed. St. Ann. 428) is not infringed by the provisions of N. Y. Consol. Laws, c. 31, § 14, that

only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference. Heim v. McCall (U. S.) 1917B-287.

(Annotated.)

- 9. Statute Prohibiting Employment on Public Works. Privileges and immunities of the citizens of the several states are not abridged, contrary to U. S. Const. art. 4, § 2 (9 Fed. St. Ann. 158), by the provisions of N. Y. Consol. Laws, c. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference. Heim v. McCall (U. S.) 1917B-287. (Annotated.)
- 10. Validity. The discrimination against aliens lawfully resident in the state, which are the state of the state of Arizona Act of December 14, 1914, that every employer of more than five workers at any one time, "regardless of kind or class of work or sex of workers shall employ not less than eighty per cent qualified electors or native-born citizens of the States or some subdivision thereof," renders the statute invalid under U. S. Const. 14th Amend. (9 Fed. St. Ann. 538) as denying the equal protection of the laws, and such statute cannot be justified as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. Truax v. Raich (U. S.) 1917B-283. (Annotated.)

### 3. NATURALIZATION.

# a. Proceedings.

11. Effect of Failure to File Certificate With Petition. Under act of June 29, 1906, c. 3592, § 3, 34 Stat. 596 (Fed. St. Ann. 1909 Supp. p. 365), conferring jurisdiction to naturalize aliens on state courts of record having jurisdiction in actions at law or equity in which the amount in controversy is unlimited, and section 4, requiring the applicant for citizenship to file a petition, and providing that at the time of filing the petition there shall be filed a certificate from the Department of Commerce and Labor stating the date. place, and manner of the petitioner's arrival in the United States, the absence of such a certificate does not deprive a state court of jurisdiction, as the court has jurisdiction to decide not only whether the petition and the petitioner's procedure are sufficient, but also to determine whether the absence of the certificate is fatal to the petitioner's right to be admitted as a citizen. United States v. Ness (Fed.) 1917C-41.

### b. Revocation.

12. Revocation of Naturalization. Under Act of June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Fed. St. Ann. 1909 Supp. p. 373), requiring United States attorneys to institute proceedings to set aside and cancel certificates of citizenship on the ground of fraud or on the ground that the certificate was illegally procured, such a proceeding is a suit in equity to be considered and decided in accordance with the rules and principles applicable to such suits, and the decision of the lower court must be presumed to be correct unless some obvious error of law or some serious mistake of fact clearly appears. United States v. Ness (Fed.) 1917C-41. (Annotated.)

13. An alien who entered the United States from Canada did not know that any formalities were required and saw no person purporting to be an immigration commissioner. When he applied for admission to citizenship, he was unable to procure and file the certificate from the Department of Commerce and Labor as to his arrival in the United States, required by Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Fed. St. Ann. 1909 Supp. p. 366), but he possessed every essential qualification for admission and he proved every fact required to be stated in such certi-ficate. The question as to his right to admission without the certificate was raised and decided by the court in his favor. It is held that the certificate was not illegally procured so as to be subject to cancellation under section 15, even though the court made a mistake in failing to require the certificate as a condition of its decree, as "illegality" signifies that which is contrary to the established principles of the law. United States v. Ness (Fed.) 1917C-41. (Annotated.)

14. Notwithstanding the absence of such certificate, the court's decision admitting him to citizenship is just and right. United States v. Ness (Fed.) 1917C-41.

(Annotated.)

### Note.

Grounds for revocation of naturalization. 1917C-45.

### 4. EXPATRIATION OF CITIZEN.

15. Congress could validly enact the provisions of the Act of March 2, 1907 (34 Stat. at L. 1228, c. 2534, Fed. St. Ann. 1909 Supp. p. 69) under which an American-born woman who marries a foreigner forfeits her citizenship, even though she remains within the jurisdiction of the United States. Mackenzie v. Hare (U. S.) 1916E-645. (Annotated.)

16. Marriage of Woman Citizen to Alien. No exception in favor of an Americanborn woman who marries a resident foreigner and remains within the jurisdiction of the United States may be read into the provisions of the Act of March 2, 1907 (34 Stat. at L. 1228, c. 2534, Fed. St. Ann. 1909 Supp. p. 69) that "any American woman who marries a foreigner shall take the nationality of her husband," but may resume her American citizenship at the termination of the marital relation, if within the United States, by her continuing to reside therein, and, if abroad, by returning to the United States, or by registering as an American citizen. Mackenzie v. Hare (U. S.) 1916E-645.

(Annotated.)

### 5. EXCLUSION OF ALIENS.

17. Immigration Act of Feb. 20, 1907. 1134, § 3, 34 Stat. 899, provided that the importation of any alien female for immoral purposes is forbidden, and whoever shall directly or indirectly import or attempt to import into the United States any alien woman for immoral purposes, or who shall hold or attempt to hold any alien woman for any such purpose, and whoever shall maintain any immoral resort frequented by any alien woman within three years after she shall have entered the United States, shall be deemed guilty of a felony, while the alien woman shall be deported. In 1910 (Act of March 26, 1910, c. 128, § 2, 36 Stat. 264, 3 Fed. St. Ann. [2d ed.] 649) the section was amended, so as to declare that any alien who shall be found an inmate or connected with the management of an immoral resort, or who shall share in, receive, or derive benefit from any of the earnings of any prostitute, shall be deemed to be unlawfully within the United States, and shall be deported. Section 20 (section 4269, 3 Fed. St. Ann. [2d ed.] 673) declares that any alien who shall enter the United States in violation of law and become a public charge, from causes existing prior to land. . ing, shall be deported to the country whence he came at any time within three years after the date of his entry, and that the expense of deporting the alien from the port of deportation shall be borne by the owner or owners of the vessel or transportation line by which the alien came. It is held that, in view of the amendment to section 3, the three-year period fixed by section 20 must be disregarded, and a steamship company which brought an alien to the country is liable after the expiration of the three-year period for the expense of his deportation, where he was guilty of sharing the earnings of a pros-titute. Oceanic Steam Navigation Co. v. United States (Fed.) 1917C-248. (Annotated.)

18. Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (3 Fed. St. Ann. [2d ed.] 640) excludes persons likely to become a public charge; section 20 (3 Fed. St. Ann. [2d ed.] 673) makes it the duty of the Secretary of Labor to cause to be

deported at any time within three years after entry any alien who shall enter in violation of law, and as such become a public charge from causes existing prior to landing; while section 21 (3 Fed. St. Ann. [2d ed.] 681) makes it the duty of the secretary, when satisfied that an alien has been found in the United States in violation of law, to deport him. It is held that the act is not limited to persons who shall from existing causes become a public charge within three years after entry, but warrants the deportation of one who is likely thereafter to become a public charge. Lam Fung Yen v. Frick (Fed.) 19170-232. (Annotated.)

- 19. That petitioner, when he entered, was the son of a Chinese merchant, and as such liable to be supported by his father during minority, does not except him from the immigration act, excluding persons likely to become a public charge, where it is clear that at the end of his minority he is likely to become such a charge. Lam Fung Yen v. Frick (Fed.) 1917C-232. (Annotated.)
- 20. "The immigration act, excluding persons likely to become a public charge," is not limited to papers or those liable to become such, but includes those who will not undertake honest pursuits, or who are likely to become periodically the inmates of prisons, and so includes one who intends to make his living by gambling, instead of honest labor. Lam Fung Yen v. Frick (Fed.) 1917C-232. (Annotated.)
- 21. The immigration act applies to aliens born in China, and the minor son of a Chinese merchant cannot lawfully enter the United States, if at that time he be a person likely to become a public charge. Lam Fung Yen v. Frick (Fed.) 1917C-232. (Annotated.)
- 22. Where supported by competent evidence, a finding by the immigration authorities with regard to an alien is conclusive on the courts. Lam Fung Yen v. Frick (Fed.) 1917C-232. (Annotated.)
- 23. On application by a Chinese person for writ of habeas corpus against the immigration inspector, the evidence is held to warrant a finding by the inspector that such Chinese person was addicted to gambling when he left China, and that he entered the United States intending to make his living by gambling, and not by profitable industry. Lam Fung Yen v. Frick (Fed.) 1917C-227.

### Notes.

Immigrant prostitution or immorality, 1917C-250.

Classes of aliens excluded by immigration act. 1917C-235.

# ALIMONY AND SUIT MONEY.

- 1. Permanent Alimony.
  - a. Nature of Allowance.
  - b. Amount of Allowance.
  - c. Modification of Decree.

See Divorce; Husband and Wife.

### 1. PERMANENT ALIMONY.

### a. Nature of Allowance.

- 1. Amount of Allowance. Where a wife was granted a divorce and custody of minor children of the marriage, an award of \$80 a month for the support of such children, four in number, while large, cannot be held excessive; the defendant husband having in the past paid the house rent and allowed the wife \$30 a week for expenses. Heicke v. Heicke (Wis.) 1918B-497.
- 2. While the amount awarded a wife on divorce should not exceed from one-third to one-half of the husband's property, it is not improper, where the husband is practically the owner of an apothecary shop, to award the wife an insurance policy on which the husband had paid fourteen premiums averaging \$100, and to require him to continue payment of the premiums, and also to pay the wife three separate sums of money amounting to \$1,200; the stock of drugs and some other property being awarded the husband. Heicke v. Heicke (Wis.) 1918B-497.
- 3. Allowance of Gross Sum. Under Shannon's Tenn. Code, \$4222, providing that the court may decree to the wife such part of the husband's real and personal estate as it may think proper, where an absolute divorce was awarded a wife for abandonment against her husband, worth some \$170,000, the husband having been the more to blame in their difficulties, an award to the wife of \$200 a month alimony cannot stand, and she will be decreed \$50,000 in solido. Winslow v. Winslow (Tenn.) 1917A-245. (Annotated.)

# Notes.

Life of decree for permanent alimony. 1917A-582.

Allowance of alimony in gross sum. 1917A-248.

# b. Amount of Allowance.

- 4. The evidence is held to sustain chancellor's allowance to wife of large amount of property, of value but little in excess of what she had invested personally, in view of respective physical condition of the parties. Klekamp v. Klekamp (Ill.) 1918A-663.
  - c. Modification of Decree.
- 5. A decree for future alimony payable in instalments, and which the court may

subsequently annul, vary, or modify upon due notice to all parties interested, confers a vested right in the beneficiary to all instalments that have become due, which cannot be annulled, varied, or modified, as to them. Bolton v. Bolton (N. J.) 1916E-938. (Annotated.)

6. The statute of the state of New York authorizing the court to make directions concerning the allowance of alimony, with power at any time after final judgment to annul, vary, or modify such judgments, confers no retroactive power to alter the judgment as to past-due instalments, and the annulment, variation, or modification can only affect instalments which have not fallen due, and such decree as to past-due instalments is a final decree, entitled to the benefit of the full faith and credit clause of the Federal Constitution. Bolton v. Bolton (N. J.) 1916E-938.

(Annotated.)

7. Life of Decree. Where the marriage status is dissolved by a divorce and the judgment provides for annual alimony, the right to collect alimony due and unpaid at the time of the wife's death may be enforced by her personal representatives; alimony not being a personal claim like a cause of action for slander. Van Ness v. Ransom (N. Y.) 1917A-580.

(Annotated.)

8. Power to Modify Decree. The decree made by a court of a sister state, adjudging alimony to a wife payable in future instalments, is a final judgment entitled to the protection of the full faith and credit clause of the Federal Constitution as to all past-due instalments, unless the right to the alimony is so within the discretion of the court rendering the decree that it does not vest in the beneficiary, even in the absence of the exercise of any discretionary power which the court may have to annul, vary, or modify the decree. Bolton v. Bolton (N. J.) 1916E-938.

(Annotated.)

# ALL CONTRACTS.

Meaning, see Life Insurance, 30.

ALL DAMAGES AND COSTS.
Meaning, see Bankruptcy, 29.

ALL MUNICIPAL POWER.

Meaning, see Intoxicating Liquors, 3.

ALL THE REST, RESIDUE AND REMAINDER.

Meaning, see Wills, 202.

# ALTERATION OF INSTRUMENTS.

- 1. What Constitutes, 31,
- 2. Materiality, 31.
- 3. Effect, 32.
- 4. Estoppel, 32.
- 5. Ratification, 32.
- 6. Evidence, 33.
- 7. Pleading, 33.

Evidence of alteration, sufficiency, see Bills and Notes, 73.

# 1. WHAT CONSTITUTES,

- 1. Distinction Between "Alteration" and "Spoliation." An "alteration" occurs when a written contract is intentionally changed in a material respect after execution by or at the instance of one of the parties and without the consent of the other, while a "spoliation" is the unauthorized change of a written contract by a stranger. Smith v. Barnes (Mont.) 1917D-330.
- 2. Filling Blanks. Where the makers of a note, other than the person for whose accommodation it was made, give it to him to negotiate, with place for the payee's name blank; and the date "July ——," they give him implied authority, not merely to fill in the name of whoever may become the payee, but the date of the actual delivery to the payee, so long as it is done in a reasonable time, so that filling in such date, at his direction, is not an alteration. Holman v. Higgins (Tenn.) 1917E-515. (Annotated.)
- 3. Detaching Instrument from Note. Where a conditional sales contract for a set of scales has as a part thereof an instalment note, the detaching of the note, thereby making it a negotiable note, is a material alteration of the contract avoiding the entire contract. Toledo Scale Co. v. Gogo (Mich.) 1917E-601.

(Annotated.)

# Note.

Effect of detaching from promissory note contract or memorandum attached thereto. 1917E-603.

# 2. MATERIALITY.

4. Substitution of "Bearer" for "Order" in Note. Under Iowa Code Supp. 1907, § 3060a125, providing that an alteration which changes the effect of the instrument in any respect is a "material alteration," a change in a note payable to order, made by striking out the words "order of," and inserting after the name of the payee the words "or bearer," is a material alteration which avoids the instrument, if made after delivery, or, if made by the maker or the payee before delivery, discharges a surety. Builders' Lime, etc. Co. v. Weimer (Iowa) 1917C-1174. (Annotated.)

5. Materiality of Alteration. The alteration of a note by adding the signature, as maker, of the firm of which the original maker was a member defeats recovery on the note by the payee. Palmer v. Blanchard (Me.) 1917A-809.

### Note.

Addition of words "or bearer" or words "or order" or substitution of one expression for other as material alteration of instrument. 1917C-1177.

### 3. EFFECT.

- 6. Liability to Payee. The joint maker in such a case is not liable to the payee on the altered note since he has never agreed to the terms of the instrument which the payee took. Builders' Lime, etc. Co. v. Weimer (Iowa) 1917C-1174.
- 7. Liability of Maker to Innocent Purchaser. A joint maker of a note, who indorsed it with a comaker, by whom it was materially altered before delivery, is liable thereon after it passes into the hands of a holder in due course, on the theory that, where one of two innocent parties must suffer by the acts of a third, he whose acts enabled the third party to cause the loss must bear it. Builders' Lime, etc. Co. v. Weimer (Iowa) 1917C-1174.
- 8. Effect of Alteration. In an action for breach of contract, plaintiff has the burden of establishing the contract substantially as alleged; and where the declaration was upon a contract without regard to alterations, and a vitiating alteration is alleged and proved by defendant, the action fails. Smith v. Barnes (Mont.) 1917D-330.
- 9. Right of Party Affected to Enforce Under Mont. Rev. Original Contract. Codes, § 5069, declaring that the material alteration of a written contract by a party entitled to any benefit thereunder extinguishes all executory obligations of the contract in his favor against parties who do not consent, the party procuring an alteration of a written contract cannot maintain any action upon the contract in either its original or altered form, but the nonconsenting party loses no right, and is not required to rescind or repudiate the contract as it was actually made, and may hold the other party to the terms of the original contract; and the effect of a spoliation is that the contract stands as originally made, without regard to the change. Smith v. Barnes (Mont.) 1917D-330.

### 4. ESTOPPEL.

10. Plaintiff, in May, 1902, quitclaimed to defendant's assignor all plaintiff's interest in a right of way for the C. ditch, with all rights to the appropriation of water and any and all interests therein. Thereafter plaintiff executed a written contract by which it assigned unto the D.

Ditch Company the entire one-third interest in and to all the rights, privileges and franchises pertaining to and secured for the appropriation of water from Sand and Deadman creeks in Larimer county (and also all of the rights, privileges, and franchises pertaining to and secured by the appropriation of water from the C. creek in such county). By the same contract the ditch company agreed to deliver to plaintiff sufficient water to irrigate his lands and to pay plaintiff for one-third of the water carried by the C. and the D. ditches, except that furnished plaintiff. Before delivery of the contract, the portion in parentheses was erased by the president of the ditch company for the reason that it "was never in the agreement." Plaintiff recorded the contract and the letter accompanying it, and for four years thereafter made no claim to any interest in the water flowing in the C. Ditch, during which time the ditch company's project was continued to completion. It is held that plaintiff was thereafter estopped to object to the alteration of the contract. Divide Canal, etc. Co. v. Tenney (Colo.) 1917D-346. (Annotated.)

- 11. Where a written contract has been altered, the nonconsenting party, entitled to stand upon the contract as made and not required to avoid it, may retain the first payment, permit the other party to perform the contract, and forfeit the payment if the other party fails to perform, and cannot be estopped by any action or inaction amounting to only less than an acceptance of the change. Smith v. Barnes (Mont.) 1917D-330.
- (Annotated.)

  12. Presumption from Apparent Alteration. The fact that one of the figures in the date of a note showed that it was written over an erasure does not create a presumption that the change was made after the execution, so as to be a material alteration which avoids the note. Palmer v. Blanchard (Me.) 1917A-809.

# 5. RATIFICATION.

- 13. A material alteration in a written instrument may be expressly or impliedly ratified after it has been executed and delivered, and, if so ratified, will bind the parties. Divide Canal, etc. Co. v. Tenney (Colo.) 1917D-346. (Annotated.)
- 14. Waiver or Ratification of Alteration. Ratification and waiver of alteration of contract are in the nature of estoppel, and, to be available, must be pleaded when an opportunity to make such plea is presented. Smith v. Barnes (Mont.) 1917D—330.

  (Annotated.)

### Note.

Ratification or waiver of alteration of instrument. 1917D-335.

### 6. EVIDENCE.

- 15. Evidence of Alteration Sufficient. Evidence, in an action for breach of a contract for the sale and purchase of stock with provision that upon payment of the respective instalments of money a proportionate amount of the stock should be delivered to the purchaser, is held to sustain a finding that the parties did not so contract, but that their contract was changed to the terms pleaded, after execution, and without defendant's knowledge or consent. Smith v. Barnes (Mont.) 1917D-330.
- 16. Evidence of Alteration. In an action at law for breach of a contract for the sale and purchase of the stock of a milling company, wherein defendant alleges that plaintiff materially altered the contract after its execution, evidence of the change of the contract after its execution is admissible. Smith v. Barnes (Mont.) 1917D-330.

# 7. PLEADING.

17. Effect of Spoliation. In the case of a spoliation of a contract, the plaintiff must declare upon the contract as originally made, and it is fatal if the contract pleaded is not, by reason of spoliation, the agreement of the parties. Smith v. Barnes (Mont.) 1917D-330.

# AMBASSADORS AND CONSULS.

Right of consul to letters, see Executors and Administrators, 3, 4.

- 1. Power of Consular Officers. International law regards consuls and consular officials as mercantile agents of the government appointing them, authorized to protect the commercial interests of its citizens or subjects in the country to which they are accredited, and clothed only with authority for commercial purposes. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 2. To conserve and guard the property within their territorial jurisdiction of their countrymen dying therein, is an important right and duty of consuls and consular officials. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 3. Source of Rights. The rights of consuls and consular officials rest on international law as well as on treaty stipulations. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 4. Power as to Decedent's Estate. The 1909 treaty between the United States and Russia contained the most favored nation clause. The then existing treaty with Spain provided that consular officials should have the right of representing the absent, unknown, or minor heirs, "next of kin," or legal representatives of citizens or

subjects of their country who should die within their consular jurisdiction, and of appearing in their behalf in all proceedings relating to the settlement of their estates, and to perform all the duties prescribed by the laws of their country for the safeguarding of their property and the settlement of the estate of their deceased countrymen. It is held that the consular officials of Russia were authorized thereby to act for the heirs, next of kin, or legal representatives of their countrymen, of the description set forth, in participating in their behalf in legal or other proceedings for the proper administration, conserving and guarding of the estates of such countrymen. Hamilton v. Erie R. Co. (N. Y.) 1918A-928. (Annotated.)

5. Release of Claim for Death. The general law of nations does not sustain as valid the settlement by a consul general with a railroad for its negligent killing within his consular jurisdiction of a countryman of the consul. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.

(Annotated.)

- 6. Release of Claim for Damages for Death. Under the 1909 treaty between the United States and Russia, containing the most favored nation clause, the powers of the Russian consul and vice consul in the matter of settling with and releasing a railroad for damages arising from the death of a Russian subject killed by it, are equal to those given to consular representatives of any other nation by treaty. Hamilton v. Erie R. Co. (N. Y.) 1918A-928. (Annotated.)
- 7. Under these treaties, a Russian consul does not have the right without judicial proceedings to settle with and release a railroad company from a cause of action for death by negligence within his consular jurisdiction of a Russian whose wife and children resided in Russia, notwithstanding the fact that the treaties give him right to represent the "next of kin" and that N. Y. Code Civ. Proc., §§ 1902-1905, giving such right of action, declares that the damages recovered are exclusively for the benefit of decedent's husband or wife and "next of kin," since the denomination "next of kin" in the statute is merely a convenient means of designating comprehensively and definitely, the distributees of the damages recovered, which they take, not through the laws of intestacy or as a part of the estate of the intestate, but through their original right thereto created by the statute. It v. Erie R. Co. (N. Y.) 1918A-928.

### (Annotated.)

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Liability of prospector for cattle falling into open shaft, see Mines and Minerals, 10.

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### 1. DOMESTIC ANIMALS.

1. Legal Status of Cat. A cat is a "domestic animal" within Me. Pub. Laws 1909, c. 222, § 17, providing that any person may lawfully kill a dog found worrying, wounding, or killing any domestic animal when the dog is outside of the inclosure or immediate care of its owner or

keeper, as there is nothing to indicate that the term "domestic" is used in other than its ordinary and popular meaning, and the term in its popular meaning is a broad one, meaning inhabiting, belonging or relating to the house or household or household affairs, domesticated, tame as distinguished from wild, living in or near the habitations of man or by habit or special training in association with man. Thurston v. Carter (Me.) 1917A-389.

2. While cats are not enumerated by name as subjects of taxation in the statutes, the general language of the statutes is sufficient to include them, even though the owner has but a qualified property. Thurston v. Carter (Me.) 1917A-389.

(Annotated.)

(Annotated.)

### Note.

Legal status of the cat. 1917A-391.

# 2. TRESPASS BY ANIMALS.

3. Liability of Owner of Uninclosed Land. An owner of uninclosed land is not liable for the death of trespassing cattle which strayed on his property and fell into an open ditch, for, while the owner of the cattle is not liable for their trespass because the land was uninclosed, that does not make the entry of the cattle rightful, nor cast on the landowner the duty of exercising care for their safety. Gillespie v. Wheatland Industrial Co. (Wyo.) 1917A-(Annotated.)

### Note.

Liability as for negligence of owner of uninclosed land for injury to domestic animal straying thereon. 1917A-288.

# 3. INJURY BY ANIMALS.

- Vicious or Mischievous Animals.
- 4. Liability for Injury to Property. If statutes protecting beaver and prohibiting the destruction of their dams and houses had been unconstitutional, the state would not have been liable to persons whose timber was injured by beaver, since, the statute being void, no one need obey it. Barrett v. State (N. Y.) 1917D-807.

(Annotated.)

### b. Evidence.

5. The habits, characteristics, and disposition of the horse are matters of such common knowledge that it does not require expert testimony to determine whether a horse was safe for certain work. Marks v. Columbia County Lumber Co. 1917A-306.

6. Opinion Evidence as to Viciousness of Animal. In an action by a servant for injuries from the alleged viciousness of a horse given him to drive, opinion evidence that the horse was not a safe one for the

work is wrongfully admitted; that being a question for the jury. Marks v. Columbia County Lumber Co. (Ore.) 1917A-306.

7. Proof of Viciousness - Subsequent Acts. In an action by a servant for injuries alleged to result from the viciousness of a horse given him to drive, evidence of conduct of the horse subsequent to the accident is admissible to show its disposition: (Marks v. Columbia County Lumber Co. (Ore.) 1917A-306.

(Annotated.)

### Note.

Liability of owner for injuries caused by runaway horse. 1916E-1114.

# 4. HERD LAW.

- 8. Validity. The Legislature, under the police power, may provide reasonable regulations for the use and enjoyment of property, where the same are necessary for the common good and the protection of others. Held, that a statute which prevents the holding under herd, or in any inclosure, unaccompanied by their mothers, of any calves of neat cattle under seven months of age is not violative of any constitutional provision, and is sustainable under the police power, where such regulation appears reasonably necessary to prevent the larceny of young animals. State v. Brooken (N. Mex.) 1916D-136.
- 9. Indictment for Violation. An indictment, charging a violation of section 1, c. 23, S. L. N. Mex. 1901, which, after alleging that defendant held, under herd in a certain pasture, calves unaccompanied by their mothers, proceeds: "The said calves being then and there under the age of seven months," is not subject to attack, on the ground that the calves are not directly and positively alleged to be under seven months of age. State v. Brooken (N. Mex.) 1916D-136.

# 5. LICENSES.

10. Power of Municipality. Municipal Code of City and County of Denver, c. 16, art. 2, \$ 747 et seq., prescribing license fees for the keeping of dogs and penalties for failure to pay, are constitutional, since the regulation of the keeping of dogs is within the police power of the state, and may be delegated to cities and towns. McPhail v. Denver (Colo.) 1916E-1143.

# WILD ANIMALS.

11. If the act of reducing to possession wild animals, such as bees, is done by a trespasser, he gets no title, which vests in the owner of the soil, and the wrongdoer is liable to the owner for the trespass and for conversion. Brown v. Eckes (N. Y.) 1917B-981. (Annotated.)

- 12. Where a swarm of bees leaves the owner's premises, his title to them is not destroyed by their alighting on another's land. Brown v. Eckes (N. Y.) 1917B-981. (Annotated.)
- 13. Bees. Bees are "ferae naturae." Brown v. Eckes (N. Y.) 1917B-981.

(Annotated.)

- 14. Liability of State for Injury to Property. The state has a general right to protect wild animals, their preservation being a matter of public interest, and no one can complain of the incidental injuries that may result from such protection. Barrett v. State (N. Y.) 1917D-807.
  - (Annotated.)
- 15. Protection of Wild Animals. Laws N. Y. 1900, c. 20, prohibiting the killing of beaver, and Laws 1904, c. 674, § 1, providing that no person shall molest or disturb any wild beaver, nor the dams, houses, homes, or abiding places of the same are not unconstitutional; the prohibition of the destruction of dams and houses being an apt means to the desired end of protecting the beaver. (N. Y.) 1917D-807. Barrett v. State
- 16. Validity of Act Protecting Beaver. The state may provide for the increase of beaver by removing colonies to a more favorable locality, or by replacing those destroyed by fresh importations, as well as by prohibiting the destruction of animals already in the state. Barrett v. State (N. Y.) 1917D-807.
- 17. Liability of Keeper of Wild Animals. One who keeps wild animals in captivity must see to it at his peril that they do no damage to others. Barrett v. State (N. Y.) 1917D-807. (Annotated.)
- 18. The state is not liable for damage to timber of private individuals committed by beavers purchased and freed in the Adirondacks by the forest, fish, and game commission under Laws N. Y. 1904, c. 674. Barrett v. State (N. Y.) 1917D-807.

(Annotated.)

19. The qualified property of an owner of a swarm of bees, which flies from the hive, continues so long as he in person or by agent can keep them in sight and possesses the power to pursue them. Brown v. Eckes (N. Y.) 1917B-981.

(Annotated.)

20. Where plaintiff in an action to establish his property rights in certain swans, wood ducks, pheasants, etc., which he had cared for as domestic fowl, or kept in inclosed runways in his poultry yard, as against interference by the game warden and the prosecuting attorney, a decree giving him the ownership and right to dispose of them in such manner as he saw fit was too broad, since thereunder he would have the right to kill and sell them during the

closed season, and so interfere with the enforcement of the game laws of the state, and since the state, for the protection of game birds, has the right to prohibit the killing and disposing of reclaimed game during the closed season. Graves v. Dunlap (Wash.) 1917B-944. (Annotated.)

- 21. Plaintiff, having a property right in the deer which he kept in an inclosure, if necessary in the care and management of the herd, might kill one of them without offending the law. Graves v. Dunlap (Wash.) 1917B-944. (Annotated.)
- 22. Right to Kill. One charged with killing deer in violation of Iowa Code Supp. 1913, §§ 2551a, 2551b, making it unlawful for any person other than the owner or person authorized by the owner to kill any deer, except when distrained as provided by law, may show in justification that the deer, when killed, was on his premises, destroying his property. State v. Ward (Iowa) 1917B-978. (Annotated.)
- 23. Right of Property. Wash. Game Code (Laws 1913, c. 120), § 21, providing that no person shall acquire any property in, or subject to his control, any of the game birds or animals mentioned in the act, but that they shall always remain the property of the state, and section 33, providing that no person shall have in possession or under control at any time any deer, fawn, etc., if retroactive in operation as against one who had reclaimed certain deer kept on an inclosed area on his farm, and certain swans cared for as domestic fowls. and wood ducks, pheasants, etc., kept in inclosed runways in his poultry yard, violated Const. Wash. art. 1, § 3, and Const. U. S. Amend. 14 (9 Fed. St. Ann. 416), since he had such a property right in them that it could not be taken away without due process of law. Graves v. Dunlap (Wash.) 1917B-944. (Annotated.)
- 24. Animals ferae naturae, if reclaimed and kept in inclosed grounds, are property, which will pass to the executors and administrators of the one who reclaimed them. Graves v. Dunlap (Wash.) 1917B-944. (Annotated.)
- 25. Right of Property. While animals ferae naturae belong to the state, yet, when they are reclaimed by the art and power of man, they are the subject of a qualified right of property, defeasible if they return to their wild state. Graves v. Dunlap (Wash.) 1917B-944.

(Annotated.)

26. "Game." Animals ferae naturae, such as deer, ducks, pheasants, and swans, are denominated "game." Graves v. Dunlap (Wash.) 1917B-944.

### Notes.

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# 1. RIGHT OF APPEAL.

### a. In General.

1. Right Purely Statutory. The right of appeal in all cases is a right created by statute, and, in the absence of a statute conferring the right, an appeal will not lie. Commonwealth v. American Express Co. (Ky.) 1916E-875.

- 2. Persons Entitled to Appeal. An appeal by third persons from a judgment annulling an election on the prohibition question will be dismissed where appellants do not allege and prove a direct pecuniary interest in the suit. A future, contingent, and speculative interest confers no right of action or of appeal. Alexandria v. Police Jury (La.) 1918A-362.

  (Annotated.)
- 3. Interest in Abstract Question. A city which was made a defendant in mortgage foreclosure proceedings, and whose lien for special assessments on the land was held superior to that of the mortgage, cannot, because of its interest in the abstract question of law, appeal from that part of the decree holding that the lien of another special assessment which the city had sold to another defendant, was inferior to the mortgage. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

# Note.

Right of citizens or taxpayers to appeal as such from judgment in proceeding to which they are not parties. 1918A-365.

# b. In Actions for Penalty.

4. Ky. St. § 2569b, subsec. 2, makes the transportation of intoxicating liquors into prohibition territory a misdemeanor, punishable by fine and imprisonment. Cr. Code Prac. § 347, gives the court of appeals jurisdiction of appeals in penal actions, and in prosecutions for misdemeanors, if the judgment be or might have been for a fine exceeding \$50. Section 352 declares that a judgment on a verdict of acquittal of an offense punishable by imprisonment shall not be reversed, but that an appeal may be taken by the commonwealth as provided in section 337, when important to the correct and uniform administration of the criminal law. Section 337 prescribes the commonwealth's appeal in felony cases before a final judgment that the law may be determined by the court of appeals before a final trial. Section 355 declares that, if the prosecution be by penal action, the appeal shall be similar in all respects to appeals in civil actions. Section 11 provides that proceedings in penal actions shall be regulated by the code of practice in civil ac-Held that, as an appeal does not lie in a civil action except from a final judgment or order therein which either terminates the action itself or operates to divest a right so that the court after term has no power to put the parties in their original condition, the commonwealth's penal action against an express company for violation of the liquor statute to recover fines of \$200, in which there was a verdict of guilty in the amount of \$100. and in which the judgment was set aside and a new trial granted, was never terminated, so that both the commonwealth's appeal and the company's cross-appeal would be dismissed. Commonwealth v. American Express Co. (Ky.) 1916E-875. (Annotated.)

# c. Waiver of Right.

- 5. Plaintiff, by replying to a new plea supported by affidavit and certificate under the Baltimore City Practice Act, and by proceeding to trial, waives her right of appeal from the action of the court in permitting the withdrawal of the former pleas. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.
- 6. Effect of Paying Fine. The defendant, a foreign corporation, indicted for a violation of the statute prohibiting an unlawful combination in restraint of trade, sought an opportunity to change its plea of not guilty to guilty and receive sentence. The sentence immediately imposed was a fine, which was at once paid. Six months thereafter, lacking a few days, this appeal was taken. Upon the state's motion to dismiss the appeal it is made to appear that appellant paid the fine voluntarily with the intention to abide by and comply with the sentence of the court, and hence the appeal should be dismissed. State v. People's Ice Co. (Minn.) 1916C-618. (Annotated.)

#### Note.

Payment of fine in criminal case as waiver of right to appeal. 1916C-619.

## d. Right to Second Appeal.

7. Failure to Perfect Appeal. Under Rem. & Bal. Wash. Code, § 1735, providing that no withdrawal of an appeal and no dismissal not on the merits shall preclude any party from taking another appeal within the time limited, the failure of an appellant to perfect an appeal by giving bond within the time limited after the filing of his notice does not prevent him from thereafter serving a new notice and perfecting his appeal thereunder. Carstens & Earles v. Seattle (Wash.) 1917A—1070.

# 2. JURISDICTION AND POWERS OF APPELLATE COURT.

### a. In General.

- 8. New Trial, Motion in Appellate Court. A petition in a criminal case to rehear or grant a new trial for newly discovered evidence cannot be entertained in the Supreme Court. State v. Salisbury Ice, etc. Co. (N. Car.) 1916C-728.
- 9. Jurisdiction—Matters Precluding Jurisdiction not Actually Involved. In a suit against a city for salary due a marshal, where none of the objections to Laws Mo. 1913, p. 517, under which the

city claimed to have removed him, involved a disincorporation of defendant municipality or its right to exist as a city of the third class, the supreme court was not precluded from considering such objections by the rule that the corporate existence of a municipal corporation can only be attacked by the state, through its proper officers. Barnes v. Kirksville (Mo.) 19170-1121.

10. Jurisdiction of Supreme Court—Revenue Act. Since an action by a township against a city for road and bridge funds levied and collected in the township and wrongfully paid over by the township officers to the city treasurer is an action involving a construction of the revenue laws, the Supreme court has jurisdiction thereof on appeal. Lamar Township v. Lamar (Mo.) 1916D-740.

# b. Amount in Controversy.

- 11. Under Burns Ind. 1914, §§ 1389, 1391, providing that no appeal shall be taken to the Supreme Court where the amount in controversy does not exceed \$50, unless a constitutional question is involved, in which case an appeal may be taken to the supreme court "for the purpose of presenting such question only," the supreme court, on appeal from a judgment for \$25, can only determine the constitutional question raised, and cannot consider whether a proper judgment has been rendered on determining that the statute involved is constitutional. Chicago, etc. R. Co. v. Anderson (Ind.) 1917A-182.
- 12. Effect of Counterclaim. Under Iowa Code, § 4547, declaring that no appeal to the district court from the final judgment of a justice shall be allowed when the amount in controversy does not exceed \$25, a suit in which the petition claimed \$20, which was denied by answer counterclaiming for \$6.50, which was denied by plaintiff, does not involve more than \$25, so that the justice's judgment for \$20 against defendant is not appealable to the district court. Morrow v. Bell (Iowa) 1917D-98. (Annotated.)
- 13. Proceeding for Violation of Ordinance. Cal. Const. art. 6, § 4, provides that the supreme court shall have jurisdiction on appeal from the superior courts in all criminal cases, where judgment of death has been rendered, and that the district courts of appeal shall have jurisdiction in criminal cases prosecuted by in-dictment and information in a court of record, except in criminal cases, where judgment of death has been rendered. Held, that where defendant electric company was prosecuted for violating a city ordinance requiring the sprinking of tracks, and was fined \$400, an appeal lay to the district court of appeal and not to the supreme court. People v. Pacific Gas, etc. Co. (Cal.) 1917A-328.

### c. Federal Courts.

14. Mode of Review—Divorce Decree in Philippine Islands. Appeal, not writ of error, is the proper mode of reviewing in the Federal Supreme Court a decree of the supreme court of the Philippine Islands in a suit by a wife for divorce, alimony pendente lite, and a division of the conjugal property. De La Rama v. De La Rama (U. S.) 19176—411.

# d. Intermediate Appellate Courts.

15. As under N. Y. Code Civ. Proc. \$1346, as amended by Laws 1914, c. 351, providing that an appeal may be taken to the Appellate Division on question of law or on the facts or on both, from a judgment on a verdict, as from a judgment on a trial by referee or court without a jury, the appeal brings up the facts, as well as the exceptions, in all cases, a reversal by the Appellate Division, silent as to its grounds, will in a jury case, as in others, import that the findings of fact, by whomsoever made, were approved by the Appellate Division, so that its reversal will be reviewable by the Court of Appeals on that assumption. Middleton v. Whitridge (N. Y.) 1916C-856.

16. Power of Appellate Court to Make New Findings. The power of the Appellate Division, under N. Y. Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, to make new findings of fact and a final adjudication on the merits in a case triable of right by a jury, is limited by Const. art. 1, § 2, providing, "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law," so that in such a case the ultimate decision of all disputed questions of fact must be by a jury, in the absence of consent to a decision of them by the court. Middleton v. Whitridge, (N. Y.) 1916C-856.

17. A judgment of reversal by the Appellate Division in a jury case, granting a final judgment dismissing the complaint rendered before amendment of N. Y. Code Civ. Proc. § 1346, by Laws 1914, c. 351, is reviewable at least to the extent of determining whether it had power to dismiss the complaint. Middleton v. Whitridge (N. Y.) 1916C-856.

18. A judgment of reversal in a jury case by the Appellate Division, granting a new trial, rendered before amendment of N. Y. Code Civ. Proc. § 1346, by Laws 1914, c. 351, would not be reviewable, unless it affirmatively appeared that the findings of the jury had been affirmed. Middleton v. Whitridge (N. Y.) 1916C-856.

19. That a judgment of the Appellate Division is entered on its unanimous de-

cision that there is evidence supporting or tending to sustan a finding of fact or a verdict not directed by the court does not, under Const. art. 6, § 9, and N. Y. Code Civ. Proc. § 191, subd. 4, deprive the Court of Appeals of jurisdiction to review it, but that specific question of law alone is not reviewable. Middleton v. Whitridge (N. Y.) 1916C-856.

- 20. An original finding or decision by the Appellate Division, under the authority of Code N. Y. Civ. Proc. § 1317, as amended by Laws 1912, c. 380, is not a decision that there is evidence to sustain a finding of the trial court or a verdict, which, being unanimous, is, under Const. art. 6, § 9 and Code Civ. Proc. § 191, subd. 4, not reviewable by the Court of Appeals. Middleton v. Whitridge (N. Y.) 1916C-856
- 21. The decision of the Appellate Division that there was no evidence to sustain the verdict is not one that there was "evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court," which, if unanimous, is under Const. art. 6, \$ 9, and N. Y. Code Civ. Proc. \$ 191, subd. 4, not reviewable by the Court of Appeals. Middleton v. Whitridge (N. Y.) 1916C-856.
- 22. The judgment of the Appellate Division, though unanimous, being one of reversal, appeal lies to the Court of Appeals without allowance of it, pursuant to N. Y. Code Civ. Proc. § 191, subd. 2. Middleton v. Whitridge (N. Y.) 1916C-856.
- 23. Action Involving Freehold. Where a vendee assigned his contract as security for payments to be made thereon by the assignee, who thereafter completed the payments and took a deed from the vendor, a suit by the vendee to enforce specific performance against the assignee's heirs does not involve a freehold; and hence an appeal in such suit should be taken to the appellate court. Henry v. Britt (III.) 1917C-977.
- 24. Orders Appealable. An order of the Appellate Division which annuls an order of the Public Service Commission without granting a rehearing is appealable to the Court of Appeals. People v. McCall (N. Y.) 1916E-1042.

# e. Constitutional Questions.

25. Constitutional Question Unnecessarily Raised. The Supreme Court on appeal has jurisdiction and will determine the constitutionality of a law, although the cause can be decided upon other grounds, where the constitutional question is made in good faith and relied on in the case, since by Tenn. Acts of 1907, c. 82, establishing and defining the powers of the Court of Civil Appeals, jurisdiction of that court is defeated by the presence of a constitutional question. Memphis St.

R. Co. v. Rapid Transit Co. (Tenn.) 1917C-1045.

# 3. APPEALABLE JUDGMENTS AND ORDERS.

### a. In General.

- 26. Overruling of Demurrer. An order overruling a demurrer to the complaint on the ground that it failed to state a cause of action is appealable. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.
- 27. Nonsuit. The rulings and orders on motions for nonsuit and for the direction of a verdict are not ordinarily appealable until after final judgment. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.
- 28. On appeal from the overruling of motions for a nonsuit and for the direction of a verdict, not ordinarily appealable until after final judgment, and from an appealable order overruling a demurrer, the matters involved will be determined, in view of the fact that the reason of the rule against appeals from orders before final judgment is to prevent unnecessary delay in the trial of causes. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.
- 29. Prosecution for Nuisance. A proceeding by indictment for maintaining a nuisance under the Canadian statute (R. S. c. 146, §§ 222, 223) providing that a person convicted thereunder, though liable to fine or imprisonment, "shall not be deemed to have committed a criminal offense," is a civil and not a criminal case. Accordingly the Privy Council may enterain an appeal in such a proceeding without determining whether the Canadian statutes (R. S. c. 146, § 1025) prohibiting appeals from the judgment of the Dominion courts in criminal cases is an infringement on the royal prerogative to hear appeals in council. Toronto R. Co. v. Rex (Eng.) 1918A-991.
- 30. Correction of Record. The action of the lower court, on an application for correction of the record and in reference to the changes requested, is final and not reviewable on appeal. Dutton v. State (Md.) 1916C-89.
- 31. Order Revoking License. The power of the district court under Laws Utah 1911, c. 106, § 10, to revoke liquor licenses in cities of the first and second classes, as is its power under section 3, to order their issuance therein, is administrative, so that, in the absence of provision in the statute therefor, appeal does not lie from its order, ruling, or judgment revoking a license. In re Grant (Utah) 1917A-1019.

(Annotated.)

# Note.

Right to and effect of judicial review of revocation of liquor license. 1917A-1024.

# b. In Administration or Probate Proceedings.

32. Revocation of Letters. Where the public administrator has no superior right to appointment as administrator with the will annexed, no appeal will be allowed from the discretionary order revoking his letters. Brinckwirth v. Troll (Mo.) 1918B-1056. (Annotated.)

# c. In Contempt Proceedings.

33. Questions of Fact. The decision of the trial tribunal on the facts in a proceeding for contempt is not reviewable on a writ of error. In re Independent Pub. Co. (Fed.) 1917C-1084.

## d. In Partition Suits.

34. In an action for partition, a judgment against appellants' claim of an interest in the land is final as to them and appealable, though interlocutory as to parties adjudged to have an interest. Albany Hospital v. Albany Guardian Society (N. Y.) 1916D-1195.

# e. Granting or Refusing New Trial.

35. A motion for a new trial being addressed to the court's discretion, a writ of error will not lie to review the court's decision on it, in the absence of an abuse of discretion. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

36. Denial of New Trial. The action of the lower court in overruling a motion for a new trial is not reviewable by the Court of Appeals. Dutton v. State (Md.) 1916C-89.

### f. In Attachment Proceedings.

37. Dissolution of Attachment. Mass. Rev. Laws, c. 167, § 110, as amended by St. 1909, c. 190, providing a summary hearing for relief against excessive or unreasonable attachment, prescribes a proceeding incidental to the action in which the attachment is made, and though the writ had not been entered in court when the petition for relief was filed, the action was pending, so that the superior court's order, dissolving the attachment, is an interlocutory order in that action, from which no appeal can be entered in the supreme judicial court. Richardson v. Greenhood (Mass.) 1918A-515.

# g. In Criminal Cases.

38. Denial of Motion to Strike Out Judgment. The action of the lower court on a motion to strike out the judgment and sentence is reviewable by the Court of Appeals. Dutton v. State (Md.) 1916C-89.

# h. In Habeas Corpus Proceedings.

39. The question of the jurisdiction of a court-martial is open to inquiry on

habeas corpus issued from a court having authority to issue that writ; and the action of such court in the premises may be reviewed by this court in the exercise of the jurisdiction conferred by article 94 of the constitution. State v. Long (La.) 1917B-240.

# 4. PARTIES TO APPELLATE PRO-CEEDINGS.

40. Administrator With Will Annexed. Upon appeal from a judgment of the district court refusing to admit a will to probate, the administrator with the will annexed is entitled to bring a writ of error and is the only necessary party plaintiff in error. Bell v. Davis (Okla.) 1917C-1075. (Annotated.)

# 5. FORM OF APPEAL.

41. Omission of Prayer for Relief. Though Conn. Gen. St. 1902, \$798, provides a form of appeal with which every appeal shall be substantially in accordance, which contains a prayer for relief, an appeal otherwise sufficient is not fatally defective through omission of prayer for relief. Douthwright v. Champlin (Conn.) 1917E-512.

# 6. NOTICE OF APPEAL.

### a. Form and Contents.

42. Surplusage. On appeal from an order of the Appellate Division, modifying and affirming an order of the Special Term, the mere fact that the notice of appeal stated that an interlocutory order of the Special Term was also to be reviewed is a harmless irregularity, for the right to review that order followed from the right to review the order of the Appellate Division affirming it. Matter of Heinsheimer (N. Y.) 1916E-384.

# b. On Whom Served.

43. Under Cal. Code Civ. Proc. §§ 578, 579, providing that judgment may be for or against one or more of several defendants, one of several joint tort-feasors, against all of whom judgment has been rendered, may be granted a new trial without it being granted to the others, so that some of them, moving for new trial, need not serve on the others notice thereof, or, appealing from the denial thereof, notice of the appeal. Fearon v. Fodera (Cal.) 1916D-312.

44. Defendants appealing from a judgment quieting title in plaintiff and awarding him certain damages against each defendant need not give notice of their appeal to a defendant against whom judgment was rendered by default, as he cannot be affected by reversal of the judgment against them. Fearon v. Fodera (Cal.) 1916D-312.

45. Defendants as to whom the judgment is silent, but who by their answers have disclaimed any interest in the land in suit, cannot be affected by reversal of judgment against other defendants, and therefore need not be served as adverse parties with notice of their appeal. Fearon v. Fodera (Cal.) 1916D-312.

### 7. PERFECTION OF APPEAL.

46. Time When Appeal is Perfected. An appeal is perfected at the time the transcript and assignment of errors are filed. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

### 8. TIME OF APPEAL.

# a. In General.

47. Burns' Indiana Annotated St. 1914, § 286, providing that, whoever has claim for personal injuries obtains judgment, and who dies pending the appeal or before a new trial after reversal, his claim may be prosecuted by his personal representatives, must be construed to mean that the action survives to the personal representative of a judgment praintiff, dying while awaiting an appeal or during the continuance of the appeal, for the words "pending such appeal" must mean during the time before appeal, and while an appeal is impending, and the word "pending" means during the time intervening before, awaiting, until, and the statute, so construed, is not unconstitutional as class legislation. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

48. Under Wash. Rem. & Bal. Code, § 1720, providing that no party can appeal from any judgment already appealed from, more than ten days after service of the notice of the former appeal upon him, the perfecting of an appeal by a party who had no interest in the controversy entitling it to appeal, and whose appeal was thereafter dismissed on that ground, does not prevent an interested party from appealing more than ten days after the notice of the former appeal. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

49. Under Cal. Code Civ. Proc. § 941b, providing that, as an alternative method of appeal, the appellant may file with the clerk of the court below a notice stating that he appeals, identifying the judgment with reasonable certainty, and requiring notice of appeal to be filed within 60 days from notice of entry of judgment, and where no notice of entry is given, within 6 months after entry of judgment, a notice filed with the clerk 31 days after judgment is sufficient. Martin v. Becker (Cal.) 1916D-171.

50. Premature Appeal. Where all parties to a suit enter into an agreement,

which is entered upon the minutes of the court, to the effect that the judge may decide the case in chambers, during the vacation of the court, "and shall grant an order of appeal, both suspensive and devolutive, to either party, fixing the return day and bond for either appeal, to have the same effect as if done in open court," and the judgment is rendered, the order of appeal granted, and the appeal lodged in this court in accordance therewith, such appeal will not be dismissed on the ground that it was taken prematurely and before the expiration of the delay within which, ordinarily, a motion for new trial may be filed, the terms of the agreement authorizing the presumption that the right to file such motion was intended to be waived. Succession of Lefort (La.) 1917E-769.

# b. When Time Begins to Run.

51. The time allowed for appeal is computed from the entry of the decree, and, though service of the notice of appeal was not acknowledged until more than six months after the judge had filed an opinion, the appeal will not be dismissed where less than six months had elapsed after the entry of the decree. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.

# 9. RECORD ON APPEAL.

# a. What Constitutes Record.

52. Exceptions. Under Wash, Rem. & Bal. Code, § 395, providing what shall be part of the record, exceptions shown by the record to have been in time allowed by an order of the court, made a part of the transcript, and certified therein by the clerk, cannot be stricken. Perine Machinery Co. v. Buck (Wash.) 1917C-341.

# b. Transcript and Abstract.

53. Supplying Deficiency in Abstract. The transcript of the reporter's notes will not be ordered to be certified to the appellate court to supply evidence omitted from the abstract, as the office of the transcript is to settle disputes as to whether the record is as contained in the abstracts of the appellant or the appellee. Ottumwa v. McCarthy Improvement Co. (Iowa) 1917E-1077.

# c. Settlement and Certification.

54. Manner of Supplementing Record. If there is any doubt or obscurity as to the reason for the court's ruling in refusing to permit the witness to be recalled, the proper method is to make the matter clear by a certiorari or remand, so that the trial judge may state whether he merely exercised his discretion or decided as he did for want of power to rule otherwise. Mc-

1916C—1918B.

Donald v. McLendon (N. Car.) 1918A-1063.

# d. Amendment of Record.

- 55. Issue as to Occurrence at Trial. Where an issue of fact is raised as to what occurred on the trial, the proper procedure is to ask for a correction of the appeal in the Supreme Court of Errors, under Conn. Gen. St. 1902, \$801, and what the facts were must be proved on an issue of fact raised, as provided in the statute. Barber v. Morgan (Conn.) 1916E-102.
- 56. After Decision. After the case has been submitted and an opinion filed, the appellant, who has lost on an imperfect appeal, will not be permitted to file a record which was not a part of the record when the case was disposed of; though a different rule prevails when a motion is made by appellee to file an additional record after an opinion has been handed down, and before the petition for rehearing has been disposed of. Myers v. Saltry (Ky.) 1916E-1134.

# e. Conclusiveness of Record.

- 57. Conflict Between Case Made and Record. When the record and case conflict, the former controls. McDonald v. McLendon (N. Car.) 1918A-1063.
- 58. Effect of Omission in Record. On a question of notice to a contractor of a city as to duty to make repairs, where the abstract does not contain all the evidence, it will be presumed that the omitted evidence sustained a ruling of the trial court that there was notice. Ottumwa v. McCarthy Improvement Co. (Iowa) 1917E-1077.

# 10. BILL OF EXCEPTIONS.

# a. In General.

- 59. Necessity of Bill of Exceptions. Facts which occur in the trial of a case can only be brought to this court for review by a bill of exceptions certified by the trial judge. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.
- 60. Conclusiveness. One convicted of crime, who accepts a bill of exceptions as qualified by the trial court, is bound by the qualification. Mason v. State (Tex.) 1917D-1094.
- 61. Establishment After Death of Judge. Where a murder case was tried August 25, 1914, and the bill of exceptions was indorsed "Presented" on November 21, 1914, by the presiding judge, who died January 3, 1915, without signing the same as a bill of exceptions, and it was stipulated that the bill presented truly stated the points for decision, together with the facts in the case, it will be established on motion. Brindley v. State (Ala.) 1916E-177.

62. Refusal to Approve. The court did not abuse his discretion in refusing to approve the exceptions to the conclusions of fact filed by the defendants in error, upon which error is assigned in the crossbill of exceptions. National Bank v. Amoss (Ga.) 1918A-74.

### b. Inclusion of All the Evidence.

- 63. Affidavits. Affidavits purporting to show misconduct of counsel, to be available on appeal, must be included in the bill of exceptions. Bursow v. Doerr (Neb.) 1916C-248.
- 64. Remarks of Prosecuting Attorney. Improper remarks by the prosecutor cannot be considered on appeal, when not preserved by bill of exceptions. Ryan v. People (Colo.) 1917C-605.

### c. Correction.

- 65. Evidence held sufficient to justify the amendment of the bill of exception to conform with the reporter's stenographic notes. Harris v. State (Wyo.) 1917A-1201.
- 66. Use of Stenographer's Notes. Under Wyo. Comp. St. 1910, § 942, requiring the court reporter to attend court, take full stenographic notes of cases on trial, testimony, admissions, objections, rulings, and exceptions, and to preserve his notes, section 945, making the court reporter the judge's stenographer, and section 944, making his transcripts, when certified to by the clerk, prima facie evidence of the matters therein, his notes are such a part of the record that they may be received in evidence to correct the bill of exceptions. Harris v. State (Wyo.) 1917A-1201.

### d. Inclusion of Matter by Reference.

- 67. Incorporation of Transcript by Reference. That the transcript was "referred to and made a part of a particular exception" is not sufficient to give the transcript standing as part of the bill of exceptions so as to entitle the contents thereof to supersede the statement made in the bill. First National Bank v. Bertoli (Vt.) 1917B-590.
- 68. Reference to Record for Facts. A bill of exceptions, stating that plaintiff seasonably objected to the admission of certain testimony and when it was admitted noted his exceptions, that he offered certain testimony which the presiding justice excluded, and duly excepted, and that he requested the presiding justice to give certain instructions which were refused, and duly excepted, with no other statement of what the admitted or excluded evidence was and nothing to show the relevancy, materiality, or competency thereof or the appropriateness of the in-

structions, did not present separately each issue of law in the clear, distinct, summary manner required by Me. Rev. St. c. 79, § 55, which provides that a party aggrieved by any of the opinions, directions, or judgments of the presiding justice may present written exceptions in a summary manner, which if found true shall be allowed and signed by the justice, though the record of the evidence was made a part of the bill of exceptions, since, while this is not improper, the reference to the evidence or the incorporation of the evidence as a part of the bill cannot take the place of a succinct and summary statement of the specific grounds of exception in the body of the bill itself. Dennis v Waterford Packing Co. (Me.) 1917D-788.

- 69. Incorporating Instructions by Reference. A bill of exceptions referring to purported instructions by number only, where no numbered instructions appeared in the record, did not sufficiently identify the instructions sought to be reviewed. Harris v. Bremerton (Wash.) 1916C-160.
- 70. Identification of Evidence. To make the evidence in an action at law part of the record, it is only necessary to use such means of identification in the bills of exception and orders as make the adoption thereof reasonably certain. Wilson v. Shrader (W. Va.) 1916D-886.

### 11. ASSIGNMENTS OF ERROR.

# a. In General.

71. Denial of New Trial. Error cannot be assigned on the overruling of a motion for new trial. Parsons v. Trowbridge (Fed.) 1917C-750.

# b. Sufficiency.

- 72. Erroneous Assumption. Where the allegations of a complaint and the findings of fact were materially different in several particulars, assignments of error assuming that the record showed that the allegations of the complaint had been found proven are improper. Walsh v. Bridgeport (Conn.) 1917B-318.
- 73. Assignments of Error Insufficient. Assignments of error held not available upon well-established rules of practice. State v. Chavez (N. Mex.) 1917B-127.
- 74. Definiteness. An assignment that the trial court erred in sustaining objections to questions to a witness concerning a certain person is too general to raise any question for review. State v. Von Klein (Ore.) 1916C-1054.
  - 75. General Assignment. An assignment of error that "the court erred in entering judgment for the plaintiffs, to which the defendant then and there excepted," is insufficient to raise any question for review

by the appellate court. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.

- 76. Particularity. An assignment of error complaining that the court erred in not holding a statute unconstitutional, but not pointing out any grounds, is too general for consideration. State v. Howse (Tenn.) 1917C-1125.
- 77. Form—Joinder of Several Assignments—Omission of References to Record. An omnibus exception or assignment of error covering numerous items or points, for an understanding of which the court must search through the abstract or transcript, will not be considered. Davidson Bros. Co. v. Des Moines City R. Co. (Iowa) 1917C—1226.
- 78. Consideration Together. Where an instruction is considered in connection with other instructions upon the same subject, or the entire charge, and is found to be free from the defects complained of ir the assignment of error, the assignment will fail. Robinson v. State (Fla.) 1917D-506.

# c. Cross-assignments.

- 79. Cross-errors. A defendant in error, who did not himself institute proceedings in error, cannot in the appellate court go beyond supporting the judgment and opposing the assignments of error by the adverse party. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.
- 80. Errors Assigned by Appellee. On an appeal by plaintiff, errors assigned by defendant's counsel cannot be considered. Niebalski v. Pennsylvania R. Co. (Pa.) 19170-632.
- 81. Necessity of Cross-assignments of Error. A defendant who does not appeal and who does not by cross-assignment in his brief ask for a modification of the judgment, as authorized by Mont. Rev. Codes, § 7118, cannot on the appeal of plaintiff complain of the judgment. Williams v. Johnson (Mont.) 1916D-595.

### 12. DISMISSAL OF APPEAL.

# a. Time for Motion.

82. Notice of Motion. Under Rem. & Bal. Wash. Code, § 1733, providing that motion to dismiss an appeal shall be made at such time as shall be fixed by the rules of court and under supreme court rules 18, 19 (132 Pac. xiii, xiv), a motion to strike the transcript and dismiss the appeal, on the ground that no statement of facts had been brought up and no exceptions taken below, cannot be considered, where not made on ten days' notice. City Sash, etc. Co. v. Bunn (Wash.) 1918B-31.

### b. Grounds for Dismissal.

83. Unauthorized Appeal. An appeal which is not authorized by law will, upon

proper motion, be dismissed by this court. Oklahoma City v. Tucker (Okla.) 1917D-984

- 84. Timeliness of Proceedings. Where judgment in an election contest appealed from was rendered April 18th, and April 28th the transcript was filed with the clerk of the court of appeals, and April 19th a regular supersedeas bond was executed before the clerk of the circuit court, the obligee being the appellee, but, after discovery of the fact that the bond was not properly executed to the clerk of the circuit court, and on the same day the record was filed in the court of appeals, another bond was executed in which the clerk of the circuit court was named as obligee, the supersedeas bond will not be discharged and the appeal dismissed because the bond was not executed as provided by Ky. St. § 1596a, subsec. 12, providing that either party to an election contest may appeal from the judgment of the circuit court to the court of appeals by giving bond to the clerk of the circuit court with good surety, conditioned for the payment of all costs and damages, etc., and by filing the record in the clerk's office of the court of appeals within thirty days after final judgment in the circuit court. Johnson v. Little (Ky.) 1918A-70.
- 85. Entitling Papers. Iowa Code, § 4108, providing that on appeal the cause shall be docketed as in the court below, being remedial, is simply directory, and the fact that the abstract designated all parties except plaintiff as defendants or appellees, whereas, some were defendants in cross-petitions and not in the main action, is not ground for dismissal, where the relation of the parties to the case was disclosed. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.
- 86. Mandate of Court Below Executed. A writ of error from the Federal Supreme Court to review a judgment of reversal with instructions to dismiss the complaint which a circuit court of appeals had entered on rehearing after it had recalled its mandate, previously issued, ordering a new trial, and had set aside the judgment of the court below, need not be dismissed, either because the trial court had theretofore entered judgment on the original mandate, and had adjourned for the term without any application made to recall such judgment, or any writ of error to review such judgment sought, or because the defendants in error in the circuit court of appeals, on whose petition the rehearing was granted, had waived therein any right to a new trial, and consented that the case be disposed of one way or the other. Thomsen v. Cayser (U.S.) 1917D-322.

# c. Questions Considered.

87. Motion to Dismiss—Merits not Considered. Whether an order of the court of

chancery, disbarring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery, is sustainable as an order suspending him from practicing in the court of chancery until the supreme court has acted under the statute, will not be considered on a motion to dismiss an appeal from the order, but the question can be dealt with only on the appeal itself in determining whether the order shall be affirmed, reversed, or modified. In re Hahn (N. J.) 1918B-830.

See 2, e, supra, as to right to second appeal after dismissal of first for failure to perfect.

# d. Reinstatement of Appeal.

88. Necessity of Showing Merits. Upon a motion to reinstate an appeal, upon the ground that the order of dismissal was entered against appellant through his mistake, inadvertence, surprise, or excusable neglect, appellant must show apparent merit in the appeal. Hilmen v. Nygaard (N. Dak.) 1917A-282.

# 13. HEARING OF APPEAL.

89. Preference on Docket—Public Interest Involved. The appeal of citizens and taxpayers of a parish from judgment annulling, at suit of a city, an election voting prohibition in the parish, involves a public interest, entitling it to be transferred to the preference docket. Alexandria v. Police Jury (La.) 1918A-362.

# 14. EXAMINATION OF CASE ON APPEAL.

- a. What is Brought Up on Appeal.
  - (1) Matters not in Record.
- 90. Evidence not in Record. Where the record is without a transcript of the evidence, the only question on appeal is whether the pleadings support the judgment. Myers v. Saltry (Ky.) 1916E-1134.
- 91. Evidence not in Record. A verdict cannot be reviewed in the absence of the evidence. State v. Haffer (Wash.) 1917E-229.
- 92. Question not Raised at Trial. In a prosecution for conspiracy, where the defense that defendants had been entrapped by a detective into the commission of the alleged conspiracy was not raised or ruled upon at the trial, it cannot be considered on appeal. Hummelshime v. State (Md.) 1917E-1072.

### Rulings on Evidence.

93. Necessity of Offer of Proof. In an action for the death of plaintiff's intestate while employed in handling switches at defendant's electric lighting station, where a witness testified on direct examination

that the station and the apparatus therein were safe if used with reasonable care, and where plaintiff makes no offer to prove that the association, of which the witness was a member had taken any position as to the safety of a method of wiring by which the blades of the switches would be alive when down, the exclusion of cross-examination as to the association's position thereon will not be reveiwed. McCarthy's Admr. v. Northfield (Vt.) 1918A-943.

# (3) Rulings on Instructions.

94. Construction as Whole. Instructions must be construed as a whole, and the appellate court may not construe away the plain meaning of a charge viewed as a whole by any process of dissection, dismembering it and leaving only separate parts. McCurry v. Purgason (N. Car.) 1918A-907.

# (4) Attachment Proceedings.

95. Dissolution of Attachment. If any question of law could ever be open upon a petition under Mass. Rev. Laws, c. 167, § 110, as amended by St. 1909, c. 190, for the dissolution of an attachment, the procedure, in the absence of a report by a presiding judge, is to file a bill of exceptions, which, if allowed, will await the stage of final disposition of the case when it may be brought to the supreme judicial court. Richardson v. Greenhood (Mass.) 1918A-515. (Annotated.)

# Note.

Appeal in principal action as bringing attachment or garnishment proceeding up for review. 1918A-516.

# b. Second Appeal.

- 96. Law of Case—Subsequent Appeal. Decisions of appellate courts of this state, upon all questions of law involved in any case, are binding, not only on the lower court, but on the appellate court as well, in case of a subsequent appeal. In re Application of State, etc. (Okla.) 1916E-399.
- 97. Decision in Former Appeal. A decision of the supreme court, on a former appeal in an action for an employee's death, that loose boards lying near the place of the accident did not show negligence was not res judicata of the admissibility of evidence of such loose boards in a subsequent action; the former decision being on the weight of the evidence and not to its admissibility. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637.
- 98. Question of Law or Fact. Where the industrial commission's finding that decedent left a widow is based on its determination that common-law marriages are valid, a question of law is raised which survives the appellate division's unanimous

affirmance of the commission's finding. Ziegler v. P. Cassidy's Sons (N. Y.) 1917E-248.

- 99. Decision on Former Appeal—Law of Case. The law as declared in a former appeal, where there is no material difference in the evidence or questions presented, is the "law of the case" during the subsequent trial or appeal. The refusal of an instruction embracing the law as declared in such former appeal constitutes reversible error. Marth v. Kingfisher Commercial Club (Okla.) 1917E-235.
- 100. Decision as Law of Case. A holding on appeal that a locomotive fireman, who was on his way back to his engine after a visit to a lunch room when he was killed, was not a trespasser in the yards, so far as relates to the defendant's duty of care, is the law of the case on a subsequent appeal where the facts are not materially different. Ingram's Admx. v. Butland R. Co. (Vt.) 1918A-1191.
- 101. Law of the Case. A proposition decided upon a former appeal becomes the law of the case and should not be re-examined in a subsequent appeal in the same action. Orr v. Sutton (Minn.) 1916C-527.
- 102. Review of Previous Holding. While the supreme court will not ordinarily review its previous holding on a subsequent appeal, yet the so-called "law of the case" is not binding when clearly erroneous and leading to unjust results, especially where no rights have accrued in reliance upon the former decision. Brewer v. Browning (Mass.) 1918B-1013.

# c. Examination of Questions of Fact.

# (1) In General,

103. Questions of Fact—Combination in Restraint of Trade. The facts are not still in controversy on a writ of error from the Federal Supreme Court to a circuit court of appeals to review a judgment which reversed, with instructions to enter an order dismissing the complaint, a judgment in favor of plaintiffs in an action to recover treble damages for the injuries sustained as the result of a combination alleged to restrain foreign trade, contrary to the Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), where the case was decided in the circuit court of appeals upon the proposition of law that the combination charged was not an unreasonable restraint of trade, and that such character was necessary to make it illegal under that statute, both trial and appellate courts concurring as to the fact of combination and restraint and the means employed, and their conclusion not being clearly erroneous. Thomsen v. Cayser (U. S.) 1917D-322.

104. Auditor's Report. An auditor's finding for plaintiff is evidence sufficient to warrant a verdict for him, unless the facts

stated in the report are insufficient to support the conclusion or so inconsistent as to neutralize themselves. Hecht v. Boston Wharf Co. (Mass.) 1917A-445.

105. Evidence Chiefly by Deposition. Upon the question of recognition, and especially upon the affirmative of that question, almost all of the evidence was by deposition. It is held that on appeal such evidence will be reviewed. Record v. Ellis (Kan.) 1917C-822.

106. Review of Facts. The general verdict and findings being supported by competent evidence and approved by the trial court will, under the settled rule, be upheld. Denver v. Atchison, etc. R. Co. (Kan.) 1917A-1007.

107. In reviewing evidence on appeal from denial of a motion for new trial, the appellate court can consider only the evidence most favorable to the appellec. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ind.) 1917B-705.

# (2) Power of Appellate Court to Weigh Evidence.

108. Sufficiency of Evidence. The trial court should not set aside a verdict as against the evidence where there was some evidence to sustain it; but should not refuse to set it aside where the manifest injustice of the verdict is so plain as to denote mistake, prejudice, corruption, or partiality. Seidler v. Burns (Conn.) 1916C-266.

109. Weight of Testimony. The supreme court, in passing on a motion to take a case from the jury, either at the close of plaintiff's evidence or of all the evidence, can only consider whether there is any evidence in the record fairly tending to support plaintiff's cause of action, and it is never a question of the weight of the testimony; all controverted questions of fact being settled by the verdict and the judgment of the appellate court. Mahlstedt v. Ideal Lighting Co. (III.) 1917D-209.

110. Sufficiency of Evidence. Where there is a substantial conflict in the evidence, the general rule is that an appellate court will not review it with a view to determine its sufficiency to support the findings of the trial court, but there is an exception where the finding is the result of bias or prejudice, mistake or misapprehension, or misconception of the legal effect of the evidence, or where there is none; nor can a judgment but slightly supported by the evidence and manifestly against its weight be permitted to stand. Neelley v. Farr (Colo.) 1918A-23.

111. Weight of Evidence. Under Ore. Const., art. 7, § 3, as amended in 1910 (see Laws 1911, p. 7), providing that no fact tried by a jury shall be otherwise re-exam-

ined in any court of the state, unless the court can affirmatively say there is no evidence to support the verdict, where the supreme court cannot say that there was no competent evidence to support a verdict, it cannot hold error in overruling a motion for a nonsuit or a directed verdict. Taggart v. Hunter (Ore.) 1918A-128.

112. Questions of Fact. Where the trial judge passed upon the evidence in passing upon the motion for new trial, exercising his judicial discretion therein, and permitting the facts produced by plaintiff to sustain verdict in her favor, the supreme court cannot interfere, on the ground that the evidence is improbable, contradictory, and opposed to every instinct of human nature, in the absence of such error as actually or presumptively prevented a fair trial to defendant. Jensen v. Lawrence (Wash.) 1917E-133.

113. It is not the province of the supreme court to weigh the evidence as it appears in the transcript, but only to determine whether there is any evidence from which the trial court might draw its conclusion; and a conclusion, in a suit to cancel a conveyance because procured by defendants' fraud, that one defendant had such knowledge of the transaction between the other defendant and plaintiff, whereby plaintiff conveyed realty to him, as would deprive him of the rights of an innocent purchaser, in view of the opportunities of the trial court for testing the veracity of the witnesses, will not be disturbed. Gilchrist v. Hatch (Ind.) 1917E-1030.

114. Weight of Evidence. It is not the purpose of Kan. Code Cr. Proc., § 528, authorizing a reversal in case of the death penalty if the verdict is against the weight of evidence or against law, to substitute the conclusions of fact which may be drawn by the appellate judges for the conclusions of fact which have been drawn from the evidence by the jury. People v. Becker (Kan.) 1917A-600.

# (3) Verdict or Finding of Jury.

# (a) In General.

115. Review of Question of Fact, Where there is any credible evidence to support the verdict, is cannot be disturbed. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.

verdict in an action for libel, supported by substantial evidence that the published charges were untrue, concludes the question on appeal. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

117. Verdict on Conflicting Evidence. A verdict based upon substantial, though conflicting, evidence, will not be disturbed on appeal. Smith v. Barnes (Mont.) 1917D-330.

- 118. Conflicting Evidence. Where a controverted question of fact as to the existence of an escrow agreement and as to its conditions was presented, the verdict of the jury thereon is conclusive. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.
  - 119. Sufficiency of Evidence. A verdict of the jury will be upheld on appeal if there is any substantial evidence to support it. Mason v. Bowen (Ark.) 1917D-713.
  - 120. Scope of Review—Sufficiency of Evidence. A verdict approved by the trial court will be accorded great deference on appeal. Frey v. Rhode Island (R. I.) 1918A-920.
  - 121. The evidence is not so conclusively against the verdict as to justify a reversal of the order appealed from. Wising v. Brotherhood of American Yeomen (Minn.) 1918A-621.
  - 122. A jury's finding on substantial conflicting evidence cannot be questioned on appeal. Spain v. Oregon-Washington R. etc. Co. (Ore.) 1917E-1104.
  - 123. A verdict on conflicting evidence and sustained by evidence, if believed, will not be disturbed on appeal. Switzer v. Sherwood (Wash.) 1917A-216.
  - 124. The court, in testing the legal sufficiency of the evidence of plaintiff to sustain a verdict in her favor, must give that evidence the highest probative value. Weber v. Weber (Ark.) 1916C-743.
  - 125. A verdict on substantially conflicting proof will not be set aside, where it is supported by sufficient competent evidence. Bursow v. Doerr (Neb.) 1916C-248.
  - 126. Where there is a substantial conflict in the evidence, the findings of the court will not be disturbed. Bower v. Moorman (Idaho) 1917C-99.
  - 127. Questions Reviewed Amount of Damages. A finding by the jury as to the amount of compensatory damages due a patient who had been imprisoned in a private sanatorium in a room next to a lunatic, approved by the trial court, cannot be reviewed on appeal. Cook v. Highland Hospital (N. Car.) 1917C-158.
  - 128. Verdict on Conflicting Evidence. A verdict on conflicting evidence will not be set aside on appeal. Seidler v. Burns (Conn.) 1916C-266.
  - 129. Where the evidence is conflicting as to the facts on which the opinions of expert witnesses are based, and where the opinions of such witnesses, on a given state of facts in the case, materially differ, it is for the

jury to determine, and their finding is conclusive. McAlinden v. St. Maries Hospital Assoc. (Idaho) 1918A-380.

130. Where an ultimate material fact is to be inferred from other facts, it is for the trier of the facts to draw the inference, and, when the facts upon which the inference is based are such that reasonable minds may draw opposite inferences therefrom, the appellate court cannot say that the fact found, as a result of the inference drawn, is not sustained by evidence, unless the facts are undisputed, and the verdict or finding is opposed to the only reasonable inference therefrom. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ind.) 1917B-705.

131. Testimony to Facts Physically Impossible. While the scintilla rule prevails as to the quantity of evidence necessary to carry a case to the jury, a verdict of the jury based on evidence contrary to the physical facts will be reversed, for the evidence to support a verdict must be such as is fit to induce conviction. Louisville, etc. R. Co. v. Chambers (Ky.) 1917B-471. (Annotated.)

132. In the case at bar, while it may be true that the jury were not in a position to say beyond the possibility of a doubt that any one single fact in evidence or the absence of any one condition established conclusively the negligence of appellant's physician and surgeon in placing the cast upon the injured limb of respondent at the time and in the manner in which it was done, and in his failure to split the cast and thus permit free and uninterrupted veinous circulation, yet if from all the testimony and circumstances of the case there is evidence sufficient to establish a prima facie case, the conclusion reached by the jury based upon the evidence will not be disturbed on appeal. McAlinden v. St. Maries Hospital Assoc. (Idaho) 1918A-

#### (b) Verdict in Criminal Case.

133. General Verdict on Several Counts. A general verdict of guilty on an information in four counts, the first count only being sustained by evidence, will not be set aside on appeal where no attempt was made at trial to have unsupported counts withdrawn from jury. State v. Reed (Mont.) 1917E-783.

134. Weight of Evidence. A verdict will not be set aside as against the evidence where there is evidence to support it, and where it does not appear that the jury were not governed by the evidence. Robinson v. State (Fla.) 1917D-506.

135. Grounds for Reversal of Conviction—Insufficiency of Evidence. In criminal cases the jury determines both the law and fact. and, in the absence of reversible

error in the rulings of the trial court, the appellate court may not disturb the verdict on the sufficiency of the evidence. Hummelshime v. State (Md.) 1917E-1072.

# (4) Findings of Court.

- 136. Review of Finding. A finding by the district court, on appeal from a finding of the board of supervisors, that a statement of consent to the sale of intoxicating liquors is insufficient, will not be disturbed on appeal where there is room for reasonable minds to differ as to the facts. Riley v. Litchfield (Iowa) 1917B-172.
- 137. Decisions of Land Department—Judicial Review. Courts have no power to review findings of fact by the Land Department which were within its province and duty to make. Daniels v. Wagner (U. S.) 1917A-40.
- . 138. Presumption. Findings are presumed correct, unless against the clear preponderance of the evidence. Heicke v. Heicke (Wis.) 1918B-497.
- 139. Review of Finding. Where decision of appellate division affirming award of the compensation commission was not unanimous, the court of appeals may consider whether there was any evidence to sustain the finding. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.
- 140. Review of Facts—Conflicting Evidence. Where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571.
- 141. Misconduct of Jury. A finding by the trial judge, denying defendant's motion to set aside the verdict for misconduct of the jury, where based upon the evidence, is not reviewable. Cook v. Highland Hospital (N. Car.) 1917C-158.
- 142. Review of Facts. In determining whether a decision is supported by any evidence, the appellate court will consider only the evidence most favorable to the successful party. Anderson v. Knotts (Ind.) 1916D-868.
- 143. Finding on Conflicting Evidence. Findings based on conflicting evidence will not be disturbed on appeal. Jorgenson v. Gessell Pressed Brick Co. (Utah) 1917C-200
- 144. Evidence to Sustain Finding of Chancellor. A finding of the chancellor with reference to a state of accounts between the parties, not against the preponderance of the evidence, must be upheld and his decree affirmed. Streudle v. Leroy (Ark.) 1917D-618.

- 145. Review of Facts. A finding not contrary to the preponderance of the evidence will not be disturbed on appeal. Cost v. Shinault (Ark.) 1916C-483.
- 146. Sufficiency of Evidence. Where the record contains a fair quantum of admissible evidence to support the conclusions of the trial court, and there is nothing to show that it was not governed by proper rules of law, the supreme court accepts its findings of fact. Rogers v. Nevada Ganal Co. (Colo.) 1917C-669.
- 147. Agreed Findings. Where counsel for appellant or plaintiff in error in the appellate court admit that the findings of fact made by the trial court are sustained by the evidence, such findings will be treated as in effect an agreed statement of facts. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.
- 148. Finding on Conflicting Evidence. A finding of the chancellor in conformity to a verdict in an equity case will not be disturbed on appeal, where the evidence is sharply conflicting. Anheier v. De Long (Ky.) 1917A-1239.
- 149. The conclusions of the trial court as to matters of fact will not be disturbed on appeal. Brace, etc. Mill Co. v. Burbank, (Wash.) 1917E-739.
- 150. Immaterial Question. The objection that a finding was immaterial, and that it was not necessary to submit the question to the jury, will not be passed upon on appeal, where the finding is supported by the evidence. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.
- 151. Evidence to Support Finding of Chancellor. The chancellor's findings on issues of fact, as to which the evidence was conflicting, not against the preponderance of the evidence, will not be disturbed. Nevada County Bank v. Sullivan (Ark.) 1917D-736.
- 152. Adoption of Findings by Court. When special findings of fact made by a referee are adopted by the court in such manner as to show an intention to make those findings its own, that intention will be given effect by the appellate court, and the findings will be treated as having been made by the trial court. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.
- 153. Scope of Review—Questions of Fact. Rule followed that where questions of fact have been determined by the trial court upon substantial and competent evidence, such determination is conclusive on appeal. Wideman v. Faivre (Kan.) 1918B—1168.

# (5) Findings of Master.

154. Where findings and conclusions as to facts, made by a master in chancery,

are sustained by the chancellor, and are not manifestly against the weight of the evidence, the decree will not be disturbed by the supreme court. Klekamp v. Klekamp (111.) 1918A-663.

# (6) Direction of Verdict or Nonsuit.

155. Request by Both Parties for Direction of Verdict—Effect. Where both parties requested peremptory instructions and the court directed verdict in favor of defendants, the case stands on appeal as if the jury, upon correct instructions, had returned a verdict in defendants' favor, and the sole question is that of the legal sufficiency of the evidence. Sims v. Everett (Ark.) 1916C-629.

156. Denial of Nonsuit. In the consideration of a motion for a nonsuit, where the record contains all the evidence produced upon the trial, the supreme court must consider the entire evidence. Taggart v. Hunter (Ore.) 1918A-128.

# (7) Judgment of Intermediate Appellate Court.

157. Errors in Trial Court. Where one convicted of crime in the county court, upon appealing to the circuit court, asked that the appeal be dismissed and the case remanded to the county court for error in the judge's having determined the fine, . and not the jury, on appeal from the circuit court's affirmance of the conviction, its refusal to dismiss and remand is not reviewable, since, under Ky. Cr. Code Prac., § 366, providing that upon appeal to the circuit courts the case shall be tried anew as if no judgment had been rendered, the trial in the circuit court was de novo, not involving a review of the county court's action, and the appeal from the circuit court's judgment was concerned only with its errors, not those below. Delk v. Commonwealth (Ky.) 1917C-884.

158. Review of Dismissal for Insufficiency of Evidence. The court of appeals, in reviewing a judgment of the appellate division reversing a judgment dismissing the complaint at the close of plaintiff's evidence, will give plaintiff the advantage of all the facts properly presented and every favorable inference deducible therefrom. Lalor v. New York (N. Y.) 1916E-572.

# (8) Adherence to Theory of Trial Court. 159. Where a cause was tried in the circuit court as one involving title as in ejectment, the court on appeal must adopt the same theory. Phillips v. Phillips (Ala.)

160. Theory of Case on Trial. Where an action by a creditor of a corporation against a stockholder was founded originally on the liability imposed by Conn.

1916D-994.

Gen. St. 1887, § 1954, and the court tried the case on that theory, but during the trial plaintiff asked for an amendment seeking a recovery on the theory that the property which the stockholder received might be charged with an equitable lien for the payment of plaintiff's debt, but the amendment was withdrawn on it appearing that a postponement of the case would result by reason of its allowance, and plaintiff's counsel remarked that the trial could proceed to determine the statutory liability, the court cannot correct the findings of the superior court that the case was tried on the theory of statutory liability. Barber v. Morgan (Conn.) 1916E-102.

161. Under Mo. Rev. Stat. 1909, § 9999, providing, relative to negotiable instruments, that absence or failure of consideration is a matter of defense as against any person not a holder in due course, and that partial failure of consideration is a defense pro tanto, where an action on a note given for mining property was tried by defendants on the theory that the consideration had failed in that there was a breach of the warranty of title to the mining property, no evidence was given as to the value or relative value of the land as to which the title was defective, there was no data to guide the jury in an attempt to find such value, and the instructions requested by defendant were on the theory that there was a total failure of consideration, and no instruction on the question of partial failure of consideration was requested, they cannot have a retrial on the theory that there was a partial failure of consideration. Carter v. Butler (Mo.) 1917A-483.

162. The case is treated on this appeal as it was tried below, and treated by the parties on the appeal, viz., a review of errors at law in a law action, and not a trial de novo. Thornhill v. Olson (N. Dak.) 1917E-427.

163. A case will not be reviewed on a theory different from that on which it was tried below, nor will questions argued for the first time on appeal be considered. Armstrong v. Philadelphia (Pa.) 1917B-1082.

164. The supreme court will review a case upon the theory on which it was tried in the court below. Smith v. Barnes (Mont.) 1917D-330.

165. Where the complaint was not attacked by demurrer or motion of any kind, resort may be had to the subsequent proceedings to ascertain on what theory the cause was tried in the court below. Smith v. Barnes (Mont.) 1917D-330.

# (9) Competency of Witnesses.

166. Children. Whether witnesses, respectively 11 and 12 years old, were of

sufficient age and capacity to testify is to be determined by the trial court, and such determination is not reviewable on appeal. State v. Pitt (N. Car.) 1916C-422.

(Annotated.)

167. Mental Capacity. The trial court's conclusion that a witness was of sufficient capacity to testify, based upon evidence warranting the finding, is not reviewable by the supreme court. State v. Tetrault (N. H.) 1918B-425.

# d. Waiver of Error.

#### (1) In General.

168. Questions Reviewable — Failure to Ask Peremptory Instruction. On a direct appeal to the supreme court, the failure to ask a peremptory instruction in the trial court does not preclude the contention that the verdict is against the weight of the evidence. Carnahan v. Hamilton (Ill.) 1916C-21.

# (2) Omission from Brief or Argument.

169. Failure to Argue Question as Waiver. Where the part of appellant's brief devoted to propositions and authorities made no specific reference to any instruction given or refused or to any testimony admitted, such causes for new trial are waived under Rule 22, cl. 5 (55 N. E. vi), providing that the brief of appellant shall fully present every error and exception relied on. White v. State (Ind.) 1917B-527.

170. Waiver of Points not Argued. No point being made in the brief as to length of time for which the carrier should be allowed for storage, any error in this respect is waived. Holloman v. Southern R. Co. (N. Car.) 1917E-1069.

171. Question not Discussed. Questions not discussed in appellant's brief are waived. Cincinnati etc. R. Co. v. McCullom (Ind.) 1917E-1165.

172. An exception not mentioned in the brief is abandoned under the rule of the supreme court. McCurry v. Purgason (N. Car.) 1918A-907.

173. Questions not Argued. Only those assignments of error set out in the brief will be considered. In re Rawling's Will (N. Car.) 1918A-948.

174. An exception is waived by failure to brief it. Comstock's Administrator v. Jacobs (Vt.) 1918A-465.

175. Necessity of Preserving Evidence in Record. Where the evidence was not embodied in the brief pursuant to Cal. Code Civ. Proc., § 953c, the question of its sufficiency cannot be reviewed on appeal. Thompson v. Hamilton Motor Co. (Cal.) 1917A, 677.

176. Exceptions not Argued. Exceptions not argued on appeal will not be considered. Egan v. Dotson (S. Dak.) 1917A-296.

# (3) Pleading Over After Order to Make More Specific.

177. Appeal from Order on Demurrer. Where, in an action on an agent's contract, a motion to make the complaint more specific by setting forth the agreement in writing constituting the agent's authority was granted and plaintiff thereupon amended the complaint by setting out such agreement and a demurrer to the amended complaint was sustained, the sufficiency of the amended pleading is the only question on appeal, and whether the court erred in granting such motion is immaterial. Springer v. City Bank, etc. Co. (Colo.) 1917A-520.

# (4) Introduction of Evidence After Refusal to Direct Verdict or Give Judgment.

178. That a motion for a directed verdict operates as a request that the court find the facts, and is conclusive upon the parties upon appeal, does not prevent consideration of the inadmissibility of rejected evidence, nor waive exceptions to the rulings of law thereon. Buckbee v. P. Hohenadel, Jr., Co. (Fed.) 1918B-88.

179. Motion for Judgment—Waiver by Introduction of Evidence. An exception to the overruling of a motion for judgment at the close of plaintiff's evidence on the trial of an action to the court is waived by the introduction of evidence in defense. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.

180. Motion for Directed Verdict. Where, at the conclusion of the state's evidence, the defendant moved to direct a verdict in his favor, but upon its being overruled proceeded with his evidence and failed to renew his motion, he waived the motion, which cannot be reviewed. State v. Asbury (Iowa) 1918A-856.

# (5) By Stipulation or Agreement.

181. Effect of Agreement of Counsel. Where counsel for respective parties agree that, should the conclusion of the court be adverse to the contention of appellant upon one question, the remaining objections assigned become immaterial, and when it appears from the record that a consideration of said questions is not necessary to a final determination of the cause under consideration, the same will not be decided by the court. Jennings v. Idaho R., etc. Co. (Idaho) 1916E-359.

182. Admissions in Open Court—Effect. Admissions and agreements made in open

court by the parties to the cause and acted upon by the court are binding and a decree founded therein will not be reversed.— McCoy v. McCoy (W. Va.) 1916C-367.

# (6) Introduction of Evidence After Adverse Ruling on Pleading.

183. Where, after the court ruled, over objection, that the third count of the amended declaration was still in the case, and plaintiff offered evidence to sustain it, defendant does not waive his objection to the decision by offering evidence to contradict it. Wende v. Chicago City R. Co. (Ill.) 1918A-222.

# (7) By Requesting Instruction.

184. Where, in an action on a promissory note, parol evidence tending to vary and contradict its terms is improperly admitted, over objection, the mere fact that plaintiff's counsel requests an instruction in order to limit, as far as possible, the prejudicial effect of such evidence, does not, where such instruction is refused by the trial court, estop the latter from asserting on appeal that the admission of such evidence was error. First State Bank v. Kelly (N. Dak.) 1917D-1044.

# 15. REVIEW OF EXERCISE OF DIS-CRETIONARY POWER.

185. Order of Proof—Review of Discretion. The discretion of the court in the exclusion of evidence offered in rebuttal, but which was, in fact, a part of the plaintiff's case in chief, will not be reviewed, where no abuse of discretion is shown. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.

186. Admission of Evidence. The question whether the admission of testimony given at a former trial is necessary to prevent the miscarriage of justice is addressed to the sound discretion of the court and is reviewable only for abuse of such discretion. Levi v. State (Ind.) 1917A-654.

(Annotated.)

187. Trial—Limiting Number of Witnesses. It is within the discretion of the trial court to limit the number of witnesses a defendant charged with criminal offense may introduce on a single point in issue, and unless it appears clearly that there has been an abuse of discretion, which was prejudicial to defendant, an appellate court will not consider it cause for reversal. Samuels v. United States (Fed.) 1917A-711.

188. Stay Pending Appeal. The supreme court has no power to review the refusal of the lower court to annul the effect of an appeal from an order refusing to grant a preliminary injunction; such being a matter expressly left to the discretion of the court in which the proceedings are

pending. Crownfield v. Phillips (Md.), 1916E-991.

189. Dissolution of Attachment. In such case, and on the assumption in favor of the appealing party that the writ in the original action had never been entered in the court so that the order might be regarded as a final judgment, the attachment was dissolved in the exercise of judicial discretion, and no error was apparent where there was nothing to indicate that such discretion was not wisely exercised. Richardson v. Greenhood (Mass.), 1918A-515.

#### 16. PRESUMPTIONS ON APPEAL.

#### a. In General.

190. Hearing in Open Court. In such case, where the law required that the proceedings be heard in open court, it will be presumed, notwithstanding a consent that the decree should be made at chambers, that it was made in open court. Glover v. Bradley (Fed.) 1917A-921.

191. Presumptions—Duty to Show Error. It is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist, every presumption being in favor of the correctness of the respective rulings of the trial court. Henry v. Spitler (Fla.) 1916E-1267.

# b. As to Motions.

192. Denial by Substitute Judge. Where the motion for a new trial was heard and denied by a judge called in, his order cannot be aided by those presumptions indulged in favor of a like order made by the trial judge. Smith v. Barnes (Mont.) 1917D-330.

#### c. As to Rulings on Pleadings.

193. Ruling on Demurrer. Where record shows appellant filed a demurrer but does not show that any ruling was made thereon, it is presumed the demurrer was overruled. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

194. An appellate tribunal is disposed to adhere to the construction of the complaint adopted by the trial court, and where that court has placed a reasonable construction upon a complaint open to two constructions, and has proceeded to a determination of the cause upon such an understanding of its scope, the supreme court will not be forward to adopt a different construction and reverse the case. Gilchrist v. Hatch (Ind.) 1917E-1030.

#### d. As to Evidence.

195. Presumptions to Support Judgment. Where the petition in an action on a contract did not allege whether the contract

was in writing or oral, the court on appeal from a judgment granting relief under the contract will presume, in the absence of the evidence, that the contract was written if a writing is necessary to support the judgment. Myers v. Saltry (Ky.) 1916E-1134.

196. In the absence of a transcript, the court on appeal may presume that proof of a written contract sued on was introduced without objection and that plaintiff without objection proved an express promise to pay the debt demanded, such as would take it out of the statute of limitations. Myers v. Saltry (Ky.) 1916E-1134.

### e. As to Instructions.

197. Issues submitted to the jury in instructions not brought to the supreme court for review will be presumed to have been properly submitted. Schas v. Equitable Life Assurance Soc. (N. Car.) 1918A-679

198. An instruction will be presumed correct, where the evidence on which it is based is not set out in the abstract. Ottumwa v. McCarthy Improvement Co. (Iowa) 1917E-1077.

#### f. As to Verdict.

199. Finding on Issue not Submitted. If all the material issues were not submitted to the jury which found for plaintiff, and no question was requested by defendant to cure the omissions, it will be presumed on appeal by defendant that the court found in plaintiff's favor on any material issue not submitted. Rowlands v. Chicago, etc. R. Co. (Wis.) 1916E-714.

200. Verdict on Proven Acts. It will not be assumed that the verdict was rested on any act of which there was no evidence. Borok v. Birmingham (Ala.) 1916C-1061.

# g. As to Judgment.

201. Where the record is without a transcript of the evidence, the court on appeal will presume that the omitted parts of the record will support the judgment. Myers v. Saltry (Ky.) 1916E-1134.

202. All intendments favor the judgment of the court below. Hihn-Hammond Lumber Co. v. Elsom (Cal.) 1917C-798.

# 17. REVERSIBLE ERROR.

#### a. In General,

203. It appears from the theory had of the case on trial and on appeal that no title can ever be shown to have been in plaintiffs, and that they can never recover on the basis of title having passed to them, and are therefore without possibility of relief in this action; and the same is accordingly ordered dismissed. Thornbill v. Olsen (N. Dak.) 1917E-427.

204. Misconduct of Inadmissible Matter Before Jury. The action of the attorney for plaintiff suing for a personal injury in stating on the examination of jurors on their voir dire that the damages recoverable would be paid by an insurance company, and in compelling defendant on cross-examination to state that sums paid by him to plaintiff for a release had been repaid by an insurance company, is reversible error as rendering the jury careless as to the amount of the verdict on the theory that defendant was protected from liability. Vasquez v. Pettit (Ore.) 1917A-439. (Annotated.)

205. Misconduct of Judge—Reference to Failure to Call Witness. Where, in an action on certain notes, the alleged signatures of indorsers are claimed to be forgeries, a question by the trial judge to plaintiff's counsel as to why he did not call the maker to testify as to the genuineness of the indorser's signatures is prejudicial error. Fourth National Bank v. McArthur (N. Car.) 1917B-1054.

# b. Error must be Clearly Shown.

206. A verdict approved by the trial court will not be disturbed unless in case of clear error. Marinette v. Goodrich Transit Co. (Wis.) 1917B-935.

207. Burden of Showing Error. An appellant attacking a judgment on special findings has the burden of showing that there is no finding which will support the judgment. In re Williams' Estate (Mont.) 1917E-126.

208. Newspaper Publication. The appellate court will not set aside a verdict of conviction on account of the fact that newspaper articles were published which may have influenced the jurymen, where there is no showing that an impartial panel or impartial talesmen could not have been obtained or that defendant was denied his privilege of examining the jurymen on the voir dire, and of thus showing their prejudice and protecting his rights. State v. Gordon (N. Dak.) 1918A-442.

# c. Error must be Material.

209. A judgment will not be reversed because of a ruling which is not material and prejudicial to appellant. Schas v. Equitable Life Assur. Soc. (N. Car.) 1918A-679.

210. Interrogation of Accused Before Sentence. It is not reversible error, even in a capital case, not to ask the prisoner if he has any reason why sentence should not be passed, unless it appears that he was or may have been injured by the omission, but the practice of inquiring any reason why sentence should not be passed is recommended in all cases in which either the death penalty or confinement in the

penitentiary can be imposed. Dutton v. State (Md.) 1916C-89. (Annotated.)

211. Right of Accused to Sit by Counsel. Refusal to permit the defendant to sit by his counsel during the trial was harmless, where it resulted merely in slight inconvenience to such counsel, and no defense on the merits was made, and the uncontradicted evidence for the commonwealth showed defendant's guilt. Commonwealth v. Boyd (Pa.) 1916D-201.

(Annotated.)

# d. Error must be Prejudicial.

#### (1) In General.

212. Voluntary Remittitur by Plaintiff. Where a verdict was not excessive and there is nothing to indicate that the jury were influenced by passion or prejudice, defendant is not prejudiced by the voluntary filing by plaintiff of a remittitur of a part of the recovery, and cannot complain thereof on the ground that the error could be cured only by granting a new trial and not by the filing of a remittitur. Craghead v. McCullough (Colo.) 1916C-1075.

213. Injury Essential. Errors will not cause reversal unless some real injury resulted. Am. Ex. Co. v. Terry (Md.) 1917C-650.

214. A judgment will not be reversed and a new trial granted when the action of the trial judge, even if erroneous, could by no possibility have injured the appellant. Ewbank v. Lyman (N. Car.) 1917A-272.

215. Submission of Exemplary Damages as Harmless Error. Where the jury awarded only \$150 for a physician's breach of his contract to attend a woman during her confinement, the submission of the question of punitive damages is harmless. Hood v. Moffett (Miss.) 1917E-410.

216. Criminal Law — Harmless Error Rule. A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from due process of law during the trial of a cause. Tingue v. State (Ohio) 1916C-1156.

# (2) Error in Ruling on Pleadings.

217. Refusal of Accused to Plead—Failure to Enter Plea. Though the statute provides that, where accused refuses to plead, a plea of not guilty shall be entered, the failure to enter a plea of not guilty is harmless, if erroneous, where the trial proceeds as if accused had so pleaded. State v. Gould (Mo.) 1916E-855.

218. Nonjoinder as Harmless Error — Suit by Insurer to Enforce Subrogation.

Where, after the owner of property destroyed by fire communicated by a locomotive collected the insurance, the railroad company paid the balance of the loss above the insurance, the fact that, in a suit by the insurer against the railroad company, the owner was not made a party, is harmless, if erroneous. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.

219. Where, in an action for rent, the defendant had judgment because it appeared that he had rightfully attorned and paid to the mortgagee, such judgment will not be reversed merely because in his pleading the defendant described the person to whom payment was made as "the owner of the reversion," when it appeared from the pleadings that such person was also the mortgagee. Hinck v. Cohn (N. J.) 1916D-200. (Annotated.)

220. Refusal of Leave to Amend Harmless. Where plaintiff did not recover, the denial of leave to file an amended petition, claiming greater damages, is not prejudicial. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.

221. Permitting Withdrawal of Plea. Error of the court in permitting defendant to withdraw its pleas and file a new plea supported by affidavit and certificate is harmless, where the case has proceeded to trial, and verdict has been rendered in favor of plaintiff for the full amount claimed by her. Shoop v. Fidelity, etc Co. (Md.) 1916D-954.

222. Striking Out Unfounded Plea. Where the relation between plaintiff, suing for a personal injury, and defendant, was that of passenger and carrier, the striking out of defendant's plea of the Workmen's Compensation Act is not prejudicial. Suzznik v. Alger Logging Co. (Ore.) 1917C-700.

223. Overruling Demurrer to Declaration. An erroneous ruling upon a demurrer to each of two counts in a declaration, one of which is insufficient, is not alone ground for reversal, if plaintiff's evidence was admissible under the good count and was sufficient to sustain the cause of action therein averred. Hill v. Norton (W. Va.) 1917D-489.

224. Overruling Demurrer to Plea. Where defendant's plea was improperly held bad on demurrer, but the evidence showed that the plea could not have been established, the error is harmless. McCarver v. Griffin (Ala.) 1917C-1172.

225. Sustaining Demurrer to Part of Pleading. Where every material allegation embodied in an affirmative defense was contained in other parts of the answer, the sustaining of a demurrer thereto in no wise prejudiced the defendant. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

226. Refusal to Compel Amendment. Where a case was tried on the issues of negligence of defendant and of contributory negligence of plaintiff, and defendant was permitted to show contributory negligence as if the complaint had contained matters defendant contended it should contain, the error in refusing to compel plaintiff to amend the complaint is not prejudicial to defendant. Switzer v. Sherwood (Wash.) 1917A-216.

226½. Where the petition in an action for the death of a street-car passenger in setting forth the appointment of a guardian ad litem was defective, but the facts as to the appointment were fully shown, the error in overruling a demurrer to the petition is harmless. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

227. Overruling of Demurrer. Where the issues on a cross-complaint are tendered by the affirmative allegations of the answer of defendant, and the evidence relating thereto is fully presented, and the findings embrace them all, overruling of demurrers to the answers to the cross-complaint is not prejudicial error. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.

228. Statutory Offense Tried as Commonlaw Crime. That the trial judge and solicitor considered that an indictment charged a common-law conspiracy is not prejudicial to defendants merely because of the failure of the judge and solicitor to consider Laws N. Car. 1913, c. 41, punishing combinations in restraint of trade. State v. Craft (N. Car.) 1917B-1013.

229. Deficiency of Pleading Supplied by Proof. Under Ala. Practice Rule No. 45 (61 South. ix), a judgment cannot be reversed because of omitted allegations in the complaint, where the instructions specifically required proof thereof. Best Park, etc. Co. v. Rollins (Ala.) 1917D-929.

230. Refusal to Make Pleading More Certain. Under Rem. & Bal. Wash. Code, §§ 307, 1572, requiring the disregarding of immaterial errors and the consideration of the case on the merits, the erroneous denial of a motion to make a complaint in a malpractice suit more definite and certain as to the usual test for discovering pregnancy, which it was alleged defendant did not use, is harmless, where defendant was not surprised, or precluded from introducing any appropriate testimony. Just v. Littlefield (Wash.) 1917D-705.

231. Defect in Pleading. Under Rem. & Bal. Wash. Code, § 1752, requiring the supreme court to decide the case on its merits, the refusal to grant a nonsuit, in an action for libel, on the ground that, when the motion was made, the complaint contained no allegation that the offending publication was untrue, is not error, where

the complaint negatived the truth of the published charges by the assertion of the opposite, and where the answer averred their truth. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

# (3) Errors in Admission of Evidence.

# (a) In General.

232. Although in a prosecution for larceny of estate moneys by the executor the papers on which his letters were revoked should not have been received over his objection, the error is harmless, when the judge rules that they shall not be read to the jury without defendant's consent. People v. Gibson (N. Y.) 1918B-509.

233. Errors in admission of evidence, if technical and not affecting defendant's substantial rights, must be disregarded, under N. Y. Code Cr. Proc., § 542, requiring judgment on appeal without regard to such errors. People v. Gibson (N. Y.) 1918B-509.

234. Harmless Error—Admission of Evidence Out of Order. The action of the court in admitting evidence as a part of plaintiffs' main case, which was but impeaching evidence, and which could be made proper by plaintiffs' adoption of a different order of proof, is not prejudicial. Williams v. Kidd (Cal.) 1916E-703.

235. Proper Answer to Improper Question. In an action against a surgeon for amputating plaintiff's leg without her consent, where she testified that she was ignorant that it had been amputated for several days after the operation, if a question asked a nurse as to whether plaintiff knew her leg had been amputated is improper as calling for the witness' cognition of the state or operation of plaintiff's mind, it is rendered harmless by her answer that plaintiff would lie there and watch the leg being dressed every time it was dressed, as she stated only cognizable facts. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

236. Admission of Trivial Evidence. In an action against a surgeon for amputating plaintiff's leg without her consent, where plaintiff intimated that from the time she went to the hospital where she was operated on and was put in defendant's charge she was kept in ignorance of the danger of her condition and deceived as to the measures that would be resorted to for her cure, the admission of testimony for defendant, apparently in answer to this contention, that on the morning she was removed to the hospital defendant told plaintiff's mother, who was making the arrangement for plaintiff, that he "would not guarantee her," but that he would do all he could for plaintiff, relates to a matter of so little significance as not to require a reversal, especially as it is probably competent to rebut the contention that defendant made an agreement or promise to restore plaintiff to health or to save her leg. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

237. Irresponsive Answer by Witness. Motion to exclude an answer merely because not responsive can only be availed of by the interrogator. Borok v. Birmingham (Ala.) 1916C-1061.

238. Admission of Evidence — Trial Without Jury. The admissibility of evidence for the plaintiff in a cause tried without a jury will not be considered upon objection by the defendant, where, irrespective of such evidence, sufficient is found in the record to support the judgment. Rogers v. Nevada Canal Co. (Colo.) 1917C-669. (Annotated.)

239. Evidence not Prejudicial—Concealment of Accused by Officers After Arrest. The admission of the testimony of the sheriff of a county in which a murder was committed, that he moved accused from one place to another, and subsequently moved him again because the newspaper reporters had located him, is not prejudicial to accused on the theory that it was necessary for the sheriff to conceal him to protect him and thereby inflaming the minds of the jury against him. State v. Giudice (Iowa) 1917C-1160.

240. Admission of Evidence as to Damages. There being other independent evidence of negligence, any error in admission of evidence thereof, which would in all probability go only to the quantum of damages, is not sufficiently prejudicial to require reversal; affirmance being, because of excessive damages, conditional on remission of part of recovery. Cranford v. O'Shea (Wash.) 1916C-1081.

241. The prejudicial effect of the admission of such evidence is not cured by the action of the prosecuting attorney in desisting from that line of proof after the court intimated that the evidence of the daughter's illness must be limited to the question of her symptoms, where the evidence is never stricken from the record and the whole subject of the daughter's illness and death is subsequently opened in rebuttal. People v. Buffom (N. Y.) 1916D-962

#### (b) Instruction to Cure Error.

242. Where, in an action for a railroad brakeman's death by catching his foot in the unblocked space between the main and guard rails, the court submitted, as the only ground of negligence, the failure to block such space, the admission of evidence of loose boards lying near the place of accident could not have prejudiced defendant. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637.

243. Evidence Stricken Out. The erroneous admission of evidence is not prejudicial, where it was stricken from the record, and the jury admonished to disregard it. State v. Inlow (Utah) 1917A-741.

244. Issue not Submitted to Jury. In an action on a policy on a stallion, where the plaintiff was allowed to testify that, in signing an application which the company's agent had filled out falsely, he had no intention of committing fraud, and where the court, in submitting the question of fraud, instructed that if the insured truthfully states the facts to the agent who fills out the answers in the application, and the party securing the insurance does not read over the application, and does not have it read over to him, and has no reason to suspect disparity between the application and his answers, he may recover, and is not guilty of fraud, although the agent has placed in the application different answers than those given him by insured, any error in the admission of the testimony is harmless, since the question of intent was not submitted to the jury. Simmons v. National Live Stock Ins. Co., 1917D-42.

245. Evidence and Instructions on Immaterial Issue. The evidence being conclusive that plaintiff was a proper beneficiary when the member died, the issue of dependency became immaterial, and errors assigned upon the reception of testimony and the instructions of the court upon such issue, even if well founded, are without prejudice. Anderson v. Royal League (Minn.) 1917C-691.

246. Error not Cured — General Remark by Court. Prejudicial error in the admission of evidence that counsel appearing for defendant represented an indemnity insurance company is not cured by plaintiff's counsel stating, at the close of the evidence, that he wanted defendant's testimony (on cross-examination) that certain counsel appearing for him represented an indemnity insurance company, excluded, upon which the court said, "That will not be before you for consideration," as the exclusion attempted was too general and indefinite, the difficulty of eradicating the unfavorable and erroneous impression naturally caused thereby demanding a more definite and comprehensive pointing out of the matter to be excluded, and the court's statement was not sufficient in direct, positive, and unequivocal instruction to eradicate such impression, which should have been eliminated by an affirmative instruction to entirely disregard the whole matter for all purposes, especially in view of the fact that the attempted exclusion was made some time after the admission of the evidence, during which time an impression might have been made on the jury, which

the court's statement failed to condemn and remove. Watson v. Adams (Ala.) 1916E-565.

247. Care and caution is to be exercised in the delicate, difficult, and important matter of removing the prejudicial effect of evidence improperly admitted, the burden of which rests upon the party causing its admission, and no duty rests upon the other party in that connection after seasonably and properly reserving his exception to its admission. Watson v. Adams (Ala.) 1916E-565.

248. In a prosecution of a wife for the murder of her husband, who died of arsenical poisoning, the prejudicial effect of admitting evidence concerning the illness and death of their daughter, apparently from poisoning, long after the death of the husband, is not cured by an instruction tending to limit the effect of such evidence to illustrate the symptoms caused by arsenical poisoning. People v. Buffom (N. Y.) 1916D-962.

# (c) Evidence as to Admitted or Proven Facts.

249. Admission of hearsay evidence is not prejudicial, where the same fact is established by other proof in the record. Taylor v. Moseley (Ky.) 1918B-1125.

250. Harmless Error. In a proceeding under the Mich. Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10), the determination of the Industrial Accident Board will not be reversed because of the admission of hearsay evidence, where competent evidence making a prima facie case is uncontradicted. Reck v. Whittlesberger (Mich.) 1916C-771.

251. Admission of Cumulative Testimony. In an action against a railroad for death of a switchman in service, where the conductor of the switching crew testified as to the exact earnings of switchmen, the admission of testimony of the fireman of the crew as to the average earnings of switchmen per month is not prejudicial to defendant, as the evidence is only cumulative. Devine v. Delano (Ill.) 1918A-689,

252. Evidence of Fact Otherwise Proved. Any error in admitting copies of letters was harmless, their only effect being to explain the purpose of later correspondence, and such purpose being made evident by subsequent letters in evidence, and their effect as proof of a certain matter being merely cumulative, so that they might be excluded without materially lessening the effect or weight of the correspondence as evidence for the purpose for which it was offered. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.

253. Trial Without Jury. In a cause tried by the court without a jury, the ad-

mission of incompetent evidence cannot be assigned as error on appeal, unless some proposition essential to sustain the judgment has no other evidence to support it. Hannah v. Knuth (Wis.) 1917C-681.

(Annotated.)

254. Trial Without Jury. In an equity case tried de novo in the supreme court, the admission of incompetent, irrelevant, or immaterial evidence is not reversible error, if there is sufficient competent and relevant evidence to sustain the findings and judgment; the incompetent evidence being disregarded in considering the case. Coe v. Wormell (Wash.) 1917C-679.

(Annotated.)

255. Trial Without Jury. An admission of evidence is harmless, the trial having been without a jury, and there having been other competent evidence sufficient to sustain the findings. Sherman v. Harris (S. Dak.) 1917C-675. (Annotated.)

256. Where incompetent evidence is admitted in a trial without a jury, a reversal is warranted only when the record shows that the competent evidence was insufficient to support the findings, or that the improper evidence affected the result. Rehling v. Brainard (Nev.) 1917C-656.

(Annotated.)

257. Proof of Conceded Facts Harmless. The admission of evidence that a witness for the state discharged his counsel, who was also counsel for the defendant on trial, and told the prosecuting attorney that he was an accomplice to the murder, is not prejudicial to defendant, where it is conceded that he was an accomplice, and defendant's lawyer admits the fact that he had previously represented the accomplice. People v. Becker (Kan.) 1917A-608.

258. In such action error in the admission of opinion evidence as to decedent's knowledge of voltage and connections is harmless, where the facts as to voltage and connections on which the opinion was based are detailed to the jury, so that the witness's opinion is fairly obvious from the facts detailed, which necessarily led to the same opinion. McCarthy's Admr. v. Northfield (Vt.) 1918A-943.

(Annotated.)

259. Hypothetical Questions — Basis — Facts Subsequently Supplied. While it is better to defer hypothetical questions asked expert witnesses until evidence of all the facts hypothesized has been offered, where evidence of such facts is subsequently offered and the error is substantially cured, it does not require a reversal. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

# (d) Irrelevant Evidence.

260. Where in a prosecution for murder the theory of the state was that defend-

ant, a police lieutenant, instigated the crime because deceased, a professional gambler, angry because defendant raided his place, threatened to disclose defendant's connection with gamblers, admission of evidence of conversations between a police commissioner and the captain of a precinct relative to keeping a policeman in the place raided is not prejudicial to defendant. People v. Becker (Kan.) 1917A-600.

261. Cross-examination on Immaterial Matter—Harmless Error. Permitting defendant in a homicide case to be asked on cross-examination whether he had previously carried a revolver, which question was immaterial to the issues involved, if error, is harmless, where he answered in the negative, especially where he had offered in evidence proof tending to show his previous good character as a quiet and peaceable citizen. State v. Cooper (W. Va.) 1917D-453.

# (4) Exclusion of Evidence.

# (a) In General.

262. In an action for wrongful death, the erroneous exclusion of evidence that deceased could not obtain life insurance is harmless. Nicoll v. Sweet (Iowa) 1916C-661.

263. The court's exclusion of a preliminary question, on an issue as to a mother's damage by the wrongful death of her son asking if her husband did not make good wages in order to minimize her pecuniary loss by the death of her som, is not prejudicial to defendant. Brown v. Erie R. Co. (N. J.) 1917C-496.

# (b) Evidence Previously or Subsequently Admitted.

264. Exclusion of Cumulative Evidence. It is not prejudicial error to refuse to allow cumulative evidence of an undisputed fact. Mason v. Bowen (Ark.) 1917D-713.

265. Harmless Error — Question Answered Though Objection Sustained Thereto. Error cannot be predicated on sustaining objection to question asked witness, where the witness answered the question. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.

266. Subsequently Admitted. The erroneous exclusion in a criminal prosecution of evidence of accused's reputation as an honest and good citizen is harmless where the witness was subsequently allowed to answer the question. State v. Schuman (Wash.) 1918A-633.

267. Error in excluding evidence is harmless, where it is subsequently admitted. Streit v. Wilkerson (Ala.) 1917E-378.

# (c) Facts Otherwise Proved.

268. The exclusion of testimony where the facts to be established thereby were brought out by other evidence in the record, is not prejudicial. Taylor v. Moseley (Ky.) 1918B-1125.

269. Where the transcript of the testimony of a witness on a former trial is introduced in evidence, any error in ruling on questions to the witness as to his former testimony is harmless. People v. Becker (Kan.) 1917A-600.

270. Error in the exclusion of such statements, in view of the witness' cross-examination and other evidence leaving no doubt as to his interest in securing a conviction, is a technical error not affecting the defendant's substantial rights which N. Y. Code Cr. Proc., § 542, expressly requires the appellate court to disregard. People v. Roach (N. Y.) 1917A-410.

271. In an action for the death of a hackman, claimed to have been caused by negligent construction of a street, where evidence of criminal charges against him was introduced to show that his mind would have been diverted from his legitimate business, and that he would have been required to spend money in defending them, the exclusion of the indictments themselves, the substance of the charges having been stated, is not error. Richardson v. Sioux City (Iowa) 1918A-618.

272. Death by Wrongful Act — Evidence — Habits and Character of Deceased. Rejection of evidence, in an action for death of a white man, that the negro woman who was accompanying him was a strumpet, is harmless; other evidence admitted tending as fully to show his dissolute character and depraved disposition. Chicago, etc. R. Co. v. Gunn (Ark.) 1916E-648. (Annotated.)

# (d) Error Cured by Verdict.

273. In an action by the grantee of leased premises against the tenant to recover the value of a growing crop delivered by the tenant to the grantor, defended on the ground that the crop was orally reserved by the grantor, where the jury finds for defendant, the exclusion of a question asked the grantee as to what steps he took to protect himself against the delivery of the crop is harmless. Willard v. Higdon (Md.) 1916C-339.

# (e) Immaterial Evidence.

274. Questions to and answers by a witness are not prejudicial to the defendant, where they in no wise tend to connect defendant with the murder charged. Brindley v. State (Ala.) 1916E-177.

275. Error in the exclusion of such evidence was harmless, where it appeared that such defendant, prior to and subsequent to such time, had opened the headgate of its ditches, contrary to the orders of the water officers. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

276. In an action for the conversion of electrical machinery, sold with reserved title, to be placed by the buyer in an electric plant constructed for defendant city, any error in excluding evidence by the mayor and council as to whether they would have consented to having the machinery placed in the plant, had they known of the reserved title, is not reversible, being merely as to purpose and not a fact. Allis-Chalmers Co. v. Atlantic (Iowa) 1916D-910.

# (f) Error Cured by Admission of Counsel.

277. Where the trial court excluded testimony offered by defendant but later changed his ruling after the witness had gone home, and the prosecuting attorney admitted the facts which defendant offered to prove by that witness, the defendant is not thereby prejudiced. Mason v. State (Tex.) 1917D-1094.

# (5) Other Errors in Relation to Evidence.

278. Exclusion of Opinion Evidence. The exclusion of such opinion, if error, is harmless, where it appears that the witness had seen a man fall from a different kind of scaffold, which fact would not have aided the jury in determining whether there was any reason for defendant to anticipate injury from the falling of a man from a staging such as was used in the present case. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115.

279. Sufficiency of Evidence. This court will not grant a new trial, where the evidence is voluminous and conflicting, unless palpably insufficient to sustain the verdict, or the amount clearly evinces partiality, prejudice, or passion on the part of the jury, or that they were misled by some mistaken view of the merits of the case. Hill v. Norton (W. Va.) 1917D-489.

280. Sufficiency of Evidence. The judgment in a case tried without a jury will not be disturbed on appeal, though the evidence is conflicting, where it is supported by any substantial evidence. Rehling v. Brainard (Nev.) 1917C-656.

281. Exclusion of Evidence. Error in excluding evidence which would not have affected the verdict sustained by evidence is not prejudicial. Murphy v. Skinner's Estate (Wis.) 1917A-817.

#### Note.

Effect of admission of incompetent evidence in trial before court without jury. 1917C-660.

- (6) Errors in Instructions.
  - (a) In General.

282. Errors Held Harmless. While some of the grounds of the motion for a new

trial may have presented inaccuracies in the charge or rulings, none of them show error requiring a reversal. Mitchell v. Langley (Ga.) 1917A-469.

283. Instructions and Rulings Approved. No reversible errors appear in the charge or rulings. Thysell v. McDonald (Minn.) 1917C-1015.

284. Instruction on Contributory Negligence Prejudicial. Under Cal. Const., art. 6, § 4½, and Cal. Code Civ. Proc., § 475, directing courts to disregard any instruction on appeal which, in the opinion of the court, does not affect the substantial rights of the parties, in an action against a street railroad by a passenger injured while riding on the step of a car, a charge that, as matter of law, plaintiff was not guilty of contributory negligence in so riding is prejudicial error, as vitally affecting the railroad's substantial rights. Kelly v. Santa Barbara Consol. R. Co. (Cal.) 1917C-67.

285. Duty to State Ground for Refusal. It is not reversible error or ground for new trial for the trial court to fail to call the attention of counsel to typographical errors or misprisions in requested charges, when they are refused on that ground alone. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.

286. Errors Held Ground for Reversal. In this action [against] a railroad company to recover damages for personal injuries, the evidence tends to show that the plaintiff was guilty of contributory negligence, and there is no evidence of money paid out or of indebtedness incurred in endeavoring to have the injured party cured, and no evidence of the extent and value of the loss of service or time, and the amount of the verdict indicates harmful error in the charge that the jury "are entitled to take into consideration any money paid out by the plaintiff in endeavoring to have the plaintiff, Dartha Carter, healed or cured; and loss of time," therefore the judgment should be reversed. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

287. Instructions as to Form of Verdict. In a prosecution for assault with intent to kill with malice, an instruction that, if accused wilfully and of his malice aforethought did shoot at another with intent to kill, he should be found guilty of assault with intent to kill, is erroneous, because failing to require the jury to specify in the verdict whether the act was done with malice is harmless to accused. State v. Gould (Mo.) 1916E-855.

288. Instruction on Immaterial Issue. Any error in instructions, which were expressly confined to other issues than the one involved on appeal, is harmless. In re Rawlings' Will (N. Car.) 1918A-948.

289. Technical Error. Plaintiff whose action for malicious prosecution was dismissed because of the evidence of probable cause, cannot complain of unfavorable instructions, though technically incorrect. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.

290. Failure to Submit Issue. In an action on open account, where defendant set up a counterclaim asserting unpaid salary, the issue being simple and the evidence concerning it so brief that the jury could not have failed to distinctly understand the dispute between the parties in respect to salary, verdict being returned that defendant was not entitled to the salary claimed, any error in the instructions, by not fairly presenting the issue of the counterclaim to the jury, is harmless. Givens v. Pierson's Administratrix (Ky.) 1917C-956.

291. Failure to Submit Contention. Failure, in submitting the issues, in a malpractice case for not seasonably discovering and setting a fracture of the femur just above the knee, to state defendant's contention that he knew of the fracture, but could not heal it, because of synovitis of the knee joint and fractures just above the angle, is harmless; every feature of the defense, as well as plaintiff's case, having been prominently and skillfully brought out during a long trial. Crawford v. O'Shea (Wash.) 1916C-1081.

292. Joint Assignment of Error—Ruling Correct as to One. Where, in an action against several defendants for malicious prosecution, all of them join in an assignment of error, authorizing an allowance of punitive damages, and it appears that actual malice warranting a recovery of punitive damages have been proved as against one of the defendants, the assignment is unsustainable. McIntosh v. Wales (Wyo.) 1916C-273.

Under Va. 293. Misjoinder — Effect. Code 1904, § 3258a, providing that whenever a misjoinder of parties shall appear in any action, the court may order the action and suit to abate as to any party improperly joined, and to proceed against the others, where there was a misjoinder of parties defendant in a husband's action against his wife's parents, brothers, and sister for conspiracy to alienate, a reversal cannot be had because of the refusal of a requested charge that unless the plaintiff proved a conspiracy by all of the defendants there could be no recovery; since no real difficulties from misjoinder of the defendants could arise in view of the stat-Ratcliffe v. Walker (Va.) 1917Eute. 1022.

294. Expert Evidence—Instructions Approved. The instructions of the trial court upon the question of expert opinion evidence held not prejudicial to the rights of

defendant. Jacobson v. Chicago, etc. R. Co. (Minn.) 1918A-355

295. Instruction After Retirement. Where the action of the court in instructing the jury in writing, after their retirement, on a material point, in the absence of counsel, was in no manner prejudicial, reversal will not be ordered. Kimmins v. Montrose (Colo.) 1917A-407. (Annotated.)

296. Instructions Approved. Instructions requested and refused, and those given and challenged as error and argued in the brief, examined and held to submit fairly the issues of fact and to be non-prejudicial. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.

297. In a prosecution for involuntary manslaughter committed by reckless driving of an automobile, although the people's third instruction was erroneous in stating that a speed greater than that mentioned in the statute would be proof of negligence, when by statute they were only made prima facie evidence of negligence defendant is not prejudiced, where other instructions charged that proof of negligence is not sufficient to warrant conviction, and that defendant's violation of law would not, of itself, justify a conviction. People v. Falkovitch (Ill.) 1918B-1077.

# (b) Error Cured by Other Instructions.

297½. Charge Construed as Whole. Error cannot be predicated upon an isolated instruction; but all charges must be construed together, and if any erroneous tendencies in a specific portion are cured by other charges, there is no error. Crawford v. McElhinney (Iowa) 1917E-221.

298. The error in such instruction is harmless where the only evidence of threats is a threat to accuse the other of grand larceny, especially where the court, after reading subdivision 2 of the section, states that that is the one under which the prosecution is brought. Lee v. State (Ariz.) 1917B-131.

299. Refusal of Instruction Given in Substance. Where a requested instruction that the jury might disregard testimony of a witness if they found from the evidence that he had made contradictory statements as to material facts in the case is refused, but others substantially embodying it are given, any error in the refusal is not prejudicial. Patterson v. State (Ala.) 1916C-968.

300. Instructing Orally Harmless. Where the court gives two instructions, one orally over objection and one in writing, substantially identical and both correct, the party objecting is not prejudiced by the giving of the instruction orally. Josephs v. Briant (Ark.) 1916E-741.

301. Proof of Existence of Debts -- Motion for New Trial Raising Question. The evidence did not authorize the court to submit to the jury the question of whether there were no unpaid debts of the estate at all

(a) The ground of the motion for a new trial on this subject did not include an entire sentence; and the same is true in regard to one or two other grounds of the motion for a new trial. If there were no other error, such exceptions would not be considered favorably as causes for reversal; especially in view of the general charge. Sutton v. Ford (Ga.) 1918A-106.

302. Instructions Given in Substance. The refusal of requested instructions is not prejudicial error, where the subject thereof is sufficiently covered by the general charge. Taylor v. Northern Coal, etc. Co. (Wis.) 19160-167.

# (c) Error Cured by Verdict.

303. Allowing Less Than Statutory Penalty. Where, in an action by a city against an auctioneer to recover the statutory penalty for carrying on his business without a license, an instruction stated that the fine might be less than the statute prescribed, followed by verdict and judgment for less, such instruction and judgment are harmless error as to defendant. Kimmins v. Montrose (Colo.) 1917A-407.

304. Instruction Cured by Verdict. Where one not engaged in the real estate business sued for the usual commissions for procuring a purchaser of real estate pursuant to a contract not fixing the compensation, defendant did not offer any evidence of the reasonable value of the services, and the jury rendered a verdict for \$200 less than the customary commission, the error in an instruction authorizing a recovery of the usual commission is not reversible. Morehouse v. Shephard (Mich.) 1916E-305. (Annotated.)

305. Instruction as to Degree not Found by Jury. An instruction which was proper in defining an assault in the third degree, but which was given as defining an assault in the second degree, was without prejudice, even if erroneous in respect to the second degree, where defendant was found not guilty in the second degree, but guilty in the third degree. State v. Lehman (Minn.) 1917D-615.

(d) Error Cured by Reducing Judgment.

306. Cure of Error by Remittitur. Where a judgment is excessive, but capable of correction by computation merely, it will not be reversed by an appellate court if the defendant in error files a remittitur of the excess. Van Boskerck v. Torbert (Fed.) 1916E-171.

(e) Error Cured by Want of Evidence.

307. Refusal of Instructions—Party not Entitled to Recover. In an action for libel and slander, the refusal to give instructions offered by plaintiff, is held not to be prejudicial error, where the plaintiff had no case in any event because the language used was not libelous per se, and the special damages avowed were too remote and speculative to authorize a recovery. Taylor v. Moseley (Ky.) 1918B-1125.

308. As to Exceptions in Statute — No Evidence to Show Exception. Where it appears that accused either killed a girl outright or in an attempt to procure an abortion, but there is no evidence that an operation was necessary to preserve the life of the mother or child, any error in failing to point out the statutory exceptions or justification for such an operation is harmless. State v. Farnam (Ore.) 1918A-318.

309. Permitting Conviction as Accessory -Error Harmless. In a prosecution for receiving the earnings of a common prostitute, the evidence showed that accused, a police officer, directed her to make payments to his codefendant, who ran a cigar store, and that such payments were made for protection. Accused, and his codefendant, who received the payments, were prosecuted and granted separate trials. The court's charge, that to convict the state must prove that the woman was a common prostitute, that either accused himself accepted from her money without any consideration or advised and aided his codefendant to obtain money without lawful consideration, and it was earned in prostitution, is harmless, though erroneous in authorizing accused's conviction as an accessory where the information charged him as a principal, the evidence clearly showing either that accused received the money himself of directed its payment to his codefendant, who did not necessarily know that money was in the envelopes left with the codefendant for accused. State v. Schuman (Wash.) 1918A-633.

310. Harmless Error—Instruction. Such statement of the court is not ground for reversal, even though counsel had not agreed that there was no evidence that the accident happened in any other way, where in fact there was no such evidence. Dishmaker v. Heck (Wis.) 1917A-400.

# (f) Error Cured by Evidence.

311. Assumption of Facts — Harmless Error. In an action for personal injuries, though an instruction that in determining the measure of damages the jury might consider the mental and physical pain and suffering endured by plaintiff in consequence of the injury, the character and extent of the injury, if permanent, together with his loss of time and service, and find for him in such sum as would be reasonable compensation for the injury, assuming that he sustained injury and suf-

fered pain and loss of time, this is unimportant where these facts were not disputed. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.

312. Refusal of Instruction Harmless. In a civil action for rape, where, if the jury believed all the testimony relative to plaintiff's indiscreet conduct to which a requested instruction applied, they could still have reasonably determined from the other evidence that defendant forcibly and unlawfully raped plaintiff against her consent, the refusal of the instruction is harmless. Jensen v. Lawrence (Wash.) 1917E-133.

# (g) Error as to Immaterial or Abstract Matters.

313. Instructions Approved. None of the other grounds of the motion for a new trial, singly or together, show error authorizing the grant of a new trial. There was no error in the rulings in regard to evidence, which were complained of. If there were any slight verbal inaccuracies in expression in one or two of the charges, they were of minor importance, and would furnish no cause for reversal. Sutton v. Ford (Ga.) 1918A-106.

314. Abstract Instruction. In an action against a carrier for damages to shipments of tobacco, an instruction that it was the duty of the defendant and its connecting carriers, after the tobacco had been damaged by flood at an intermediate point, and as soon as conditions there would permit, to promptly carry it to destination, and that defendant and its connecting carriers failed to perform such duty by reason of which the tobacco was further damaged, in so far as bearing on the question of promptness, merely prefatory and abstract, and not submitting the question itself, is not prejudicial to defendant. Louisville, etc. R. Co. v. O'Brien (Ky.) 1917D-922.

315. Irrelevant Instruction — Harmless Error. In an action against a street railway company for damages from a collision with plaintiff's team, where the court correctly states the rule as to the operation of street cars, the fact that he also instructs that the rules for the operation of steam cars differ from those for the operation of street cars is not prejudicial. Pollica v. Twin State Gas, etc. Co. (Vt.) 1917C-1240.

316. In such action an instruction that, if defendant's employees knew, or ought to have known, that decedent was in a place of danger, it was their duty to have given warning, is not prejudicial error. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-167.

317. Refusal of Instruction Harmless. In an action for the death of plaintiff's decedent, a licensee, while repairing a

coal-laden steamer at defendant's discharging dock, from coal dropping from the discharging buckets, where the questions whether decedent was warned not to be on the dock between the hoisting rig and the boat while the hoisting apparatus was in operation were immaterial, and, if eliminated, would have left findings sufficient to support the verdict, a charge putting the burden of proof upon the defendant on the issues made on such questions is not reversible error. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-167.

# (7) Rulings as to Witnesses.

318. Leading Questions. This court will not reverse a case on the ground that leading questions were asked, unless it is shown that there was a flagrant abuse of judicial discretion. Hammett v. State (Okla.) 1916D-1148.

319. Improper Cross-examination — No Material Fact Elicited. In an action for injuries to plaintiff's delivery wagon in a collision with defendant's street car, where defendant's witnesses stated on cross-examination that they could not remember whether the bell on the car was rung or how far the car step projected into the street, their testimony is not prejudicial to defendant, even though not proper cross-examination. Davidson Bros. Co. v. Des Moines City R. Co. (Iowa) 1917C-1226.

# (8) Findings.

320. Other Findings Sufficient. Where findings as to fraud in the procuring of a guaranty are clear, full, and explicit, and are themselves sufficient to support the judgment, uncertainty in other findings will be disregarded. American National Bank v. Donnellan (Cal.) 1917C-744.

321. Inconsistency of Findings. It is only when a judgment rests on some particular finding for its validity and support that the lack of sufficient evidence to support such finding or the contradictoriness between two findings treating of the same essential matter will necessitate a reversal. American National Bank v. Donnellan (Cal.) 1917C-744.

322. Finding by Referee. A referee's findings of fact, when sustained by the court, cannot be disturbed on appeal, in the absence of manifest error. Miller v. Dilkes (Pa.) 1917D-555.

323. Error in Unnecessary Finding. A finding on one issue being sustained by the evidence and justifying the judgment, any errors as to other issues are immaterial. In re Rawlings' Mill (N. Car.) 1918A-948.

324. Immaterial Finding not Supported. That some of the special findings are not supported by the evidence will not war-

rant the overturning of the judgment where there are other special findings supported by evidence which warrant the judgment. In re Williams' Estate (Mont.) 1917E-126.

(9) Submitting Equity Case to Jury.

325. Directing Jury Trial of Equitable Issue. The error in directing a trial by jury of the issue, in a suit to restrain a nuisance, is immaterial, where the jury failed to agree, and the court, at the request of both sides, set aside the order for submission and disposed of the controversy on the evidence in the case, including that taken before the jury. Face v. Cherry (Va.) 1917E-418.

# (10) Striking Out Parties.

326. A judgment will not be reversed for technical error in striking out the names of certain plaintiffs where no prejudice results to defendant therefrom. Sweetser v. Fox (Utah) 1916C-620.

# (11) Misconduct and Argument of Counsel.

327. Remarks of Counsel — Prejudice. Where counsel on a murder trial was given every opportunity to bring all the facts before the jury, and the court in sustaining an objection to a statement by the prosecuting attorney that, of the articles coming into the possession of the chief of police, a cap was the most important, remarked that the assumption implied something that was not of record and not evidence in the case, error, if any, in such remark is not prejudicial. State v. Mewhinney (Utah) 1916C-537.

·328. Instruction to Disregard. Remarks of counsel in argument, which, when objected to, the court instructs the jury to disregard, are not cause for reversal of a judgment on a verdict otherwise free from error. State v. Cooper (W. Va.) 1917D-453.

329. Misconduct Harmless. Improper argument of counsel, the only injurious effect of which would be to enhance damages, will be deemed harmless; the verdict not being complained of as excessive. Chicago, etc. R. Co. v. Gunn (Ark.) 1916E-648.

330. Curing Misconduct. The prosecuting attorney in his closing argument read to the jury certain testimony which had been stricken by the court. Upon objection, the prosecutor insisted that he was reading from the record of the official stenographer, and that the evidence was not stricken, and the court overruled the objection. The court also refused an instruction that the evidence had been stricken, and that the jury should not consider it or the remarks by the prosecutor, and, in-

stead, charged that it appeared from the record that the evidence had been stricken out and they should therefore disregard it, adding that the reference by the counsel for the defendant to the fact that the evidence was not furnished by the state was also withdrawn from the jury. Held, that the instruction given was too vague and uncertain, that the defendant was entitled to an emphatic instruction that the jury should disregard the evidence, and the remark by the counsel thereon and the court's action in the matter constituted reversible error. Levi v. State (Ind.) 1917A-654.

331. Misconduct of Counsel Harmless, Misconduct was harmless where the court admonished the jury that their verdict must be based upon the evidence and not upon statements of counsel, for the jury must have understood that the evidence referred to was immaterial and irrelevant. State v. Inlow (Utah) 1917A-741.

332. A judgment should never be reversed by reason of misconduct of counsel at the trial, unless the appellate court is of the opinion such misconduct had prevailing influence upon the jury, to the detriment of appellant. Theriault v. California Ins. Co. (Idaho) 1917D-818.

#### Note.

Restricting argument of counsel in criminal action as constituting reversible error. 1917A-718.

# (12) Refusal of Continuance.

333. Denial Held Harmless — Facts Proved Without Absent Witness. Sections 2986 and 2987, N. Mex. Comp. Laws 1897, require a continuance of a cause for absence of a witness only in case the applicant has "no other witness by whom such facts can be fully proved." Where, after the overruling of a motion for continuance, the desired fact is fully proved by other witnesses, the ruling of the court in denying the continuance, even if technically erroneous when made, is rendered harmless. State v. Chavez (N. Mex.) 1917B-127.

# (13) Transfer of Cause.

334. Effect of Giving Effect to Affidavit Filed Too Late. Even if the affidavit of prejudice against the judge before whom a case is pending for trial is not seasonably filed, any error in his sending it for trial to a judge presiding over another branch of the circuit court for the county is not jurisdictional or prejudicial. Dibbert v. Metropolitan Investment Co. (Wis.)

# e. Errors must Appear from Record. (1) In General.

335. Prejudice of Judge — Absence of Unfair Ruling. Prejudice or fear on the part of the trial judge on account of the publication of a newspaper article cannot be presumed where the record shows that the rulings of such judge were eminently fair. State v. Gordon (N. Dak.) 1918A-442.

336. Only errors of law apparent on the record are reviewable on error. Facts which do not appear in the record may not be brought to the attention of the supreme court by means of exhibits attached to briefs of counsel. Holstein v. Benedict (Hawaii) 1918B-941.

337. Error must be affirmatively shown, and is not shown with respect to the suppression of a deposition on a motion on the ground, among others, that notice of the time and place of taking the deposition was not given, where the evidence on the motion, if any was taken, is not before the Supreme Court and it did not appear that the deposition was not suppressed for lack of compliance with the statute. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

# (2) Errors in Ruling on Evidence.

338. Matters not Shown by Record. Alleged errors in rulings on evidence may be disregarded; the rulings and objections not being shown by the abstract. People v. Elliott (III.) 1918B-391.

- 339. Grounds of Motion. Where the abstract does not state the grounds assigned for a motion to withdraw testimony from the jury, the exception will be overruled. Davidson Bros. Co. v. De Moines City R. Co. (Iowa) 1917C-1226.
- 340. Question Reviewed Evidence not in Record. Where on appeal from a judgment sustaining a lien of attorneys for fees against papers in their possession the certificate of evidence as to their lien was not in the record, the judgment cannot be reviewed on the question of the character of their possession of the papers. McCracken v. Joliet (Ill.) 1917D-144.
- 341. Sufficiency of Record Showing as to Excluded Testimony. The exclusion of the testimony of a competent witness which should have been admitted is not error, where the record does not show that his testimony would have been favorable to the appellant. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.
- 342. Omission from Record. Though a telegram was erroneously admitted in evidence, no inference of prejudice can be indulged in where the telegram is not set out in the abstract. Ottumwa v. McCarthy Improvement Co. (Iowa) 1917E-1077.
- 343. Sufficiency of Record—Showing as to Excluded Testimony. Error cannot be predicated on the exclusion of questions

where the expected answers are not shown by the record on appeal. Schas v. Equitable Life Assurance Soc. (N. Car.) 1918A-679.

- 344. Exclusion of Evidence. That plaintiff may complain of exclusion of his evidence, offered to meet defendant's evidence of C's declarations, the record should show that defendant was permitted to prove C's declarations. Comstock's Administrator v. Jacobs (Vt.) 1918A-465.
- 345. Admission of Evidence. Where the record does not show what a paper was or its relation to the case, error in permitting a witness to testify that a request was made for a paper which was delivered to a deputy sheriff who said he wanted to read over the statement, is not prejudicial. State v. Giudice (Iowa) 1917C-1160.
- 346. Record not Showing Importance of Testimony. Where the record does not show what an exhibit referred to by a witness was, and by whom signed, accused is not prejudiced by the testimony of an officer who was at the jail when the exhibit was signed and who heard the talk between the county attorney and accused prior to the making thereof, that no promise was made, though the officer should have been required to give the conversation instead of his conclusion. State v. Giudice (Iowa) 1917C-1160.
- 347. Ruling on Unidentified Exhibit. Where the record does not disclose what an exhibit was, the court on appeal cannot say that the trial court erred in refusing to permit an identification of the exhibit. State v. Giudice (Iowa) 1917C-1160.
- 348. Documents Excluded at Trial. Documentary evidence excluded below cannot be considered on appeal, though incorporated in the abstract. Schworm v. Fraternal Bankers Reserve Soc. (Iowa) 1917B-373

### (3) Error in Instructions.

- 349. Questions Presented by Record. The general rule applied, that on exceptions to instructions given or requests therefor refused, the charge given to the jury should be in the record. Holstein v. Benedict (Hawaii) 1918B-941.
- 350. Necessity of Showing Exceptions. Where no exception to instructions, given or refused, appears in the statement of facts, they will not be reviewed. Harris v. Bremerton (Wash.) 1916C-160.

#### (4) Error in Argument.

351. Absent the transcript, or an agreement dispensing with it, exceptions to argument of counsel cannot be considered, the bill of exceptions referring to the transcript on this question, and so making it controlling, and there being in the bill of exceptions, not the precise language of

the argument, but only a meager statement of it. Comstock's Administrator v. Jacobs (Vt.) 1918A-465.

#### (5) Error in Rulings on Pleadings.

352. As the object of the rule requiring an assignment of errors is to enable the court and the opposing counsel to know on what points the counsel for plaintiff in error intends to ask a reversal and to limit the discussion to these points, it is a commendable practice to assign only such rulings as are complained of as reversible error, and where plaintiff in error relied on the overruling of a demurrer to the petition for a reversal and assigned such ruling as error, the writ of error would not be dismissed, because of his failure to assign as error the rendition of the judgment adverse to him, especially in view of rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) which provides that the court at its option may notice a plain error not assigned. Blalock v. Georgia R. etc. Co. (Fed.) 1917A-679.

#### f. Errors not Available.

# (1) Questions not Raised Below.

# (a) In General.

353. Capital Case. In a capital case, where justice requires it, the court of appeals may review errors, though no exception was taken. People v. Watson (N. Y.) 1917D-272.

354. Argument of Counsel. The general rule is that counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his argument to the jury, and after verdict obtain a reversal because of matters not objected to at the time. Kriss v. Union Pacific R. Co. (Neb.) 1918A-1122. (Annotated.)

355. Agreement Dispensing With Timely Objection. Where it was agreed that to avoid interruption accused might have an exception to everything that was said by the prosecuting attorney in his argument, and misconduct of the prosecuting attorney was made one of the grounds of a motion for new trial, the state cannot insist that objection to improper argument should have been made. State v. Giudice (Iowa) 19170-1160.

356. Questions not Raised Below. Where the jurisdiction of a court of another state in probate proceedings is attacked in the surrogate's court on the sole ground that notice was not served upon the parties, the objection cannot be raised on appeal that the court was without jurisdiction because the testator did not have his domicile in the state where the proceedings were held. Matter of Horton (N. Y.) 1918A-611.

357. Scope of Review—Test Case. Where the mutually professed object of an appeal is to test the validity of a statute, assignments which cannot aid in the decision of that question will not be considered. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

358. Separation of Conjugal Property. Taking the date of a divorce decree as the date for liquidating the wife's claim for a division of the conjugal property cannot be held erroneous on appeal to the Federal Supreme Court from a decree of the supreme court of the Philippine Islands, on the grounds that there was no formal decree of separation of the property, and no such inventory as was required by law, where there is nothing in the record sufficient to control the opinion of the latter court that the method adopted by the judge of first instance "in liquidating the assets of the conjugal partnership was substantially in accord with the method prescribed in the code." De La Rama v. De La Rama (U. S.) 1917C-411.

359. The Federal Supreme Court will not reverse a decree of the supreme court of the Philippine Islands on objections that a division of the conjugal property could not be asked in a divorce suit in the Philippine courts, but must proceed on the footing of a decree already made, and that the judge of first instance who decided the cause was illegally designated, where such objections were not presented to the court below, nor assigned as error on the appeal. De La Rama v. De La Rama (U. S.) 1917C-411.

360. Saving Questions for Review—Misconduct of Counsel. A claim of misconduct of counsel cannot be urged as ground for reversal, unless it is made a ground of the motion for a new trial in the court below. Price v. Minnesota, etc. R. Co. (Minn.) 1916C-267.

361. Contention not Made Below. In an action to recover payments under a contract for the purchase of land which the purchaser had attempted to rescind, where no claim was made in the trial court that there was a rescission by mutual agreement, no such claim can be made in the Supreme Court. Brown v. Aitken (Vt.) 1916D-1152.

# (b) Sufficiency of Pleadings.

362. Order Sustaining Demurrer. An order sustaining a demurrer to the answer being made upon the matter in writing and on file in the court, no exception is necessary under Ore. L. O. L., § 172, to obtain review on appeal. Pullen v. Eugene (Ore.) 1917D-933.

363. Questions Presented by Record—Admission of Evidence. An assignment of

error upon the admission of testimony, where the evidence objected to is neither literally nor substantially set out, cannot be considered. Gordon v. Spellman (Ga.) 1918A-852.

364. Objection not Ruled on Below. Where there was no ruling by the court below upon the complainant's objection to the defendant's answer, it will be passed on appeal without further notice. Vidmer v. Lloyd (Ala.) 1917A-576.

365. Validity of Count not Considered Below. Where an affidavit filed in recorder's court for violation of an ordinance was treated on appeal to the criminal court as importing the charge tried, and under it guilt was determined, whether the other count of the affidavit, or the statement filed in the criminal court, both attempting to charge a like offense, were sufficient or not, is immaterial on a further appeal. Borok v. Birmingham (Ala.) 1916C-1061.

366. Objection not Made Below. An objection that causes of action set out in a petition are inconsistent, not called to the attention of the trial court, will not be considered when presented for the first time in this court. Stewart v. Murphy (Kan.) 1917C-612.

367. Criminal Law—Necessity of Exception—Ruling on Flea in Abatement. A plea in abatement filed in a case is a part of the record, and it is not necessary to except to the action of the court in sustaining a demurrer thereto in order to claim the benefit of error alleged to have been committed in sustaining the demurrer. State v. Wetzel (W. Va.) 1918A-1074.

368. Review—Necessity of Objection Below—Variance. On rehearing, it having been called to the attention of the court that no motion was made for an instructed verdict on the ground of a variance between the indictment and proof, or such variance in any manner called to the attention of the trial court, the judgment of reversal is set aside, as it is a well-established rule of this court that the question of variance, between the allegations in the indictment and the proof, unless raised in the court below, cannot be reviewed here. State v. Klasner (N. Mex.) 1917D-824.

# (c) Reception and Rejection of Evidence.

369. Where defendant did not object to testimony offered at the trial, the question of the competency of any part of it cannot be made for the first time on appeal. Brindley v. State (Ala.) 1916E-177.

370. A wrong judgment, whereby a plaintiff corporation was defeated in the trial court, will not be upheld in this court on the sole ground that the corporate existence of the plaintiff was not proved, when that corporate existence was not

treated as one of the issues on trial, and such failure of proof is presented and is called to the attention of the unsuccessful party for the first time in this court. Insurance Co. v. Baer (Kan.) 1917B-491.

371. Ruling not Availed of. Error in overruling defendant's objection to a question asked plaintiff's witness is harmless where the question was never answered. Corry v. Sylvia Ylia (Ala.) 1917E-1052.

372. The fact that the attorney was permitted to testify before the referee in violation of a code provision could not be considered on appeal, where no objection was made to such testimony. Matter of Howell (N. Y.) 1917A-527.

373. It not having been claimed at the trial that the official character of witness affected the admissibility of a declaration made to him, such question cannot be considered on review of exclusion of the declaration. Comstock's Administrator v. Jacobs (Vt.) 1918A-465.

374. Reception of Evidence. In an action for malicious prosecution, where defendants offered the testimony of a deputy prosecuting attorney as a part of their case, which testimony was consented to by the plaintiff, and he was called solely to identify a certain exhibit, any error in his cross-examination as to the facts actuating his office in prosecuting the plaintiff is cured by its admission without objection. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.

375. An objection to the admission of evidence cannot be considered on appeal when not made below. Myers v. Bender (Mont.) 1916E-245.

376. Necessity of Objection Below. An alleged error in admitting in evidence the contents of a letter, the loss of which it was claimed was not sufficiently proved, cannot be reviewed where the finding did not disclose that any claim was made in the trial court as to the insufficiency of the proof of loss, since, had such claim been made, other evidence would undoubtedly have been required. New York, etc. R. Co. v. Cella (Conn.) 1917D-591.

#### (d) Errors in Instruction.

377. Striking Out Unnecessary Matters. Where no objections are interposed to the oral charge, and no exceptions are reserved to it as a whole, or to any part thereof, and it is, as a whole, incorporated into the bill of exceptions by the party taking the plea, it is not error for the trial judge to strike it out of the bill signing it. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.

378. Objections to instructions cannot be raised on appeal, where they were not excepted to, and were not questioned, either

in the motion for new trial or for judgment non obstante veredicto. Gust v. Littlefield (Wash.) 1917D-705.

- 379. Necessity of Exception. Where no exception is saved to an instruction, it cannot be considered on appeal, under Iowa Code Supp. 1913, § 2705a, providing that all objections or exceptions to instructions must be made before they are read to the jury and must point out the grounds thereof with reasonable exactness. State v. Stanton (Iowa) 1918A-813.
- 380. Necessity of Decision Below. The Supreme Court reviews only questions considered and determined by the court below, and therefore will not review the correctness of the submission of a case, where it has been submitted from the standpoint in which both parties manifestly tried it. Richardson v. Flower (Pa.) 1916E-1088.
- 381. Error in Instructions. Under Ore. Const. art. 7, § 3, as amended, providing that, if the Supreme Court shall be of opinion that the judgment appealed should have been rendered, such judgment shall be affirmed notwithstanding any error at the trial, a judgment on a verdict for defendants in an action for an unlawful search will be affirmed where the court instructed that, if the officer in executing the warrant unnecessarily offended those present, the search warrant could be of no protection to him, and that otherwise would constitute a defense as to both defendants, even though the search warrant was issued without probable cause and maliciously by the defendant justice of the peace, to which language no exception was taken, though the court erroneously instructed that the process under which defendants justified was regular on its face and justified the obedience to its commands. Smith v. McDuffee (Ore.) 1916D-947.
- 382. Where no exceptions are taken to instructions given by the court of its own motion, error cannot be assigned on such instructions. State v. Klasner (N. Mex.) 1917D-824.
- 383. Criminal Law—Review—Necessity of Exception. N. Y. Code Cr. Proc. § 528, declares that, in case of a death sentence, the Court of Appeals may order a new trial, if justice requires it, though no exception was taken. No exception was reserved to an instruction charging that accused, whose assailant attacked him in his dwelling house, should have retreated. Accused claimed self-defense, and admitted, on cross-examination, that if he had fled from his house he would have been safe. Held, that a conviction of murder in the first degree must be reversed, though no exception was reserved to the instruction, for it deprived accused of all benefits of his plea of self-defense. People v. Tomlins (N. Y.) 1916C-916.

- (e) Errors in Findings or Verdict.
- 384. Necessity of Objection—Failure to Make Finding. Failure to raise, in the trial court, the question that the master's report made no finding whether plaintiff was guilty of adultery, waives such question. Klekamp v. Klekamp (III.) 1918A-663.
- 385. Where the correctness of a finding was not challenged, appellant cannot make it the basis of an appeal. Weber v. American Silk Spinning Company (R. I.) 1917E-153.
- 386. Necessity of Exception—Direction of Verdict. Error in directing a verdict for defendant is not reviewable by the supreme court, unless excepted to. Barnum v. Chamberlain Land, etc. Co. (S. Dak.) 1917A-848. (Annotated.)
- 387. Findings by Master—Necessity of Exception. Objections to a decree, based upon a master's findings not excepted to before confirmation, and not apparently erroneous, are ineffectual as grounds for reversal in an appellate court. Williams v. S. M. Smith Ins. Agency (W. Va.) 1917A-813.
- 388. Necessity of Exceptions. On appeal from a decree in equity, assignments of error in the admission of evidence and in findings of the trial court are defective where no exceptions are shown to have been taken to the action of the court and it does not appear that any action was taken by the court in banc with reference to the findings. Duquesne Light Co. v. Pittsburgh (Pa.) 1917£-534.

#### Note.

Necessity of exception to direction of verdict. 1917A-849.

- (f) Rulings on Motion for New Trial.
- 389. Necessity for Exceptions—Denial of New Trial. An assignment based upon the denial of the motion for a new trial cannot be considered by an appellate court, in the absence of an exception to such ruling. Henry v. Spitler (Fla.) 1916E—1267
- 390. Necessity of Exception. In the absence of an exception to the denial of a new trial, such denial could not be reviewed, to determine whether it was an abuse of discretion. Philadelphia, etc. Rs Co. v. Gatta (Del.) 1916E-1227.
- 391. The technical error, in the order granting defendants in ejectment a new trial, that the costs be paid "to the clerk," whereas the provision of St. Wis. 1913, § 3092, that they "be paid" means paid to plaintiffs, not having been objected to below, will not avail on appeal. Guaranteed Investment Co. v. Van Metre (Wis.) 1916E-554. (Annotated.)

392. Necessity of Exception—Decision on Stipulated Facts. Where the facts were all stipulated, no exception to the court's decision need be taken under Ore. L. O. L. § 172, declaring that no exception need be taken to any decision upon a matter of law; the judgment being merely an application of the law to the facts. Grice v Oregon-Washington, R., etc. Co. (Ore.) 1917E-645.

# (g) Conduct of Court or Counsel.

393. Remarks of Counsel. The question as to the alleged prejudicial remarks of the state's attorney being raised for the first time in the trial court on motion for new trial will not be reviewed. People v. Falkovitch (Ill.) 1918B-1077.

394. Remarks Addressed to Jury in Another Case—Prejudice. In a prosecution for conspiracy, where the state's attorney was excused at his request for a few minutes, an interval of which the court availed itself to sentence one convicted of murder in the second degree, taking occasion, in the presence of the jury in the conspiracy case, to express at some length its views as to the insufficiency of a defense in the murder case, where no exception was taken by the conspiracy defendants to the expressions of the court, and no suggestion made at the time that they might have a prejudicial influence, such action presents no question for review. Hummelshime v. State (Md.) 1917E-1072.

# (h) Denial of Continuance.

395. Where the record fails to show that appellant, when he applied to the trial court for a continuance, brought to the attention of the court, by his affidavit or otherwise, the fact that he had been cited to appear in another court on the day of the trial, the action of the court in denying the continuance will not be disturbed. Neven v. Neven (Nev.) 1918B-1083.

#### (2) Sufficiency of Objection or Exception.

# (a) Rulings on Evidence.

396. Sufficiency of Evidence. Though accused, by proceeding with his defense, when his motion to direct a verdict at the close of the case for the state was denied, and failing to renew it later, waived the right to claim on appeal that there was no case for the jury, yet his motion for new trial on the ground that the evidence was insufficient to support the verdict, and the denial thereof, will preserve for review the question whether the jury should have found it sufficient. State v. Asbury (Iowa) 1918A-856.

397. Review of Exclusion of Question— Necessity of Offer of Proof. In a trial for murder, there is no error in sustaining an objection to defendant's question to a witness, "What did you all say?" since the question is too general, and does not disclose that the answer sought to be elicited would be material, and since the defendant did not inform the court what was proposed to be proved, so that the court might see whether the evidence sought was proper. Brindley v. State (Ala.) 1916E-177.

398. Motion to Strike. Where objection was made to one question propounded a witness, and sustained without motion made to strike from his answer, though there may have remained in the answer semething not responsive, it cannot be made the basis of error on appeal. Viss v. Calligan (Wash.) 1918A-819.

399. Ground of Objection Below. The question of evidence being incompetent as hearsay cannot be considered on appeal, the overruled objection below being that it was irrelevant and immaterial. Sherman v. Harris (S. Dak.) 1917C-675.

400. Questions Reviewed — Specific Objection. Unless brought to its attention by special bills of exception, or upon a motion for a new trial, specifically stating, as grounds therefor, the admission or rejection of evidence, this court will not consider the rulings of the trial court thereon. Hill v. Norton (W. Va.) 1917D—489.

401. Withdrawal of Evidence—Necessity of Request. Where a witness called by the state testified contrary to her testimony at the preliminary hearing, and the prosecutor interrogated her as to that testimony, accused cannot on appeal complain that the witness' former statements were not wholly withdrawn from the jury, where his own request on that point was substantially given. State v. Unlow (Utah) 1917A-741.

402. Instructions—As to Weight of Evidence—Necessity of Specific Objection. In view of court rule 27 (164 N. C. 548, S1 S. E. xi), providing that it shall not be ground for exception that the court failed to charge the jury as to the effect to be given testimony admitted in corroboration or contradiction, unless such charges are specially requested, the giving of a charge which informed the jury that testimony was to be considered solely in impeachment of a witness, even if error, is harmless. Medlin v. County Board of Education (N. Car.) 1916E—300.

403. Sufficiency of General Objection. A general objection to evidence is no ground of reversal. Garrison v. Newark Call Printing, etc. Co. (N. J.) 1917C-33.

#### (b) Rulings on Instructions.

404. Specific Objection Necessary. If an instruction for plaintiff, correct as far as

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- it went, fails to state a certain qualification which all other instructions given for plaintiff did contain, objection to the omission should be made the subject of specific objection before it can be reversible error. Josephs v. Briant (Ark.) 1916E-741.
- 405. Refusal to Direct Verdict—Necessity of Motion for New Trial. The refusal of the trial court to direct verdict by peremptory instruction cannot be made the basis for an independent assignment of error on appeal; such action must be presented to the trial court as cause for new trial, and the court's refusal to grant it assigned as error. White v. State (Ind.) 1917B-527.
- 406. Necessity of Motion for New Trial. Before the supreme court can reverse a judgment on account of the exclusion of evidence, that evidence must be presented to the trial court when the motion for a new trial is heard. O'Neal v. Bainbridge (Kan.) 1917B-293.
- 407. Failure to Object or Except. A defendant requesting a directed verdict in his favor, may not have the accuracy of statements in the charge of the trial court and the legal effect adjudicated by the supreme judicial court, in the absence of failure to direct the attention of the trial court specifically to the complaint, and to allege exceptions. McLellan v. Fuller (Mass.) 1917B-1.
- 408. Appeal from Magistrate. Objection to the sufficiency of a complaint for violation of an ordinance cannot be made for the first time in the circuit court on appeal. Borok v. Birmingham (Ala.) 1916C-1061.
- 409. Instructions—Necessity of Request. Where a party makes no special request or charge, and does not specially except to the charge given, the appellate court will not reverse for a mere inadequacy in the charge. Hunter v. Bremer (Pa.) 1918A-152.
- 410. Instruction as to Indictment. A motion in arrest of judgment and for new trial on the ground of error in the refusal of instructions does not present the question of the sufficiency of the indictment, though one of the requested instructions was that the indictment did not state an offense, since such instruction was properly refused in any event. State v. Gardner (Iowa) 1917D-239.
- 411. Exceptions to Refusal—Sufficiency of Single Exception. A single exception to three refused instructions will not avail, where one of the instructions is argumentative and the others covered by the general charge. Lee v. State (Fla.) 1917B-236.
- 412. In an action against the indorser of a note which contains a complete waiver of notice of presentment and dishonor,

- though the notice of motion for judgment should allege such waiver, the defect in the notice is harmless, as, in view of the undisputed written waiver, an amendment at bar would be proper. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375.
- 413. Applicable to One Cause of Action -Harmless Error. Though the petition in one count, alleging breach of promise of marriage, seduction, pregnancy, and abor-tion at the instance of defendant, might well be treated as one for breach of promise alone, with the other matters pleaded in aggravation of damages, yet plaintiff having, under Iowa Code, § 3470, also a cause of action for seduction, with right, under section 3545, to prosecute both causes of action in one action, and the court, in receiving evidence and giving instructions, having seemed to rule that both causes of action were alleged, and objection not having been raised to each not being stated in a separate count, as they should, an instruction authorizing recovery of an element of damages recoverable only in an action for seduction is not reversible error; defendant not being prejudiced thereby, Nolan v. Glynn (Iowa)
- 414. In order to object on appeal to the giving of a requested instruction in language different from the request, an objection should be taken to the request as charged and to the refusal to charge as requested. Miller v. Delaware River Trans. Co. (N. J.) 1916C-165.
- 415. Objection to Refusal of Instruction. Notwithstanding the new practice act, the appellate court will not review error in refusing requested instructions, unless appellant, at the time of presentation, objected to the refusal to charge each specific request. Miler v. Delaware River Trans. Co. (N. J.) 1916C-165.
- 416. Necessity of Specific Objection—Harmless Error. Instructions declaring sound propositions of law, though not wholly applicable to the issues, are not reversible error, unless the court's attention was directed thereto at the time and prejudice resulted to the party complaining. Osteen v. Southern R. Co. (S. Car.) 1917C-505.
- 417. Duty to Instruct—Necessity of Request. When the trial court gives a general instruction upon a matter involved in the issues, and a more specific instruction is requested, such request should fairly present the matter as it affects all parties to the litigation. If it fails to do so, to refuse the request will not be prejudicial error requiring a reversal, unless it appears from the entire record that the jury probably misunderstood the real issue for want of a more specific instruction. Kriss v. Union Pacific R. Co. (Neb.) 1918A-1122.

- 418. Nocessity of Specific Objection. Where counsel wishes to take advantage of alleged errors in the court's charge, he should point out the portion of the charge which is subject to criticism, and wherein the defects, if any, consist. State v. Brunette (N. Dak.) 1916E-340.
- 419. An exception to an instruction which fails to point out clearly the ground of the objection and the particular portion of the instruction to which it is directed is insufficient. Carmody v. Capital Traction Co. (D. C.) 1916D-706.

# (c) Time of Making Objection.

- 420. Misconduct of Juror. Where defendant and his attorney knew at the trial that the juror had a conversation with one of the witnesses, but did not call the attention of the trial court thereto until after the motion for a new trial was made, such matter will not be reviewed, especially where the affidavits presented warranted the court in finding that the conversation had no reference to the trial. People v. Falkovitch (III.) 1918B-1077.
- 421. Denial of Motion to Dismiss in Intermediate Court. Under Ky. Civ. Code Prac. § 334, providing that the party objecting must except when the decision is made, where defendant in a prosecution for breach of the peace did not except at the time to the circuit court's overruling of his motion to dismiss and remand the case to the county court, he cannot assign such ruling as error. Delk v. Commonwealth (Ky.) 1917C-884.
- 422. Amendment of Pleading. Where objection to the allowance of an amendment is not made before the trial, and where it does not appear that the party complaining is prejudiced, the courts will not favorably consider it. Drennen v. Williams (Colo.) 1917A-664.
- 423. Time for Objecting. Objections to evidence must be made at the right time or they cannot be considered on appeal. State v. Von Klein (Orc.) 1916C-1054.
- 424. Necessity of Objection—Examination of Witness by Court. Where on the trial of a case the court propounded certain questions to a witness, which examination, it is insisted, was so conducted as to prejudice the rights of the plaintiff in error and elicited certain hearsay testimony, this action on the part of the court will not cause a reversal in the absence of any objection having been raised thereto at the time. Brown v. Caylor (Ga.) 1916D-745.

# (d) Sufficiency of Pleadings.

425. Necessity of Demurrer or Motion. Under Iowa Code, \$ 5328, authorizing demurrer to the indictment for insufficiency

- to state facts constituting an offense, authorizing motion in arrest of judgment on the same ground, the supreme court will not review the sufficiency of the indictment in the absence of either of these proceedings, in passing on a requested instruction that it states no offense. State v. Gardner (Iowa) 1917D-239.
- 426. Matters Provable Under Other Counts. Error in sustaining demurrers to special pleas is harmless, where all the matters specially pleaded were available to defendant under his plea of the general issue. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.
- 427. Specification of Errors—Limitation on Appeal. Under Ind. Acts 1911, c. 157 (Burns' Ann. St. 1914, § 344), one who demurred to a complaint for want of facts to state a cause of action, cannot, on appeal, assign objections not stated in the memorandum filed with the demurrer. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) ,1918A-828.

# (e) Verdict or Findings.

- 428. No exception is necessary in a federal court to raise the question whether, when a jury has been duly waived, the special findings of fact by the court are sufficient to support the judgment rendered thereon. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.
- 429. To Overruling of Objections to Report of Referee. Where an action at law in a federal court is tried to the court by stipulation, pursuant to Rev. St. § 649 (4 Fed. St. Ann. 393), and by consent the cause is referred to a referee to take the evidence and report his findings of fact and conclusions of law, a general exception to the action of the court in overruling in a mass the exceptions taken to the report of the referee is too indefinite to present any question for review by the appellate court, and also, if any one of the rulings of the referee excepted to was correct, the exception is not good. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.
- 430. Where the court, in addition to special findings, made a general finding and holding in favor of the contestees and against the contestants, the general assignment in the contestants' motion for new trial, that the verdict is contrary to the law and the evidence, is sufficient to challenge the correctness of the finding and judgment of the court. Webb v. Bowden (Ark.) 1918A-60.
- 431. Failure to Request Submission of Issue—Presumption. Under the express provision of Wis. St. 1913, § 2858m, an issue of settlement in an action for the balance due upon a contract for grading, as to which defendant requested no submission, will be deemed, after judgment

for plaintiff, to have been found by the court against defendant, where there was ample evidence to support such finding. Gist v. Johnson-Carey Co. (Wis.) 1916E-460

# (f) Rulings on Motion for New Trial.

432. Where no notice of intention to move for a new trial was given, and the notice of the motion stated that it would be made on the minutes of the court, but even that notice did not contain the specifications which are required in the notice of intentions by S. Dak. Code Civ. Proc. § 303, no errors predicated upon the motion for new trial can be considered on appeal. Richelson v. Mariette (S. Dak.) 1917A-883.

# (g) Sufficiency of Decree.

433. Sufficiency. Exceptions challenging a decree, in that it did not do equity and was contrary to the evidence, are sufficient to entitle defendants, seeking the same, to a hearing de novo on the merits on appeal. Tevis v. Tevis (Mo.) 1917A-865.

# (3) Inconsistent Attitude on Appeal.

434. Admissions—By Counsel at Trial—Estoppel to Repudiate. Appellant is estopped to claim admissions were not made by his counsel, or were inadvertently made, the trial court having recapitulated what he conceived to have been admitted, stating that he intended to make those admissions the basis of his decree, and having appealed to counsel to say whether there was any dispute as to the facts so recited, and counsel having admitted they were true. Black v. Suydam (Wash.), 1916D-1113.

# (4) Error Caused by Appellant.

435. Charge Given at Request of Party. Plaintiff, having requested it, may not complain of the giving of an instruction not within the issues. Newby v. Times-Mirror Company (Cal.) 1917E-186.

436. Though plaintiff, having requested it, may not complain of the giving of an instruction not within the issues, he may make the point that the implied findings thereunder are not supported by the evidence. Newby v. Times-Mirror Company (Cal.) 1917E-186.

437. Estoppel to Allege Error—Refusal of Motion of Appellant to Dismiss Appeal. Where defendant, in a prosecution for breach of the peace before the county court, appealed from conviction to the circuit court, he cannot, on appeal from that court's affirmance, assign as error its refusal to dismiss the appeal from the county court and remand the case to it. Delk v. Commonwealth (Ky.) 1917C—884.

- 438. Where the court, ordering the jury to be kept together during the trial, indicated that the order was made at the request of accused, but the order was subsequently withdrawn and the jury never confined thereunder, accused was not prejudiced. State v. Giudice (Iowa) 1917C-1160.
- 439. Any error of the court in refusing, in a mortgage foreclosure suit, to try out the question of priority of title between defendants W. and T., as to nine acres of the mortgaged land, which W. claimed by contract of sale made by the mortgagor before he conveyed the entire tract to T., was invited by T., and so cannot be complained of by him, he having objected to trial therof. Black v. Suydam (Wash.) 1916D-1113.
- 440. Requesting Instruction. A party who has requested an erroneous instruction waives the error of the court in giving it at the instance of the opposite party. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.
- 441. Rulings as to Pleadings. The elimination by plaintiff of counts of a complaint rendered harmless any errors committed in rulings as to such counts. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 442. Joint Request for Submission of Issues. Where appellant has joined with appellee in having certain issues submitted to the jury, he cannot complain of the rulings of the court in submitting them. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.

# (5) Errors Favorable to Appellant.

- 443. Harmless Error-Exclusion of Evidence Favoring Adverse Party. In a prosecution for conspiracy, where a detective had been engaged to ascertain if there was corruption in a city council, and, posing as one to whom the city owed money, had had an interview with the son of a councilman respecting his supposed claim, the refusal of the court to permit such councilman to repeat a statement made by his son to him after the interview, as to which the detective's testimony for the state substantially agreed, is notprejudicial. Hummelshime v. State (Md.) 1917E-1072.
- 444. On appeal from a judgment against a sheriff and his surety for selling property levied under two executions, under the junior execution, defendants could not complain that the trial judge ordered the proceeds of the sale to be paid to plaintiff in reduction of defendant's liability, as it was beneficial to them. Continental Distributing Co. v. Hays (Wash.) 1917B-708. (Annotated.)
- 445. For "Plaintiff" in Action by Two. In an action by two plaintiffs, where only

543.

one was entitled to recover, a judgment for "the plaintiff," without specifying which one, is not prejudicial to defendant, and will not be reversed, where the plaintiff entitled to recover makes no complaint. Gish Banking Co. v. Leachman's Admr. (Ky.) 1916D-525.

- 446. Conviction of Included Offense. Accused, convicted of assault with intent to do great bodily harm, cannot complain that the evidence showed that he should have been convicted of assault with intent to kill. State v. Cessna (Iowa) 1917D-289.
- 447. Error Favorable to Appellant. A party who appeals from an order granting a new trial after verdict in his favor cannot assail the order on the ground that the trial court committed errors against him on the trial. Herman & Ben Marks v. Haas (Iowa) 1917D-543.
- 448. Evidence Beneficial to Party Complaining of Admission. A party cannot complain on appeal of the admission of incompetent evidence which inures to his benefit. Rehling v. Brainard (Nev.) 19170-656.
- 449. Whether demurrer to a plea of limitations to a count was properly overruled cannot be considered by a reviewing court, defendant alone bringing error, and plaintiff assigning no cross-errors. Wende v. Chicago City R. Co. (Ill.) 1918A-222.
- 450. Instruction Too Favorable to Appellant. Where a physician broke his contract to attend plaintiff, a charge that it was his duty to either have sent another doctor, or notified plaintiff that he could not attend her, being more favorable to the physician than is the law, is harmless. Hood v. Moffet (Miss.) 1917E-410.
- 451. An instruction that "if one of the parties to the illicit intercourse is guilty, then both are guilty of adultery," being a statement unduly favorable to the defendant convicted, is harmless. State v. Ayles (Ore.) 1916E-738.
- 452. On plaintiff's appeal, error in overruling a demurrer to the complaint will not be considered. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.
- (6) Wrong Reason for Correct Decision.
- 453. Punishment Imposed Appropriate to Valid Portion of Verdict. Where defendant was convicted, under Ore. L. O. L. §§ 5293, 5298, regulating fishing in the waters of the state, of two offenses, first, in having fished without a license, and second as having fished without being a resident of the state, and where the punishment in each case was the same, although the defendant should have been convicted under the charge of fishing without a license alone, his conviction can be

upheld under Const. art. 7, § 3, as amended, providing that if the supreme court shall be of opinion that the judgment of the court appealed from was such as should have been rendered, it shall be affirmed, notwithstanding any error committed during the trial. State v. Catholic (Ore.) 1917B-913.

- 454. Grant of Nonsuit. A nonsuit granted on one of several grounds may be sustained if any of the other grounds specified authorize it. Solomon v. Public Service R. Co. (N. J.) 1917C-356.
- (7) Nonsuit Instead of Directed Verdict. 455. Nonsuit Instead of Directed Verdict. The irregularity, if any, in entering a compulsory nonsuit in accordance with the state practice, instead of directing a verdict for defendant, is one of form only. Dominion Trust Co. v. National Surety Co. (Fed.) 1917C-447.
- (8) Error Cured by Verdict. 456. Errors committed against a party are cured by a verdict in his favor. Herman & Ben Marks v. Haas (Iowa) 1917D-
- 18. DECISION OR JUDGMENT OF APPELLATE COURT.
- a. Rendition of Final Judgment on Appeal.
- 457. Final Judgment on Reversal. The question of the sufficiency of the evidence to present a question of fact must be determined on appeal, as regards the right to finally dispose of the case by dismissal of the complaint, by the evidence actually admitted, including opinion evidence, given over proper objection that the hypothetical questions did not include all the facts which should have been put before the witnesses. Middleton v. Whitridge (N. Y.) 1916C-856.
- 458. Final Judgment on Appeal as Denial of Jury Trial. N. Y. Const. art. 1, § 2, merely guaranteeing the substantial right of trial by jury, and not preserving ancient common-law forms and rules of procedure, is not contravened, where, as matter of law, dismissal of the complaint or direction of a verdict being proper, or disputed questions of fact being by consent submitted to the court for decision, as where both sides move for a direction of a verdict, without asking to go to the jury, the trial court determines the causo without taking a verdict of the jury, and so is not contravened, where, in such a case, the trial court having erred in submitting it to the jury, or in deciding a question of fact submitted to it for decision, the appellate division makes such final disposition of the case as the trial court should have made. Middleton v. Whitridge (N. Y.) 1916C-856.

459. The final judgment of reversal and dismissal which the appellate division is empowered by N. Y. Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, to render in a jury case, being required to be "on special findings of the jury or the general verdict, or on a motion to dismiss the complaint or to direct a verdict," is such only as the trial court should have rendered on such a verdict or motion; the error thus corrected being that of the court and not of the jury, and the province of the jury not being invaded. Middleton v. Whitridge (N. Y.) 1916C-856.

460. Even if it is indispensable in capital cases to ask the prisoner if he has anything to say before sentence, error in omitting the inquiry affects only the sentence and not the verdict; and in view of Md. Code Pub. Gen. Laws 1904, art. 5, § 81, providing that if the court of appeals reverses for error in the judgment or sentence itself, it shall remit the record to the court below that it may pronounce the proper judgment, and especially where a motion for a new trial and to strike out a judgment and sentence have been overruled, the court of appeals is not required to reverse the judgment and remit that the court below may first ask the prisoner if he has anything to say and then to resentence him. Dutton v. State (Md.) (Annotated.) 1916C-89.

461. Rendering Final Judgment on Reversal. A judgment for plaintiff cannot be reversed, and judgment rendered by the appellate division for defendant, unless there was no evidence presenting a question of fact in favor of plaintiff, and defendants were entitled to an order of nonsuit of a directed verdict. Carlisle v. Norris (N. Y.) 1917A-429.

#### b. Granting New Trial.

462. On appeal from a judgment of the appellate division, rendered before amendment, by Laws 1914, c. 351, of N. Y. Code Civ. Proc. § 1346, reversing the judgment for plaintiff and dismissing the complaint, there being evidence from which the jury could draw inferences for plaintiff, and the record disclosing exceptions requiring a new trial, instead of remitting the case to the appellate division to consider it on the facts, a new trial will be granted. Middleton v. Whitridge (N. Y.) 1916C-856.

463. Limiting Issues on Retrial. That Miss. Code 1906, §§ 4944, 4945, by the rule of "expressio unius est exclusio alterius," prohibits the supreme court from granting a new trial on the issue of damages only, does not affect such right if it exists by some other statute. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880. (Annotated.)

464. At common law in a civil action, the supreme court has the power to award

a new trial on the issue of damages only. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880. (Annotated.)

465. Questions not Likely to Arise on Retrial. The case being remanded for a new trial upon another ground, it is unnecessary to determine or decide questions made by assignments of error upon rulings of the court refusing to declare a mistrial based upon certain incidents occurring during the trial, as those incidents will probably not occur at the next hearing. Loewenherz v. Merchants', etc. Bank (Ga.) 1917E-877.

466. Scope of Remand—New Trial on Single Issue. A reviewing court may, in its discretion, qualify the order of remand so as to restrict the scope of the new trial ordered. Perkins v. Brown (Tenn.) 1917A-124.

467. Where the only question at issue was the measure of damages, the appellate court, on reversal of a judgment for plaintiff, will qualify the order of remand so as to determine only the matter of damages. Perkins v. Brown (Tenn.) 1917A-124.

468. Issues — Effect of Agreement. Where opposing counsel in such case agree that there is no question of assumption of risk in the case, and the trial judge agrees to disregard such question in his charge, and where, after verdict for plaintiff, the court, in considering defendant's motion for judgment non obstante veredicto, treats such question as controlling, the judgment should be vacated on appeal and a new trial awarded. Richardson v. Flower (Pa.) 1916E-1088.

469. General Rule. The supreme court cannot grant a new trial merely for excessive damages for personal injury, unless they appear to have been given under the influence of passion or prejudice; that is, so excessive as to be entirely out of proportion to the injury. Rosenberg v. Dahl (Ky.) 1916E-1110.

### Note.

Right of appellate court, upon granting new trial, to limit issues to be tried by jury. 1917E-888.

# c. Remand for Additional Findings.

470. Remand for Further Proof—Election Contest. Where there is a discrepancy between the printed list of taxpayers and those who had voted at the election in a township, but the evidence is not fully developed, so that it is possible that the contestees may show that the election returns are correct, the case will be remanded to give the contestees an opportunity to prove the correctness of the election returns. Webb v. Bowden (Ark.) 1918A-60.

# d. Remand for Proper Judgment.

471. Disposition of Cause—Demurrer Properly Overruled. Where the trial court erred in overruling the demurrer to the amended declaration on the ground of misjoinder of causes of action, the supreme court will not sustain the demurrer and enter judgment for defendant, but will remand, with instructions to give plaintiff leave to withdraw his joinder in the demurrer and amend his declaration. Tanner v. Culpeper Construction Co. (Va.) 1917E-794.

# e. Modification of Judgment.

472. Cure of Error by Remittitur. Where, in an action against a city for personal injuries, the court erroneously permitted an amendment of the claim filed with the city to include \$65 expended in the employment of a nurse, the error can be remedied on appeal without a reversal, if plaintiff will file a remittitur of \$65. Wagner v. Seattle (Wash.) 1916E-720.

# f. Modification of Judgment of Appellate Court.

473. Recall of Remittitur. The supreme court may at any time recall a remittitur which through mistake of the clerk incorrectly states the judgment rendered. Oakland v. Pacific Coast Lumber, etc. Co. (Cal.) 1917E-259.

474. Where the judgment of the supreme court is not objected to or modified within 30 days after its rendition, it becomes absolutely final, and cannot thereafter be modified. Oakland v. Pacific Coast Lumber, etc. Co. (Cal.) 1917E-259.

# g. Jurisdiction of Appellate Court After Remand.

475. Where an appeal has been dismissed, and the remittitur transmitted to and filed in the trial court, the appellate court has lost jurisdiction of the case, and cannot recall the remittitur, or review its decision, unless the order was based on fraud or mistake of fact, or the remittitur was sent down through inadvertence or mistake. Hilmen v. Nygaard (N. Dak.) 1917A-282. (Annotated.)

#### Note.

Jurisdiction of appellate court after remand. 1917A-284.

# h. Amendment of Pleadings on Remand.

476. Right to Amend Pleading. Where after a jury trial a case is appealed and reversed for new trial, amendments to the pleadings are not a matter of right, but may be allowed in the discretion of the court. Estate of Oldfield (Iowa) 1917D-1067.

477. Where a plaintiff elects to stand upon his amended complaint when a de-

murrer was sustained to it, on reversal no further amendment can be permitted. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638.

#### 19. EFFECT OF APPEAL.

478. Law of the Case. A decision on the facts certified that defendant's incompetency as a witness was waived becomes the law of the case for subsequent trials, as such record can be corrected only on a rehearing, and not falsified on a subsequent trial, by showing the facts were otherwise than certified. Comstock's Administrator v. Jacobs (Vt.) 1918A-465.

479. Decision as Law of Case. The law as enunciated by the court on appeal as applicable to a given case remains the law of that case for all future proceedings. Rugenstein v. Ottenheimer (Ore.) 1917E-953

480. Liability of Guardian for False Claim-Effect of Allowance of Claim. The right of a minor ward upon coming of age to obtain relief in equity under the Hawaiian laws, against his guardian, who had, in fraud of the ward, presented a claim and obtained in his own name an award by the Hawaiian board of land commissioners of a title in fee simple to the ward's land, was not foreclosed by an affirmance in the Federal Supreme Court of a decree of the Hawaiian Supreme Court adjudging that the award in question could only be attacked by a direct appeal by a party who had presented his claims to the board, where the vitally important fact of guardianship was not included in the findings of fact certified to the federal supreme court. Kapiolani Estate v. Atcherly (U. S.) 1916E-142.

#### Note

Force and effect of advisory opinion by appellate judges. 1917A-495.

# 20. SUPERSEDEAS AND BOND.

#### a. In General.

481. Appeal Bond—Failure to Indorse Filing. Where a justice accepted an appeal bond, his failure to mark it filed is not a jurisdictional defect. Brown v. Mellon (Iowa) 1917C-1070.

482. Revocation of License—Appeal. A judgment revoking a liquor license being self-executing, an appeal therefrom does not suspend it, or stay its force, at least where a supersedeas bond is not given under Utah Comp. Laws 1907, § 3314. In re Grant (Utah) 1917A-1019.

(Annotated.)

#### b. Release of Sureties.

483. Abandonment of Appeal. An undertaking on appeal from a justice of the

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peace is to be construed strictly in favor of the surety, and, where it is conditioned that the appellant will pay all costs and disbursements that may be awarded against him on the appeal, and satisfy any judgment that may be given against him in the appellate court, and the appeal is abandoned and no judgment is rendered in the appellate court, the surety is not liable. Woodle v. Settlemyer (Ore.) 1916C-1222. (Annotated.)

#### Note.

Effect of abandonment or dismissal of appeal on liability of sureties on appeal bond, 1916C-1226.

# c. Actions on Appeal Bonds.

484. Effect on Original Judgment. If, upon appeal to this court, such judgment is affirmed, and the property is returned to the defendant pursuant to such judgment, in an action upon the appeal bond the plaintiff cannot recover damages occurring prior to the original judgment. Wallace v. Cox (Neb.) 1917D-699.

(Annotated.)

### 21. COSTS.

485. Cost of Transcript. A refusal of the clerk to order either the defendant or the clerk of the court to furnish a copy of the stenographer's minutes, and its order that the plaintiff furnish such copy for the purposes of his appeal from the court's action in setting aside a verdict in his favor, is proper in view of Conn. Gen. St. 1902, § 805, providing that, on appeal from the denial of a motion for new trial based on the verdict being against the evidence, the expense of printing evidence shall be governed by the provisions of section 796, which provides that the expense of printing any evidence made part of the record on appeal shall be paid by the party taking the exceptions to which it relates. Gray v. Mossman (Conn.) 1917C-27.

486. Printing Unnecessary Record. Where appellant prevails, and the record is not abbreviated in compliance with the rules of the supreme court codified as Md. Code Pub. Gen. Laws, art. 5, §§ 10, 34, 35, but contains a large amount of testimony, which could have been omitted without prejudice to any question involved, the cost of the record will be divided. Oxweld Acetylene Co. v. Hughes (Md.) 1917C-837.

#### 22. REHEARING.

487. Raising Constitutional Question. A constitutional objection to a criminal statute may be raised on a petition for a rehearing, even though it has not been raised either upon the trial or upon the original appeal. State v. Bickford (N. Dak.) 1916D-140.

#### APPEARANCES.

Effect of appointment of guardian ad litem, see Infants, 19.

- 1. The filing of a petition and bond for a removal to the federal court is not an appearance in the state court, under the provisions of the Revised Codes of Idaho. State v. American Surety Co. (Idaho) 1916E-209.
- 2. Objection to Jurisdiction—Effect. Under the federal practice, an appearance to object to the jurisdiction of the court does not bind the parties appearing to submit to the jurisdiction on the overruling of the objection. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.
- 3. Waiver of Special Appearance. In an action of replevin, where the defendant enters a special appearance "for the purpose of moving to quash the return to the writ of replevin," and files his motion to that effect, which is denied, and the defendant then proceeds to defend the action on the merits, he will be considered to have waived any defect which may exist in the service of the writ. Henry v. Spitler (Fla.) 1916E-1267. (Annotated.)
- 4. A defendant, in an action at law, who has appeared specially for the purpose of contesting the validity of the service of the summons upon him, and such matter has been determined adversely to him, in order to preserve his status as not having been properly served with summons, so as to give the court jurisdiction over his person, must refrain from taking any subsequent steps to defend the action upon the merits. In the event he proceeds to a trial upon the merits, he cannot thereafter in an appellate court be permitted to raise such question of jurisdiction, but will be held to have entered a general appearance. Henry v. Spitler (Fla.) 1916E-1267. (Annotated.)
- 5. Writ of Error as General Appearance. A writ of error to what purports to be a final judgment of a circuit court operates as a general appearance in the case of the party taking such writ. Henry v. Spitler (Fla.) 1916E-1267.
- 6. Motion to Set Aside Order for Want of Jurisdiction. The contents of the plaintiffs' motion to set aside the order considered and held not to constitute a general appearance in the receivership suit. Bishop v. Fisher (Kan.) 1917B-450.

  (Annotated.)

### Notes.

Waiver of special appearance by pleading to merits. 1916E-1270.

Motion to set aside order in cause for want of jurisdiction as general or special appearance. 1917B-454.

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APPLICATIONS FOR MEMBERSHIP. See Beneficial Associations, 6-7.

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Priority of right in subterranean waters. see Waters and Watercourses, 12.

#### APPROPRIATIONS.

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See Fire Insurance, 21, 30-36, 42-44.

- 1. Power of Arbitrators. Arbitrators empowered to decide "all disputes . . . arising out of" a contract may determine the existence of a usage affecting the interpretation and effect of the contract. Produce Brokers Co. v. Olympia Oil, etc. Co. (Annotated.) (Eng.) 1916D-351.
- 2. Failure to Give Notice of Hearing. An award of arbitrators under Me. Rev. St. c. 21, § 6, authorizing an assessment by arbitration if any person is dissatisfied, is a nullity if made without notice of hearing, in the absence of waiver of notice by the party claiming to be aggrieved. Auburn v. Paul (Me.) 1917E-136.

Power of arbitrators to determine existence of usage or custom. 1916D-360.

# ARCHITECT'S CERTIFICATE.

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# AREAWAY.

Meaning, see Streets and Highways, 30.

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#### 1. IN GENERAL.

- 1. Determining Right to Open and Close -Pleadings Construed. In determining which party has the affirmative of the issue, and hence is entitled to open and close, regard is had to the substance and effect of the pleadings, rather than to their form. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.
- 2. Demand for Incriminating Documents. Since the defendant in a criminal case cannot be compelled to produce incriminating documents, counsel should not demand such production. People v. Gibson (N. Y.) 1918B-509. (Annotated.)
- 3. Right to Open and Close-Right to Recover Admitted. In an action on an accident policy, in which defendant by its plea did not expressly deny plaintiff's right to recover, but alleged that the accident occurred while insured was engaged in an

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extrahazardous occupation, so that by the terms of the policy plaintiff was entitled to recover only six-elevenths of the amount of the policy, defendant is not entitled to open and close, not having admitted the plaintiff's prima facie right of recovery, but in effect denying it as to five-elevenths of the face of the policy. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.

(Annotated.)

4. In an action for libel, an opening statement by plaintiffs, as attorney for himself, that defendants falsely charged him with theft and rape, and that such charges caused his friends to withdraw their support from his candidacy for governor, is prejudicial; the statement being a direct statement of fact, and not as to matters plaintiff expected to prove. Egan v. Dotson (S. Dak.) 1917A-296.

#### Note.

Right to open and close where only issue is amount plaintiff is entitled to recover. 1916D-958.

# 2. ARGUMENTS.

- a. Legitimate Deductions from Evidence.
- 5. Sufficiency of Evidence to Warrant. In an action for the death of plaintiff's intestate, who was burned in a fire in defendant's establishment, where the negligence relied on was defendant's failure to furnish adequate fire escapes and permitting the only fire escape to be obstructed, evidence that other employees jumped from windows to buildings below, after they had made an effort to reach the fire escape, having been received without objection, argument that the escape was obstructed, based on such evidence, is permissible. Lichtenstein v. L. Fish Furniture Co. (III.) 1918A-1087.
  - b. Comment Unsupported by Evidence.
- 6. Going Outside Record. The action of the prosecuting attorney in assailing accused in his closing argument for an offense of which there was no proof and properly could be none, is prejudicial. State v. Giudice (Iowa) 1917C-1160.
- 7. The profession of law being for the administration of justice, counsel should not in their argument to the jury appeal to the passions of the jury or go outside the record. Egan v. Dotson (S. Dak.) 1917A-296.
- 8. Where defendant sought to recover for libelous charges published against him while he was a candidate for governor, argument that rival candidate had induced the publication of the charges which was not supported by any evidence is improper. Egan v. Dotson (S. Dak.) 1917A-296.

- 9. Opening Statement. Under S. Dak. Code Civ. Proc. § 255, declaring that, when the jury has been sworn, the plaintiff, after stating the issues in his case, must produce the evidence on his part, and the defendant may then open his defense and offer his evidence, plaintiff, who was attorney for himself, cannot in his opening statement give unsworn testimony making statements not as matters which he expected to prove, but as actual facts. Egan v. Dotson (S. Dak.) 1917A-296.
- 10. Where counsel for defendant in his closing argument makes a statement: "This is M., I could say more. I couldn't say less. He is an absolutely unreliable man and an absolutely unreliable man gistrate"—and there is no evidence in the record which tends in any way to question the general reliability of the witness, nor any which casts discredit upon his career as a police magistrate, it is not error for the court to say: "I think you will have to be a little careful, Mr. H., in the use of your words. You have a certain latitude, but beyond that, please don't go. . Getting so close to the line, it was dangerous." State v. Brunette (N. Dak.) 1916E-340.
- c. Failure to Produce Evidence or Testify.
- 11. Failure to Call Attorney as Witness. In a will contest, it is error for contestant's attorney in argument to the jury to ask why the executor's attorney, who had helped draw up the will, did not testify as to testator's mental capacity. Ravenscroft v. Stull (Ill.) 1918B-1130.

(Annotated.)

- 12. Comment on Failure of Incompetent Witness to Testify. Where a witness was known to an attorney to be incompetent, and he had in fact objected to her when offered, it is error for him to comment on her failure to testify. Ravenscroft v. Stull (Ill.) 1918B-1180.
- 13. Fallure of Defendant to Testify. Under N. Y. Code Cr. Proc. § 393, declaring that the neglect or refusal of a defendant to testify does not create any presumption against him, statements by the prosecutor in argument, reflecting on defendant's failure to take the stand, by pointing out that the testimony of the only eyewitness was absolutely uncontradicted, and that it would have been contradicted, if possible, are improper. People v. Watson (N. Y.) 1917D-272. (Annotated.)
- 14. In a Libel Case. Argument by plaintiff, who acted as counsel for himself, that he by force stopped the taking of one deposition, and, if present, he would have prevented the taking of another, is improper. Egan v. Dotson (S. Dak.) 1917A-296.
- 15. Where accused did not testify in his own behalf, but introduced testimony

tending to show that between two certain hours on the evening of the homicide he was not at the place where it was committed, comment by the state's attorney that the testimony did not show where accused was prior to those two hours is not erroneous as a comment on defendant's failure to testify. Mason v. State (Tex.) 1917D-1094.

- 16. Under N. Y. Code Cr. Proc. § 524, declaring that the court must give judgment without regard to technical errors, improper comment by the prosecutor on accused's failure to take the stand, which the jury was by the trial court directed to disregard, is no ground for reversal; accused's guilt being abundantly shown. People v. Watson (N. Y.) 1917D-272. (Annotated.)
- 17. Reference to Failure to Produce Immaterial Witness. Where the state claimed that accused killed deceased to prevent the latter from testifying against him in a prosecution for burglary, it is improper for the state's attorney to refer to accused's failure to introduce witnesses in support of his defense to the charge of burglary, as such evidence would have been immaterial and irrelevant. State v. Inlow (Utah) 1917A-741.

### Note.

Comment by prosecutor on failure of accused to testify. 1917D-277.

### d. Expression of Opinion as to Guilt.

18. It is not improper for the state's attorney in his argument to state that he believes defendant to be responsible for the condition of prosecuting witness prior to the time she testified to intercourse with him, and that he bases his belief upon a card sent by defendant to the prosecuting witness, and which has been introduced in evidence. Riggins v. State (Md.) 1916E-1117.

#### e. Reference to Defendant's Wealth.

19. Where, in an action under Iowa Code, \$2423, to recover money paid for liquor illegally sold by defendant to plaintiff, defendant on cross-examination stated that he had made good money in real estate, and further questions on cross-examination insinuated that he had become wealthy out of illegal sales of liquor, the argument of plaintiff's counsel, that detendant became rich collecting money on liquor which he sold, is prejudicial, and the misconduct is not cured by the court stating that it made no difference whether defendant was rich or not. Cvitanovich v. Bromberg (Iowa) 1917B—309. (Annotated.)

#### Note.

Propriety of argument of counsel referring to poverty or wealth of party to action. 1917B-312.

#### f. Erroneous Statement of Law.

21. Opening statement of plaintiff, in an action for personal injury on defendant's track, calling attention to the legal proposition that the public might use an approach to a station, that when plaintiff went through a gate in its right of way which had been used as an approach she became a passenger, entitled to care and protection as such, and the proximate cause of the injury, as he understood it, was defendant's violation of its duty to stop to take her up, was erroneous as an argument on the law of the case. Wells v. Ann Arbor R. Co. (Mich.) 1917A-1093.

# g. Appeal to Race Prejudice.

22. In replevin by a mortgagee for two cows mortgaged to plaintiff by defendant to secure the price of a horse, where counsel repeatedly referred to plaintiff in argument as a Jew in such a manner as to arouse race prejudice on the part of the jury, and when cautioned by the court persisted in arguing with the court to get more of the matter before the jury, such conduct is prejudicial misconduct. Solomon v. Stewart (Mich.) 1917A-942. (Annotated.)

# h. Appeal to Sympathy of Jurors.

- 23. Asking Jury What They Would Take for Similar Injury. Plaintiff's closing argument, asking the jury which one of them would accept the injury plaintiff was alleged to have suffered for a stated sum of money, and what each juryman would think it worth if plaintiff was his wife, was reversible error. Wells v. Ann Arbor R. Co. (Mich.) 1917A-1093. (Annotated.)
- 24. In a libel case, argument by plaintiff, who was an attorney, and who appeared for himself, that he was the attorney for the oppressed, is improper, being immaterial. Egan v. Dotson (S. Dak.) 1917A-296.

### Note.

Propriety of argument of counsel in personal injury case asking jury what they would take for similar injury. 1917A-1099.

# i. Retaliatory Statements.

25. Where plaintiff, who was seeking to recover for libel, was an attorney wno had been disbarred by the supreme court, it is improper in his argument to the jury to mention his disbarment and cast asper-

sions on the members of the supreme court, particularly where his plea for reinstatement contained an admission of the court's integrity. Egan v. Dotson (S. Dak.) 1917A-296.

j. Reference to Expense of Imprisonment.

26. Plea for Death Penalty. Argument by the prosecutor, urging the jury not to burden the state with the expense of maintaining accused, if he is guilty of murder in the first degree, is improper. People v. Watson (N. Y.) 1917D-272.

# k. Reading Law.

27. Discretion of Court. In a will contest case, where on objections to a question to a witness contestant's counsel read in the presence of the jury an opinion of another court in another case, proponent cannot complain, for the question whether the jury should be excused during the reading rests in the trial court. In re Williams' Estate (Mont.) 1917E-126.

1. Comment on Change of Venue.

28. Where a criminal case was transferred from one county to another, the action of the county attorney in his opening argument in stating that he believed that the former county owed to the citizens of the latter county and to the jurors an apology and an explanation of why the jurors were present, and that it was through no solicitation of the prosecuting attorney, is improper, for it was no concern of the jury how the case came to be there. State v. Giudice (Iowa) 1917C—1160.

m. Comment on Rejected Testimony.

29. In a libel case, statements by plaintiff's counsel in argument that depositions of two Catholic priests taken by plaintiff were suppressed on motion of defendant because the order was not served in time is improper. Egan v. Dotson (S. Dak.) 1917A-296.

#### n. Abusive Language.

30. A prosecuting officer under no circumstances should resort to vituperative and abusive language in arguing a case to the jury. Bishop v. State (Tex.) 1916E-379.

Reply to Improper Argument.

31. Comment Justified by Acts of Opposing Counsel. Where the attorney for accused on the cross-examination of a witness propounded questions which he must have known were improper and sought to inject evidence in the case that had no place there, the remark of state's counsel that accused's attorney was "shooting hot air" into the case and "insisting on stick-

ing in that prejudicial stuff that he knows is not true," is not misconduct. State v. Giudice (Iowa) 1917C-1160.

p. Stating Penalty for Crime.

32. In a prosecution for statutory rape, the refusal to allow defendant's counsel to state to the jury the penalty nrescribed for the offense, on the ground that more evidence would be required to convict of a serious crime than of a trivial one, is proper. State v. Tetrault (N. H.) 1918B-425.

#### ARMY AND NAVY.

Courts martial, see Courts, 1, 19, 20. Right to vote, see Elections, 3.

Public report of army council, privilege, see Libel and Slander, 64.

Calling militia into U. S. service, see Militia, 12.
Soldiers' Home, see Pensions, 1, 2.

Soldiers' Home, see Pensions, 1, 2. Veterans' Preference Acts, see Public Officers, 10.

Liberal construction of law, see Statutes, 58.

- 1. The Powers of Congress. Respecting the militia under Const. art. 1, § 8 (8 Fed. St. Ann. 652), authorizing Congress to provide for calling forth the militia to execute the laws of the nation, suppress insurrections, and repel invasions, and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress, and the power to raise armies conferred by the same section, are separate powers, and the army power embraces complete authority. and is not diminished by the control over the militia left in the states, though the militia power may diminish the occasion for the exertion by Congress of its military power, and though the power to raise armies is susceptible of narrowing the area over which the militia clause operates. Selective Draft Law Cases (U. S.) 1918B-857. (Annotated.)
- 2. When Congress exercises its power to call a citizen into the army without his consent, the army into which he enters is not limited to services such as those for which it is claimed the militia may only be used. Selective Draft Law Cases (U. S.) 1918B-857. (Annotated.)
- 3. Conscription—Validity of Act. Under Const. art. 1, \$ 8 (8 Fed. St. Ann. pp. 637, 645, 649), authorizing Congress to declare war, to Taise and support armies, and to make rules for the government and regulation of the land and naval forces, and to make all laws necessary and proper for carrying the foregoing powers into execution, and article 6 (9 Fed. St. Ann.

218), providing that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land, Congress has power to raise armies by conscription, and such power is not denied by reason of the fact that under the Constitution as originally framed state citizenship was primary, and United States citizenship but derivative and dependent thereon, or by the fact that, prior to the Constitution, the state authority over the militia embraced every citizen, and therefore Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85) providing for raising an army by means of a selective draft, is valid. Selective Draft Law Cases (U. S.) 1918B-857. (Annotated.)

- 4. Draft Act—Validity. Act May 18, 1917. c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85); providing for raising an army by means of a selective draft, does not impose involuntary servitude, in violation of Const. Amend. 13 (9 Fed. St. Ann. 376). Selective Draft Law Cases (U. S.) 1918B-857.
- 5. Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for the raising of an army oy means of a selective draft, and exempting from the draft regular or duly ordained ministers of religion and theological students under prescribed conditions, and also relieving from military service, other than service of a noncombatant character, members of religious sects whose tenets exclude the moral right to engage in war, does not violate Const. Amend. 1 (9 Fed. St. Ann. 241), providing that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Selective Draft Law Cases (U. S.) 1918B-857. (Annotated.)
- 6. Act Mav 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for raising an army by selective draft, is not void, as conferring judicial power on administrative officers. Selective Draft Law Cases (U. S.) 1918B-857.

  (Annotated.)
- 7. Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for raising an army by a selective draft, is not void, as vesting administrative officers with legislative discretion. Selective Draft Law Cases (U. S.) 1918B-857. (Annotated.)
- 8. Conscription—Validity of Act. Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for the raising of an army by means of a selective draft, is not void as delegating federal powers to state officials because of

- some of its administrative features. Selective Draft Law Cases (U. S.) 1918B-857. (Annotated.)
- 9. Compulsory Service—Persons Subject to Conscription—Review of Finding. The finding of a magistrate that an Irishman employed in England was "ordinarily resident" there so as to be subject to the Military Service Act of 1916 will not be reviewed on habeas corpus. Rex. v. Commanding Officer (Eng.) 1917C-809.

  (Annotated.)
- 10. Receiving Public Property in Pledge from Soldier. On the trial of a defendant for knowingly receiving in pledge from a soldier an automatic pistol, the property of the United States, in violation of Pen. Code, § 35 (Act March 4, 1909, c. 321, 35 Stat. 1095 [Fed. St. Ann. 1909 Supp. p. 414]), the confession of the defendant that he received the pistol in pledge from a soldier was sufficiently corroborated to justify the submission of the case to the jury by evidence showing that the pistol was issued to a soldier, and that it was found in the possession of defendant, whose place of business was very near the reservation on which such soldier was stationed. Bolland v. United States (Fed.) 1918B-520. (Annotated.)
- 11. Evidence offered by defendant to show that the pistol had been charged to the soldier is properly excluded, where the evidence does not show that he was the owner at the time it was pledged, but that the charge was made after its loss was known. Bolland v. United States (Fed.) 1918B-520. (Annotated.)
- 12. Evidence that the pistol was found in defendant's possession was sufficient to sustain a verdict of guilty under Rev. St. §§ 1242 and 3748 (7 Fed. St. Ann. 1017; 6 Feu. St. Ann. 711), which make such possession by one not an officer or soldier of the United States prima facie evidence that it was obtained in violation of the statute. Bolland v. United States (Fed.) 1918B-520. (Annotated.)

#### Note.

Compulsory military service. 1917C-812.

Right of infant unlawfully enlisted to release from detention of military or naval authorities. 1917C-778.

Liability of civilian for purchasing or receiving in pledge public property from soldier or sailor. 1918B-523.

# ARRAIGNMENT.

See Criminal Law, 31.

#### ARREST.

1. Execution of Process.

2. Arrest Without Warrant.

See False Imprisonment.

Arrest of passenger by conductor, liability, see Carriers of Passengers, 28.

# 1. EXECUTION OF PROCESS.

- 1. Right to Summon Bystanders to Assist. While every citizen is bound to assist a known public officer in making an arrest when called upon to do so, without information as to the offense charged or inquiry into the regularity of the process, and is protected in making such arrest, yet, where a special railway police officer, not a known public officer, but assuming to act as an officer, summons a railroad employee to aid in ejecting and arresting a passenger the employee is liable as such if the alleged officer was a trespasser. Cincinnati, etc. R. Co. v. Cundiff (Ky.) 1916C-513.
- 2. Sufficiency of Warrant. Under Ky. Cr. Code Prac. § 27, providing that a warrant of arrest shall, in general terms, name and describe the offense charged to have been committed, and section 276, providing that the only ground upon which judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, where, in a prosecution for a breach of the peace, the warrant read that 'the said D did . . . unlawfully commit a breach of the peace, by using obscene, vulgar, and indecent language in the presence of and to an assembly of people, men, women, and children, which language was obscene, inde-cent, and offensive, and was calculated to insult the hearers, and to provoke an assault, and was in every respect disorderly, the language used and the words uttered being unknown to the court, against the peace and dignity of the commonwealth," such warrant, in the absence of demurrer and motion to make it more specific, is sufficient upon motion in arrest of judgment, since the offense charged in a war-rant need not be placed with the tech-nical strictness required in an indictment, while objection raised to an indictment by motion in arrest of judgment, instead of by demurrer, prevails only when the indictment fails to state a public offense within the jurisdiction of the court. Delk v. Commonwealth (Ky.) 1917C-884.

# 2. ARREST WITHOUT WARRANT.

3. The requirement that the sheriff, to prevent breaches of the peace, arrest one who threatens unlawful sale of intoxicating liquors and if necessary close his place of business, is not subject to the objection of requiring services without

compensation. State v. Reichman (Tenn.)

- 4. Duty of Sheriff to Arrest Without Warrant. The right of the sheriff to arrest without warrant for threatened unlawful sale of intoxicating liquors and to close the place of business is not unlawful as an arbitrary invasion of property rights, which are not more secred than the person, which may be seized to prevent breach of peace. State v. Reichman (Tenn.) 1918B-889.
- 5. For a misdemeanor committed without his presence, a sheriff cannot arrest without warrant; but, if breach of peace is threatened in his presence, he needs no warrant to arrest to prevent the breach under Shannon's Tenn. Code, § 6892. State v. Reichman (Tenn.) 1918B-889.
- 6. Insane Person. In an action for false arrest and imprisonment it is not a justification that the defendant as a police officer made the arrest upon reliable information that the plaintiff was insane, that the officer in good faith believed this to be true, and that an ordinarily prudent person, under the same conditions, would have entertained and acted upon such belief, the arrest being made without warrant, and there being no proof of insanity, nor any urgent necessity for restraint, even had plaintiff been in fact insane. Witte v. Haben (Minn.) 1917D-534. (Annotated.)

#### Note.

Right to arrest person without warrant on ground of insanity. 1917D-536.

- 7. Right of Police Officer. Under the Ga. Penal Code (1910), § 917, "an arrest may be made for a crime by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant."
- (a) Under previous rulings of this court, a police officer of a city, in making an arrest for an offense against the state law, or for a violation of an ordinance of a municipality, falls within the protection of the section of the Penal Code just above cited. Graham v. State (Ga.) 1917A-595.
- 8. Homicide in Resisting Arrest. By the Ga. Penal Code (1910), § 921, it is declared that a private person may arrest an offender, if the offense is committed in his presence or within his immediate knowledge; and if the offense is a felony, and the offender is escaping, or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.

(a) This section was a codification of the pre-existing law. Unless clearly so intended, it will not be construed as working so radical a change in the prior law as to authorize a private person to arrest another for a violation of a municipal ordinance committed in his presence, when the act does not constitute a felony or a misdemeanor.

(b) Evidence was introduced to show that the person killed was a police officer of the city of Broxton, and he was not in uniform but had on a badge, and that he was engaged in arresting the accused when the homicide occurred. It was contended on behalf of the state that the accused was at the time violating an ordinance of the city, and also a penal law of the state; and an ordinance of the cuty was introduced. The charge of the court did not fully or clearly submit to the jury the issues involved. Graham v. State (Ga.) 1917A-595. (Annotated.)

# Note.

Right of private person to arrest another for violation of municipal ordinance committed in his presence. 1917A-599.

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Action on bond for assault, see Sheriffs and Constables, 11.

Necessity of malice, see Trespass, 4.

# 1. AS A CRIME.

- a. Assault With Intent to Inflict Grievous Bodily Harm.
- 1. Indictment. The term "wilfully" imports designedly and intentionally; and an indictment for an assault which follows the language of the statute and charges that defendant wilfully assaulted another and wilfully inflicted grievous bodily harm upon him sufficiently charges an intent to inflict such harm. State v. Lehman (Minn.) 1917D-615.
- b. Assault With Dangerous or Deadly Weapon.
- 2. Shooting With Intent to Frighten. Unlawfully discharging a firearm to frighten another, although intending not to hit him, is an assault and battery if the other be hit. State v. Lehman (Minn.) 1917D-615. (Annotated.)

#### Note.

Discharging firearm to frighten person as assault. 1917D-617.

#### c. Defenses.

- 3. Ejection of Trespasser. A proprietor may order a trespasser off his premises and, if he refuses to go, he may use such reasonable force as may be necessary to expel him. But if he exceeds the bounds of reasonable force he is guilty of an assault. State v. Flanagan (W. Va.) 1917D-305. (Annotated.)
- 4. Defense of Habitation. One assaulted in his habitation need not retreat, but may repel force with force. State v. Cessna (Iowa) 1917D-289.

(Annotated.)

- 5. Supposed Intruder. One unaware that persons entering his dwelling are officers, supposing them mere intruders, may resort, to such force to eject them as a reasonably cautious and prudent man would use under like circumstances, without incurring criminal responsibility. State v. Cessna (Iowa) 1917D-289.
- 6. Defense of Property. The owner of property may not maintain his possession thereof by force against an officer attaching it as the property of another. State v. Selengut (R. I.) 1917D-303.

Note. (Annotated.)

Defense of property as justification for assault. 1917D-291.

# d. Evidence.

- 7. What Constitutes Participation—Presence at Scene of Assault. The mere presence of a person at the time and place of an assault, without any act, word, or gesture in aid of it, with nothing to show he advised it, will not render him guilty; mere knowledge not being enough. Wooden v. Commonwealth (Va.) 1917D—1032. (Annotated.)
- 8. Sufficiency of Evidence. In a prosecution for assault, the evidence is held to be insufficient to sustain a verdict of guilty. Wooden v. Commonwealth (Va.) 1917D-1032.

#### e. Instructions.

9. Undisputed Fact. In a prosecution for assault with intent to kill, where the jury heard the information read, and it charged and the evidence showed that the offense occurred on December 19, 1912, which was within less than three years before filing, the failure of an instruction to state the date of the offense, where it required the jury to find that the acts charged occurred within three years before the date of filing of the information, is not error. State v. Gould (Mo.) 1916E-855.

# f. Questions for Jury.

10. Assault With Intent to Kill. In a prosecution for assault with intent to kill, held that, under the evidence, it was a question for the jury whether accused was acting in self-defense or, of his malice, assaulted the prosecuting witness with intent to kill. State v. Gould (Mo.) 1916E-855.

# 2. AS A CIVIL INJURY.

# a. Defenses.

11. Ejection of Trespasser. In such case, the lessee, on his lessor's refusal to leave the premises, had a right to forcibly remove him, and will not be guilty of assault if he used no more force than was reasonably necessary to remove him but will be liable if he used unreasonable or excessive force. Oleson v. Fader (Wis.) 1917D-314. (Annotated.)

### Note.

Right of person assaulted on his own premises to repel attack without retreating. 1916C-918.

Trespass as justification of assault and battery. 1917D-307.

# b. Evidence.

12. Evidence of Self-defense. In a civil action for assault, in which defendant claims that he used only such force as appeared to him reasonably necessary to protect himself from the threatened assault, evidence for defendant that plain-

tiff had the reputation of being a quarrelsome and dangerous man who went armed, and was known as a gun fighter, is admissible. Cooper v. Demby (Ark.) 1917D-580.

# c. Questions for Jury.

13. In a lessor's action against his lessee for assault, where it appeared that the lessee used considerable violence in removing the lessor from the premises, and there was evidence that the lessor's resistance was very violent, the question of the lessee's excessive force was for the jury. Oleson v. Fader (Wis.) 1917D-314. (Annotated.)

### d. Measure of Damages.

- 14. Elements of Damages Recoverable. In a civil action for assault and battery, the compensatory damages include such items as loss of time, bodily suffering, impaired physical and mental powers, mutilation, disfigurement, expense of attendance, etc. Cooper v. Demby (Ark.) 1917D—580.
- 15. In a civil action for assault and battery, provocation of such a character as to make the impulse irresistible and to be solely responsible for the assault will not affect the compensatory damages. Cooper v. Demby (Ark.) 1917D-580. (Annotated.)
- 16. The extent to which punitive damages may be mitigated is a question of fact for the jury in each particular case, and depends on the nature and character of the provocation. Cooper v. Demby (Ark.) 1917D-580. (Annotated.)
- 17. Provocation. If defendant had a reasonable excuse arising from the provocation or fault of plaintiff, but not sufficient entirely to justify the assault, damages ought not to be assessed by way of punishment. Cooper v. Dempey (Ark.) 1917D-580. (Annotated.)

#### Note.

Provocation in mitigation of damages for assault. 1917D-582.

#### ASSESSMENT.

For taxation, see Taxation, 48-66. Under Foreign Corporation Tax Act, see Taxation, 164-169.

#### ASSESSMENTS.

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## ASSIGNMENTS.

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Assignability of trade name, see Trade Marks and Trade Names, 2.

# WHAT MAY BE ASSIGNED.

## a. In General.

1. Ind. Acts 1909, c. 34, § 4, prohibiting assignments of wages by a married man without his wife's consent, is not invalid as a regulation of interstate commerce when applied to an assignment, by an employee of an interstate railroad, of part of his wages for the purchase of a watch, which he was required by the company's regulations to carry. Cleveland, etc. R. Co. v. Marshall (Ind.) 1917A-756.

(Annotated.)

- 2. Validity of Prohibition. Ind. Acts 1909, c. 34, § 4, prohibiting the assignment of wages by a married man without his wife's consent, which was intended to protect the earnings of a married man so as to enable him to perform his legal duty to support his family, is a valid exercise of the police power, and does not deprive a person of his property without due process of law, notwithstanding, however, that it applies to wages already earned, as well as to wages to be earned in the future. Cleveland, etc. R. Co. v. Marshall (Ind.) (Annotated.) 1917A-756.
- 3. Laws 1911, c. 62, amending Burns' Ind. Ann. St. 1908, § 2669, so as to allow a debtor, injured by his creditor's assignment of the claim to a nonresident so as to enable its collection by attachment or garnishment, to recover damages including attorney's fees, is not void as based on an unreasonable classification because not applying to persons who send their claims into foreign jurisdictions for like purposes, for in the latter case the domestic courts may enjoin the local creditors from continuing the foreign action, while in the former the assignee cannot be enjoined, and if the attachment is successful the debtor may not have funds sufficient to procure an attorney unless recovery of attorney's fees is provided for by the stat-

Anderson v. Knotts (Ind.) 1916Dute. (Annotated.)

- 4. The title of Laws Ind. 1911, c. 62, entitled "An act to amend section 664 of an act concerning public offenses," etc., is sufficiently broad to include a provision for the allowance of attorney's fees to a debtor damaged by a creditor's assignment of the claim to a nonresident in violation of the criminal statute. Anderson v. Knotts (Ind.) 1916D-868. (Annotated.)
- 5. Laws Ind. 1911, c. 62, amending Burns' Ann. St. 1908, \$ 2669, making criminal a creditor's assignment of a debt to a nonresident to enable its collection by attachment or garnishment, by adding a provision authorizing the injured debtor to recover damages and attorney's fees, is not void under Const., art. 4, § 19, providing that every act shall embrace but one subject and matters properly connected therewith, for the provision for the recovery of damages is germane to the criminal provisions of the statute. Anderson v. Knotts (Ind.) 1916D-868.

(Annotated.)

6. Of Debt for Collection in Another Jurisdiction. In 1909 defendant recovered a judgment against plaintiff. Burns' Ind. Ann. 1908, § 2669, enacted in 1905, making it a crime for a creditor to assign a claim for debt against a citizen of the state for the purpose of having it collected by attachment and garnishment proceedings in another state, was amended in 1911 (Laws 1911, c. 62) so as to entitle the debtor injured by such garnishment to recover damages and attorney's fees. Thereafter defendant assigned his claim to a nonresident, and it was collected by garnishment. Held that, in view of the state of the law at the time of the recovery of the judgment, the amendment of 1911 was not invalid as to defendant under Const. U. S., art. 1, § 10, prohibiting the passage of any law impairing the obligation of a contract. Anderson v. Knotts (Ind.) 1916D-868.

(Annotated.)

## Note.

Validity of statute forbidding assignment of debt or claim for collection in another jurisdiction. 1916D-870.

## b. Executory Contracts.

- 7. Expectancy. A child having an expectancy in the residue of an estate may for valuable consideration release such expectancy to other children. Simmons v. Ross (Ill.) 1916E-1256. (Annotated.)
- 8. Expectancy. A sale by an expectant heir of an interest in land which he expects to inherit from a person then living is not against public policy, and the fact that a grantor is an expectant heir of the owner of land, an interest in which his

deed purported to convey, does not prevent the title subsequently acquired by him by descent passing thereunder, under the rule of estoppel. Blackwell v. Harrelson (S. Car.) 1916E-1263. (Annotated.)

- 9. Expectancy. A contract to purchase the prospective interests of the heirs apparent of an owner of land is not enforceable at law or in equity, where the owner has not consented to the sale and is insane and cannot consent. Stevens v. Stevens (Mich.) 1916E-1259. (Annotated.)
- 10. Assignability of Covenant. An agreement with the buyer, and not with him "and assigns," by the sellers of the good will of a business not to become competitors is assignable to one to whom the buyer sells such business and good will. Public Opinion Pub. Co. v. Ransom (S. Dak.) 1917A-1010.

# c. Rights of Action.

- 11. Assignability of Right of Action for Tort. S. Dak. Civ. Code, § 384, making assignable a cause of action for tort, is not modified by Code Civ. Proc., § 80, requiring every action to be prosecuted in the name of the real party in interest, except as otherwise provided, "but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract"; the limiting clause not taking away right of assignment otherwise conferred. Sherman v. Harris (S. Dak.) 1917C-675.
- 12. S. Dak. Civ. Code, § 384, declaring a thing in action arising out of an obligation transferable, an assignment of a cause of action for deceit cannot be held contrary to public policy. Sherman v. Harris (S. Dak.) 1917C-675.
- 13. Criterion of Assignability. The criterion as to assignability of a cause of action under S. Dak. Civ. Code, § 384, declaring a thing in action arising out of violation of a right of property, or out of an obligation, transferable, is whether it is lawful to make the assignment, for instance, it must not be within the inhibition of sections 918, 919, as to subjectmatter. Sherman v. Harris (S. Dak.) 1917-675.
- 14. Right of Action for Deceit. A claim for deceit, whether considered as arising from a violation of a right of property or an obligation imposed by law, is assignable; S. Dak. Civ. Code, § 384, declaring a "thing in action" (defined by section 383 as a right to recover money or other personal property by a judicial proceeding) arising out of the violation of a right of property, or out of an obligation, to be transferable; section 1115 declaring that an "obligation" (defined by section 1114 as a legal duty by which a person is bound to do or not to do a certain thing) arises

from the contract of the parties or the operation of law; section 2444 declaring that, when the meaning of a word is defined in any statute, such definition is applicable to the same word wherever it occurs, except where a contrary intention plainly appears; and section 1134, which, with sections 1114, 1115, appears under that part of the subject of "Obligations" dealing with obligations in general, providing that a right arising out of an obligation is the property of the person to whom it is due and may be transferred as such. Sherman v. Harris (S. Dak.) 1917C-675.

- 15. Right of Action for Penalty. A right of action for a penalty, given by section 7 of chapter 79 of the W. Va. Code, is not assignable. Wilson v. Shrader (W. Va.) 1916D-886. (Annotated.)
- 16. Right to Sue for Rescission. A mere litigious right cannot be assigned; consequently one purchaser of land cannot assign to another the right to sue for a rescission of the contract. Cooper v. Hillsboro Garden Tracts (Ore.) 1917E-840.

(Annotated.)

#### Note.

Assignability of right of action for penalty. 1916D-893.

# 2. CONSTRUCTION AND EFFECT OF ASSIGNMENTS.

- 17. Requisites of Assignment. An assignment of a cause of action must conform to the fundamental tests applied to any contract, prescribed by S. Dak. Civ. Code, § 1189, as to parties, consent, lawful object, and consideration. Sherman WHarris (S. Dak.) 1917C-675.
- 18. Assignments Against Public Policy. An assignment must not violate S. Dak. Civ. Code, § 1271, declaring a contract unlawful which is contrary to the express provisions of law, the policy of express law, or good morals. Sherman v. Harris (S. Dak.) 1917C-675.
- 19. What Constitutes. Where the commissioners of an improvement district agreed to hold up payment until plaintiff's claim was satisfied, and the debtor consented, there is no assignment of the payment; plaintiff not being a party to the agreement. Dickey v. Southwestern Surety Ins. Co. (Ark.) 1917B-634.
- 20. Prohibition of Assignment of Wages—Scope of Statute. Ind. Acts 1909, c 34, § 4, prohibiting the assignment of wages by a married man, who is the head of a family, without the written consent of his wife duly acknowledged although to be strictly construed as a statute in derogation of the common law, is not limited to assignments to wage brokers, to which class alone sections 2 and 3 of the same act apply, since the intention of the legis-

lature to extend it to all assignments is so manifest from the language that there is no room for construction. Cleveland etc. R. Co. v. Marshall (Ind.) 1917A-756.

## 3. ACTIONS.

21. Liability for Purchase Money-Defenses-Payment to Third Person. Regarding right of recovery from G. by the assignee of F.'s claim for the price of lumber which F. sold G., it is immaterial that G., knowing of the assignment, under its oral promise, void under Rem. & Bal. Wash. Code, \$5289, to see that T., who had sold the lumber to F., got its money, paid T. First National Bank v. G. Geske & Co. (Wash.) 1917B-564.
22. Effect of Assignment on Suit to Re-

scind. Where purchasers of land assigned their contracts to plaintiff, the assignment was an affirmance of the agreement, and so precluded suit by plaintiff for rescission of the contracts on the ground of misrep-resentations; plaintiff having no more rights than his assignors. Cooper v. Hillsboro Garden Tracts (Ore.) 1917E-840

(Annotated.)

23. Action on Assigned Penalty. claimant of a penalty by an attempted assignment from the person entitled to sue therefor cannot maintain an action for it, in the name of his alleged assignor, and the objection of nonassignability of the claim is available on a demurrer to the declaration. Wilson v. Shrader (W. Va.) 1916D-(Annotated.)

24. Evidence-Weight - Uncontradicted Testimony. An assignee suing on a claim, who has not been led to expect that a fact defeating a recovery on the claim would be attempted to be proved by an admis-sion of his assignor, does not, by failing to contradict testimony of a witness as to admissions of the assignor, admit the truth of the testimony, but that is for the jury. Schmidt v. Marconi Wireless Tel. Co. (N. J.) 1918B-131.

## Note.

Right of assignee of contract for purchase of land to sue for rescission thereof. 1917E-845.

## ASSIGNMENTS OF ERROR.

See Appeal and Error, 71-81.

# ASSOCIATES IN OFFICE.

Defined, see Public Officers, 4, 21.

# ASSOCIATIONS.

See Beneficial Associations; Corporations; Partnership: Societies and Clubs.

## ASSUMPSIT.

Administrator's action on note, pleading, see Executors and Administrators, 82 83.

For use and occupation, see Landlord and Tenant, 32, 36.

1. Form of Remedy for Wrongful Discharge. Where a bookkeeper was employed under a written contract for one year and subsequently continued in service for several years thereafter receiving one increase in salary, the appropriate remedy on his discharge is an action on the common counts in assumpsit. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171.

## ASSUMPTION OF RISK.

By passenger, see Carriers of Passengers. 39, 40.

By servant, see Master and Servant, 29-31. Under Employers' Liability Act, see Master and Servant, 69-72.

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# ATTACHMENT.

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2. What may be Attached, 88. 3. Sufficiency of Levy and Lien of Attachment, 88.

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Force in resisting levy, see Assault, 6. Judgment as concluding claims for wrong-

ful attachment, see Judgments, 77, 78. As waiver of right to lien, see Mechanics' Liens, 31.

# 1. FOREIGN ATTACHMENTS.

1. A corporation organized under the laws of a foreign jurisdiction, although engaged in business in this state and having complied with the Idaho Constitution and all the laws of this state affecting foreign corporations is a nonresident and subject to attachment as such. Jennings v. Idaho R. Etc. Co. (Idaho) 1916E-359.

(Annotated.)

2. Foreign Corporation as Nonresident. Under section 2792, Rev. Idaho Codes, which provides "that foreign corporations complying with the provisions of this section shall have all the rights and privileges

1916C-1918B.

of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the state applicable to like domestic corporations," such corporation is not a citizen or resident of this state, within the meaning of the foreign attachment laws, and is not exempt from attachment as a nonresident. Jennings v. Idaho R. etc. Co. (Idaho) 1916E-359. (Annotated.)

#### Note.

Right to issue attachment against foreign corporation on ground of nonresidence. 1916E-362.

## 2. WHAT MAY BE ATTACHED.

- 3. Corporate Stock. At common law corporate stock is not subject to attachment, but is made so by Ky. Civ. Code Prac., §§ 202-236. Husband v. Linehan, (Ky.) 1917D-954.
- 4. Equitable Interest in Land. Under N. Car. Revisal 1905, §§ 767, 784, providing that the officer to whom a warrant of attachment is directed and delivered shall take into his possession the personal property of the defendant, and shall levy on so much of the real estate of the defendant as prescribed for executions, an attachment can be levied only upon property subject to execution; and hence an attachment upon the equitable interest of a non-resident defendant in lands held in trust is void, and will not support any judgment. Johnson v. Whilden (N. Car.) 1916C-783. (Annotated.)

## Note.

Equitable interest in real property as subject to attachment. 1916C-786.

# 3. SUFFICIENCY OF LEVY AND LIEN OF ATTACHMENT.

5. Manner of Levy on Stock. An attachment cannot be levied upon negotiable mortgage coupon bonds, or a lien acquired thereon, by service of garnishment process upon the corporation owing them, as they can only be attached by actual levy on the person in possession. Husband v. Linehan (Ky.) 1917D-954.

## 4. UNDERTAKING.

- 6. Amendment of Bond. If an attachment undertaking was invalid where the surety signed his name to the justification, instead of to the undertaking, the court had power, on a motion to vacate, to permit the filing of a proper undertaking. Boger v. Cedar Cove Lumber Co. (N. Car.) 1917D-116. (Annotated.)
- 7. Signature in Wrong Place. Under N. Car. Revisal 1905, § 763, directing the officer issuing a warrant of attachment to

require a written undertaking on the part of plaintiff with sufficient surety, it was immaterial that the surety, by mistake, signed his name to the justification of the undertaking, instead of to the undertaking itself, since, the statute prescribing no rule as to the execution of the undertaking, asigning and delivery is sufficient, and, where the statute requires an instrument to be signed, but does not require it to be subscribed, it is not necessary for the signature to appear on any particular part of the instrument, if written with intent to become bound. Boger v. Cedar Cove Lumber Co. (N. Car.) 1917D-116.

## Note.

Right to amend attachment bond. 1917D-117.

# 5. DISSOLUTION.

- 8. Death of Defendant. Mass. St. 1913, c. 305, amending Rev. Laws 1902, c. 167, § 112, providing that attachments not levied on before the debtor's death are thereby dissolved, by excepting attached property which the debtor had alienated before his death, is prospective only; a contrary intention not appearing by necessary implication. Hanscom v. Malden etc. Gaslight Co. (Mass.) 1917A-145.
- 9. Right of Defendant to Move for Dissolution. Where plaintiff, in an action to recover a debt from defendant, attaches money in the hands of a trust company, defendant, claiming that the money belonged to a bank, has no standing to move to dissolve the attachment. Union Buffalo Mills Co. v. Thesmar (S. Car.) 1916D-476. (Annotated.)

(Annotated.)

- 10. Death of Defendant. Since, under the statute, plaintiff may continue a pending action against defendant's executor, an attachment of realty sued out in the action was not dissolved by defendant's death, but would be continued though the estate was insolvent. Craig v. Wagner (Conn.) 1917A-160. (Annotated.)
- 11. Mass. St. 1913, c. 305, amending Rev. Laws 1902, c. 167, § 112, providing that attachments not levied on before the debtor's death are thereby dissolved, by excepting attached property alienated by the debtor before his death, if construed as retroactive, would, as to property deeded subject to an attachment, be a taking of property without due process. Hanscom v. Malden etc. Gaslight Co. (Mass.) 1917A-145.
- 12. Motion to Dissolve—Objection to Sufficiency. Where there has been a trial, and no objection has been made to the sufficiency of a motion or affidavit to dissolve an attachment, either by demurrer or motion, an objection to the introduc-

tion of evidence in support of the motion, on the ground that it does not put in issue or traverse the grounds laid in the affidavit for attachment, will be sustained only when the allegations of the traversing affidavit wholly fail to deny the grounds of attachment. First Bank of Texola v. Terrell (Okla.) 1917A-681.

13. Sufficiency of Denial. Where the traversing affidavit is in the conjunctive, and is laid in the present tense, its legal sufficiency should be tested by either motion or demurrer, and not alone by mere objection to the introduction of testimony. First Bank of Texola v. Terrell (Okla.) (Annotated.) 1917A-681. Notes.

Right of defendant to move to dissolve attachment. 1916B-476.

Dissolution of attachment by death of defendant. 1917A-149.

## 6. RELEASE OF ATTACHMENT.

14. Enforcement-Election of Remedies. A plaintiff who has attached a person's effects, both at law and in equity, may dismiss his attachment at law and proceed in equity. Niehaus v. C. B. Barker Construction Co. (Tenn.) 1918B-23.

#### ATTEMPTS.

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# 1. STATUS, ADMISSION, AND RIGHT TO PRACTICE.

1. Right to Practice-Nature of Right. The practice of law is not an inherent right, but a privilege subject entirely to 1916C-1918B.

state control. In re Bailey (Mont.) 1917B-1198.

- 2. Status as Officer. An "attorney at law" is in a sense an officer of state under oath binding him to the highest fidelity to the court as well as to his client, and sustains an obligation to the public no less significant than that to his clients. In re Bergeron (Mass.) 1917A-549.
- 3. Rules of Examiners. A rule of the Board of Bar Examiners, approved by the supreme judicial court, requiring an applicant for examination to certify that he is a graduate of a college or a day high school, or school of equal grade, or has passed the entrance examination of a college or of the college entrance, examination board, or equivalent examinations, or has complied with the entrance requirements of a college, or has passed the examination for entrance to the Massachusetts state normal schools in English grammar and literature, in United States his-tory covering the history and civil gov-ernment of Massachusetts, with related geography and English history directly contributory to a knowledge of United States history, in Latin or French, in algebra, or plane geometry, and in any two of the following subjects: Physiology and hygiene, physics, chemistry, botany, and physical geography---prescribes a qualification in general education which is reasonable as a prerequisite for examination for admission to the bar. In re Bergeron (Mass.) 1917A-549.

(Annotated.)

- 4. Right of Nonresident Counsel to Appear. Nonresident counsel are not permitted to practice in the courts of North Dakota as a matter of right, but as a matter of permission and privilege merely. Youmans v. Hanna (N. Dak.) 1917E-263.
- 5. Repeal by Statute. Rule 7 of the Mass. Board of Bar Examiners, relative to general education, effective February 2, 1914, was not repealed by St. 1914, c. 670, \$1, effective September 1, 1914, amending Mass. Rev. Laws, c. 165, \$40, authorizing the Board of Bar Examiners, subject to the approval of the supreme judicial court, to make rules, as to qualifications of applicants for admission to the bar, by adding the proviso that he "shall not be required to be a graduate of any high school, college or university." In re Bergeron (Mass.) 1917A-549.
- 6. Unauthorized Practice as Contempt. Under Mont. Rev. Codes, § 6388, providing that if any person practice law in any court, except a justice's court or a police ccurt, without having received a license as attorney, he is guilty of a contempt of court, where respondent advised clients as to legal matters pending or to be brought before courts of record, and prepared

pleadings and proceedings for use in such courts, and appeared before courts of record by his partner, he "practices law" in such a sense as to render him guilty of contempt when without a license. In re Bailey (Mont.) 1917B-1198.

(Annotated.)

7. Under Mont. Rev. Codes, § 7309, subd. 6, providing that assuming to be an officer, attorney, or counsel of a court, and acting as such without authorization, shall constitute contempt of court, where respondent employed all customary methods to advertise himself as an attorney, when without a license, he is guilty of contempt. In re Bailey (Mont.) 1917B-1198.

(Annotated.)

## Notes.

Validity of rule regulating admission to bar. 1917A-552.

Practicing law without license as contempt of court. 1917B-1200.

# 2. RELATION OF ATTORNEY AND CLIENT.

# a. Authority of Attorney.

# (1) In General.

- 8. Power to Disclaim. An attorney has no general power to execute a retraxit or disclaimer, or otherwise bind his client by the surrender of his rights. Glover v. Bradley (Fed.) 1917A-921.
  - (2) To Compromise Cause of Action.
- 9. Power to Compromise. Consent of counsel to orders and judgments made in the progress of a cause and intended to promote the interest of his client is binding on the client; a compromise settlement made in good faith by counsel, though the client is an infant, when sanctioned by the court and embodied in a decree, being binding. Glover v. Bradley (Fed.) 1917A-921.
- 10. Power to Release. An attorney cannot release his client's claim, except upon full payment. Glover v. Bradley (Fed.) 1917A-921.

## (3) Consent to Judgment.

11. Power to Consent to Judgment. An attorney who is representing interests antagonistic to infant clients cannot give binding consent to a decree against the infants, and a decree based on such consent is invalid. Glover v. Bradley (Fed.) 1917A-921.

# b. Summary Jurisdiction.

12. Transaction Outside Professional Relation. The courts will not maintain summary proceedings to discipline an attorney for alleged misconduct, in order to compel

e.

him to pay money or perform any other act, in matters disconnected with his professional duties. Krickau v. Williams (R. I.) 1916C-1145. (Annotated.)

13. Respondent, an attorney, while not acting for petitioner in a professional capacity, received \$500 from her as a loan, and executed a mortgage to secure the same on property, the title to which stood in the name of his mother-in-law. He claimed that the property in fact belonged to him, which the holder of the title admitted; that he had executed the mortgage as collateral entirely on his own suggestion; that it was not demanded by petitioner, nor was it an inducement to the loan, which petitioner admitted. It appeared that at the time respondent fully explained the circumstances to petitioner, and since the commencement of the proceedings to discipline respondent, he had offered to repay the loan, with interest, but petitioner thought she was not at liberty to accept the payment until the conclusion of the proceedings. Held, insufficient to justify any order against respondent. Krickau v. Williams (R. I.) 1916C-1145. (Annotated.)

# c. Right to Testify.

14. Attorney Conducting Trial as Witness for Client. It is improper to allow one who testifies as a witness to the principal facts in the case to also as attorney conduct the trial in the examination of witnesses and argument to the jury. But the judgment will not necessarily be reversed because an attorney at law, who is a witness in the case, is allowed to assist the prosecuting attorney in the preparation and in the details of the trial. Roberts v. State (Neb.) 1917E-1040.

# d. Authority of Client.

15. Right of Client to Dismiss Action. A client may dismiss his cause of action, or settle with the opposite party, without consulting his attorney. St. Louis, etc. R. Go. v. Blaylock (Ark.) 1917A-563.

(Annotated.)

16. Settlement of Cause of Action Subject to Lien. It is opposed to the policy of the law and section 6293, Rev. N. Dak. Codes 1905 (section 6875, Comp. Laws 1913), gives to an attorney no right to prevent his client from himself settling his claim for damages for personal injuries and without dictation by such attorney. An agreement which seeks to deprive the client of such right is void, but it does not otherwise invalidate an agreement for contingent fees which is otherwise valid. Greenleaf v. Minneapolis, etc. B. Co. (N. Dak.) 1917D-908.

(Annotated.)

## Note.

Right of client to dismiss action without attorney's consent. 1917A-570.

# 3. COMPENSATION OF ATTORNEYS.

# a. Right to Compensation.

17. Contract Made After Establishment of Relation. Contracts affecting an attorney and his client subsequent to the employment which are beneficial to the attorney place the burden on the attorney to show that the provisions thereof are fair and reasonable, and were fully known and understood by the client, and it is not incumbent upon one attacking the contract to show fraud or undue influence on the part of the attorney. Matter of Howell (N. Y.) 1917A-527. (Annotated.)

18. Contract for Increased Compensa-An attorney, retained by the wife in a divorce action to represent her in all matters pertaining thereto, in considera-tion of a fee of \$250 which he received, procured a tentative agreement with her husband for a division of property, and binding him to withdraw objectionable matter from the divorce petition. The wife, being desirous of having the tentative agreement set aside against her attorney's wishes, visited the attorney's office at his request and was induced by him, under threat that he would withdraw from the case and without advising her to seek independent advice, to agree to pay him an additional fee of \$1,000. Held, that such contract was unenforceable, regardless of the purity of defendant's motives and the wisdom of his advice, especially where it did not appear that he informed and advised her fully in respect to the tentative agreement. Egan v. Burnight (S. Dak.) 1917A-539. (Annotated.)

19. Strict Construction Against Attorney. The grantor in a trust deed conveying real and personal property in trust to pay over the net income to the grantor for life, with remainder over to the trustee and another, was made a party defendant in the trustee's action for an accounting, and employed a firm of attorneys to represent her in the action under an agreement to pay \$3,500 for their services, and, after an interlocutory judgment therein appointing a new trustee and requiring the first trustee to file an account, the attorneys retired, charging only \$1,500 and their disbursements. Petitioner was substituted as attorney, and acted as such for fourteen months, and three months before the report of the referee on the accounting he induced his client to sign a paper prepared by him agreeing to pay him \$1,656 net, equal to the balance of the original \$3,500, and in addition any sum allowed by the court to him for his services. On

motion to confirm final judgment for his client against the first trustee, he failed to object to costs and allowances to such trustee, who was not entitled thereto, and secured in the name of his client \$427 costs and an allowance of \$1,000 to be paid out of the principal of the trust fund, and thereafter brought proceeding under Judiciary Law (N. Y. Consol. Laws, c. 30), § 475, to procure a determination and an enforcement of his lien for services. Held that, construing the writing most strongly against the attorney, the allowance to the client should be construed as made to enable her to reimburse herself in part from the principal of the trust fund for expenses incurred in the litigation, including attorney's fees, and not as allowed as an extra and additional compensation to the attorney. Matter of Howell (N. Y.) 1917A-527.

- 20. Third Person Benefited by Services. Holders of stock in an insolvent bank employed a trust company as their agent to make sale of the stock. The stock was sold to a bank on a contract providing for a certain absolute payment per share, and for additional payments upon certain contingencies. The purchasing bank, however, refused to make such additional payments, and certain shareholders sued on the contract, employing plaintiffs as their attorneys, and, it appearing that a suit might terminate successfully, other shareholders intervened, but were represented by other attorneys, although they had an opportunity to employ plaintiffs. A settlement was made between the claimants and purchasing bank, and part of the fund deposited in court. Plaintiffs, whose contract with their clients provided for a contingent fee of one-third of the amount recovered, demanded compensation at the same rate from the other stockholders. Held that, there being no contractual relations with other stockholders, they were not entitled to compensation, although their services had been of benefit to the other stockholders. O'Doherty v. Bickel (Ky.) 1917A-419. (Annotated.)
- 21. Allowance of Fee. Under section 247 of the Kan. code, the allowance by the court of \$25 attorney's fee for the plaintiff was proper. Sherman v. Havens (Kan.) 1917B-394.
- 22. Solicitation of Business by Attorney. A contract between an attorney and his client obtained by solicitation of the client by the attorney's agent, and providing for a contingent fee, is not unenforceable as against public policy merely because it was obtained by solicitation. Chreste v. Louisville R. Co. (Ky.) 1917C-867.
- 23. Contract for Division of Fees With Layman. Generally a contract between an attorney and a layman by which the latter

agrees to solicit business for the former in consideration of a share of the fees is void as against public policy. Chreste v. Louisville R. Co. (Ky.) 1917C-867.

- 24. Contract After Formation of Relation. A contract for compensation made by an attorney with his client after the relation has arisen will be closely scrutinized, and may be avoided when a similar contract between parties not sustaining the relation of attorney and client would be upheld. Chreste v. Louisville R. Co. (Ky.) 1917C-867.
- 25. Necessity of Showing Fairness. A contract made between an attorney and a prospective client with reference to compensation may be enforced without the showing on the part of the attorney that the contract is just, fair, and reasonable, since, when it was entered into, no confidential relations existed. Chreste v. Louisville R. Co. (Ky.) 1917C-867.
- 26. Rights on Compromise by Client. Under Ky. St. § 107, giving an attorney's lien for fees, where a client, after a judgment in his favor; settled with the adverse party for an amount less than that awarded him by the judgment, the attorney, having a contingent contract for one-half of the recovery, is entitled to one-half the amount of the judgment, instead of one-half the amount of the compromise. Chreste v. Louisville R. Co. (Ky.) 1917C-867
- 27. Reasonableness of Fee. Where an attorney retained to represent the defendant in a divorce suit for a fee of \$250, which he had received, procured a contract for an additional fee of \$1,000, under which contract a satisfactory settlement reached by one day's efforts would have been full performance, the amount of such additional fee is unreasonable, regardless of the services actually performed by the attorney thereafter; the reasonableness of a fee being determined not alone by the value of the services which might become necessary, but also by the value of the services that might, in the contemplation of the parties, have constituted a full performance. Egan v. Burnight (S. Dak.) 1917A-539.

(Annotated.)
28. Contingent Fee for Recovery of Land. The attorney's compensation became due when the compromise agreement was signed; and hence the 12½ per cent is based on the value of the land at such time, though the patent from the government was not obtained until a later date. Myers v. Bender (Mont.) 1916E-245.

29. Under such clause the attorney is entitled to recover the 12½ per cent in money and not in land, though the preceding clause provided that plaintiff should receive "12½ per cent of all land and money recovered." Myers v. Bender (Mont.) 1916E-245.

- 30. Contract for Contingent Fee. Under a clause of a contract between an attorney and client, providing that the attorney should receive 12½ per cent of the value of all the land and money recovered by compromise or in any manner whatsoever in an action pending against a railroad company over the title to certain land, the attorney is entitled to 121/2 per cent of the value of all lands to which his client secured title by a compromise agreement, though such title was obtained through a relinquishment by the railroad company to the government, in order that the client might obtain title directly from the government. Myers v. Bender (Mont.) 1916E-245.
- 31. Interest on Attorneys' Fees. Failure of a client to pay an attorney his fee when it became due under the contract between them is "a breach of an obligation arising from contract," within Rev. Mont. Codes, § 6048, providing that the measure of damages for such a breach, unless otherwise expressly provided, is the amount which will compensate the aggrieved party for the detriment approximately caused thereby, or likely to result therefrom; and hence the measure of damages for such breach was the principal amount due, together with interest at the legal rate up to the time of trial, allowing credit for payments made at their respective dates. Myers v. Bender (Mont.) 1916E-245.

(Annotated.)

### Notes.

Solicitation of business by attorney as forfeiture of right to compensation therefor, 1917C-871.

Right of attorney to recover for services beneficial to person not employing him. 1917A-423.

Interest on attorney's fees. 1916E-249. Validity of contract for compensation of attorney made after fiduciary relation is established. 1917A-531.

32. Allowance of Fees. An attorney's fee of \$1,000 allowed plaintiff recovering \$3,000 on an accident policy is reasonable. Actna L. Ins. Co. v. Taylor (Ark.) 1918B-1122.

# b. Actions for Compensation.

- 33. In an attorney's action on a contract for additional compensation, procured after his retention in a case, the burden is on plaintiff to prove that he advised his client fully in relation to her rights and duties, and that his advice was as free of all personal consideration on his part as would have been the advice of any disinterested attorney. Egan v. Burnight (S. Dak.) 1917A-539. (Annotated.)
- 34. Contingent Fee Contract. In an attorney's action for compensation under a

contract entitling him to a certain per cent of the value of land recovered, estimated at the time of the signing of a compromise agreement, evidence of the value of the land at a time subsequent to such agreement is improper. Myers v. Bender (Mont.) 1916E-245.

35. Acknowledged by Client. An acknowledgment by a client of a debt to his attorney which is barred by the statute of limitations is within the rule that an attorney is not permitted to receive any benefit from a client unless the latter has had independent advice in the matter. Lloyd v. Coote & Ball (Eng.) 1916E-434.

# Note.

Validity of acknowledgment by client of debt to attorney barred by limitations. 1916E-436.

## 4. LIEN OF ATTORNEYS.

# a. Right to Lien.

36. Retaining Lien. Where the court reporter refused to surrender the certificate of evidence in an action until payment of his fees, but loaned it to plaintiff's attorneys to prepare their abstracts and briefs for appeal, they are entitled to a lien on the certificate for their compensation; the character of their possession not being adverse to their lien. McCracken v. Joliet (III.) 1917D-144.

(Annotated.)

(Annotated.)

- 37. Extent of Lien on Judgment. Under the common-law rule, giving an attorney a retaining lien on all papers, securities, or money belonging to his client which come into his possession in the course of his professional employment, and a charging lien against a judgment recovered through the attorney's efforts, and under Judiciary Law (N. Y. Consol. Laws, c. 30) § 475, giving an attorney a lien on his client's cause of action which attaches to a verdict, judgment, or final order in his client's favor, and the proceeds thereof, an attorney, employed as general counsel at an annual salary, payable semiannually, has no lien for unpaid salary on the proceeds of a judgment procured by him after termination of the general employment, under an agreement to pay him reasonable value of services in the trial of the action. Matter of Heinsheimer (N. Y.) 1916E-(Annotated.)
- 38. Lien on Cause of Action. The attorney's lien given by section 6293, N. Dak. Rev. Codes 1905 (section 6875, Comp. Laws 1913), when sought to be asserted in an action or proceeding for the recovery of damages for personal injuries, attaches to that into which the right of action is merged. If a judgment is recovered the lien attaches to it, if a compromise agreement is made, the lien attaches to it, and

in either case the attorney's lien is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent. Greenleaf v. Minneapolis, etc. R. Co. (N. Dak.) 1917D-908.

- 39. On Cause of Action for Tort. Section 6293, Rev. N. Dak. Codes 1905, being section 6875, Comp. Laws 1913, and which provides for an attorney's lien on "money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing," applies to tort actions for personal injuries as well as to actions which are founded upon contract, and this although such actions do not survive the death of the plaintiff. Greenleaf v. Minneapolis, etc. R. Co. (N. Dak.) 1917D-908. (Annotated.)
- 40. The words "action" and "proceeding" as used in section 6293, Rev. N. Dak. Codes 1905 (section 6875, Comp. Laws 1913), include actions and proceedings for the recovery of damages for personal injuries. Greenleaf v. Minneapolis, etc. R. Co. (N. Dak.) 1917D-908.
- (Annotated.) 41. Where a lien is claimed under section 6293, Rev. N. Dak, Codes 1905 (section 6875, Comp. Laws 1913), in an action for personal injuries, and due notice thereof is given to the defendant and a settleor compromise is made with the plaintiff with or without the consent of the attorney, such lien will attach merely to the proceeds of the settlement, and if the contract or lien is for a percentage of the claim or recovery, it will merely be for such percentage of the amount for which such claim is settled or compro-(Greenleaf v. Minneapolis, etc. R. Co. (N. Dak.) 1917D-908. (Annotated.)
- 42. Joining Attorney as Party. A firm of attorneys had a contract with their client for a fee contingent upon recovery for personal injuries, and began suit thereunder. The client dismissed the suit and commenced another one of the same cause of action in a different circuit. Acts 1909, p. 892, Kirby's Ark. Dig. §§ 4458, 4462, provide for an attorney's lien on the proceeds of a judgment for their client. Held, that the attorneys were not proper parties to the second action, the act not giving them any interest in the cause of action itself. St. Louis, etc. E. Co. v. Blaylock (Ark.) 1917A-563.

## Notes.

Lien of attorney as extending to action for tort. 1917D-917.

Extent of attorney's lien on judgment. 1916E-387.

Lien of attorney on papers in his possession connected with litigation. 1917D-147.

# b. Loss of Lien.

43. Settlement by Client. Under Acts 1909, p. 892, Kirby's Ark. Dig. §§ 4458, 4462, providing for an attorney's lien on the proceeds of a judgment for his client, an attorney has a lien for his fee which cannot be defeated by any settlement of the parties litigant before or after judgment or final order. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.

## 5. DISBARMENT.

## a. Jurisdiction and Power.

- 44. Right of State's Attorney to Institute. Conn. Acts 1907, c. 120, authorizing the appointment of a grievance committee in each county whose duty it shall be to inquire into and present to the court offenses involving the character, professional standing, etc., of members of the bar, does not provide an exclusive mode of instituting such inquiries, and does not restrict the inherent power of the court to inquire into the conduct of its own officers on its own motion or on the complaint of any party, and hence the state's attorney can present a complaint against an attorney as authorized by section 10 of the rules of court. State v. Peck (Conn.) 1917B-227.
- 45. Inherent Power of Court. Courts having power to admit attorneys to the bar possess an inherent power to disbar them for unworthy behavior, unprofessional conduct, or moral turpitude, independent of any statutory authority. In re Hilton (Utah) 1918A-271.
- 46. Findings in Disbarment Proceeding Facts Outside of Charges. It is immaterial in a disbarment proceeding that the court found facts outside of the charges contained in the complaint, where its judgment was not based upon such findings, but upon matters alleged in the complaint and unquestionably sufficient to support the judgment. State v. Peck (Conn.) 1917B-227.
- 47. The state's attorney is not disqualified to present a complaint of professional misconduct against an attorney by reason of his bitter enmity to the accused attorney or his prejudice against him, since he does not appear as a prosecuting officer and has no power to control the proceeding, and his only duty is to call the attention of the court to the alleged misconduct; the duty thereafter resting upon the court to see that the interests of justice are preserved and the rights of the accused attorney protected. State v. Peck (Conn.) 1917B-227.
- 48. Determining Fitness of Accused to Practice. The question for determination in a disbarment proceeding is whether the defendant by reason of his past conduct

evidencing his qualities of character and uprightness was a fit person to exercise longer the functions of an attorney, and in determining this question a large measure of judicial discretion was to be exercised reasonably, fairly, and dispassionately. State v. Peck (Conn.) 1917B-227.

49. Court of Chancery. Under 2 Comp. N. J. St. 1910, p. 2278, fixing a fee for the governor for a license to an attorney and solicitor, to appear and practice in all courts, and page 2281, providing for fees for the judges of the supreme court for license to an attorney and solicitor, and page 4054, \$ 5, providing that any counselor, solicitor, or attorney who shall be guilty of malpractice in any of the courts shall be put out of the roll and not thereafter permitted to practice, unless he shall obtain a new license and be again enrolled in due form of law, which is section 5 of the Practice Act of 1903 regulating "the practice of courts of law," and the constitution, protecting the jurisdiction of the court of chancery as existing at the time of the adoption of the constitution, the court of chancery has no jurisdiction to make an order adjudging a solicitor guilty of malpractice and debarring him from practice as solicitor and counsel in the court of chancery. In re Hahn (N. J.) 1918B-830.

# b. Nature of Proceedings.

- 50. A disbarment proceeding is not a criminal prosecution, nor is it a civil action, though section 11 of the Conn. rules regulating the admission, suspension, and displacement of attorneys requires complaints for misconduct to be proceeded with as civil actions, and the complaint need not have the same technical precision of statement or conformity to recognized formalities required in criminal prosecution or civil actions; it being sufficient if it is sufficiently intelligible and informing to advise the court of the matter complained of in order that it may determine whether it shall institute an inquiry and properly conduct it if instituted, and to advise the attorney of the accusation in order that he may be prepared to meet the charges. State v. Peck (Conn.) 1917B-
- 51. Sufficiency of Complaint. The sufficiency of the complaint in a proceeding to disbar an attorney must be determined upon an examination of the complaint as a whole. State v. Peck (Conn.) 1917B-227.
- 52. Rights of Accused. An attorney accused of professional misconduct is entitled to notice of the charge against him, an opportunity to be heard, a fair and dispassionate investigation, and a reasonable exercise of the judicial discretion. State v. Peck (Conn.) 1917B-227.

53. An order of the court of chancery disbarring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery, entered in proceedings not purporting to be proceedings to punish for contempt, is not sustainable as a punishment for contempt. In re Hahn (N. J.) 1918B-830.

## c. Grounds of Disbarment.

- 54. Loss of Character. The loss by a member of the bar of the supreme court of the United States of his fair private and professional character by wrongful personal and professional conduct, no matter where committed, furnishes adequate reason for taking away his right to continue to be a member of such bar in good standing. Selling v. Radford (U. S.) 1917D-569.
- 55. Misconduct as Judge. Where an attorney who was judge of the probate court procured the payment of \$750 to him from the assets of an estate as compensation for pretended services as an attorney on behalf of the estate which were never rendered, and exerted his authority as such judge to secure such payment, resorted to deception and concealment in his efforts to secure such payment, and made use in his official position of threats calculated to produce the end desired, for the purpose of coercing payment, he is properly suspended indefinitely from practicing law. State v. Peck (Conn.) 1917B-227.

(Annotated.)

- 56. That an attorney sought to be disbarred is judge of the probate court does not prevent his disbarment, since the judge of the probate court need not be an attorney, and his disbarment can have no effect upon his official status. State v. Peck (Conn.) 1917B-227. (Annotated.)
- 57. Misconduct of an attorney, who was judge of the probate court, in the course of the settlement of an estate of a deceased person in such court, justifies his disbarment, since it directly involves a misuse of his professional privilege and is misconduct as a member of the bar, and moreover any misconduct, professional or nonprofessional, disclosing a moral unfitness for the enjoyment of the professional privilege, justifies disbarment. State v. Peck (Conn.) 1917B-227. (Annotated.)
- 58. Attack on Court. Where an attorney, delivering an oration over the body of a murderer, venomously attacked the supreme court which affirmed the conviction, accusing the court of being improperly influenced by a powerful religious body in the state, charging the court with prejudice and unfairness and garbling the accounts of the trial and of proceedings before the pardon board, the attorney is guilty of professional misconduct which warrants

his disbarment under Utah Comp. Laws 1907, §§ 113, 120, respectively, declaring that it is the duty of an attorney to support the Constitution and laws of the United States, to maintain the respect due courts, and employ for the purpose of maintaining causes confided to him only such means as are consistent with the truth, and that an attorney may be disbarred for any violation of his duties or for moral turpitude, for an attorney who so misrepresented the court, attempting to bring the high judicial office into disrespect, is guilty of moral turpitude. In re Hilton (Utah) 1918A-271.

(Annotated.)

- 59. An attorney guilty of slandering or defaming a court or judge is subject to discipline and disbarment. In re Hilton (Utah) 1918A-271. (Annotated.)
- 60. Criticism of Decision of Court. An attorney may publicly or privately criticize the decision of the court, pointing out wherein he deems it defective, and may state that it should not be final. In re Hilton (Utah) 1918A-271.

(Annotated.)

- 61. Loss of Moral Character. Where the statute makes a good moral character a condition precedent to admission to the bar, the court may disbar an attorney when he forfeits his claim to such character by misconduct of a nature rendering him unfit to be continued in office. In re Hilton (Utah) 1918A-271.
- 62. Effect of Pardon on Disbarment Proceeding. Where an attorney was convicted of forgery and a certified copy of the judgment filed in the supreme court, its effect as furnishing conclusive ground for disbarment is not nullified by a conditional pardon granted to the attorney by the governor. In re Sutton (Mont.) 1917A-1223.

  (Annotated.)
- 63. Crime Involving Moral Turpitude. Forgery is an offense involving moral turpitude, within Rev. Mont. Codes, \$ 6393, providing for the disbarment of attorneys on conviction of a felony or of a misdemeanor involving moral turpitude. In re Sutton (Mont.) 1917A-1223.

## Notes.

Criticism of decision of court as ground of disbarment. 1918A-283.

Pardon as affecting right to disbar attorney for criminal misconduct. 1917A-1226.

Misconduct in official or fiduciary capacity other than that of attorney as ground for suspension or disbarment. 1917B-232.

# d. The Hearing.

64. Record Conclusive. By Rev. Mont. Codes, § 6393, a certified copy of the record

of conviction of an attorney for a felony or for misconduct involving moral turpitude is conclusive evidence of his unfitness to be a member of the bar, and the supreme court must disbar him under section 6410 without notice by citation or other process. In re Sutton (Mont.) 1917A-1223.

#### e. Effect of Disbarment.

- 65. An order of the court of chancery debarring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery cannot be sustained under the practice act, requiring the solicitor to act under the direction of the court, which refers only to causes in which the solicitor is acting, and not to his own disqualification for practicing. In re Hahn (N. J.) 1918B-830.
- 66. Standing in Other Courts. The want of fair private and professional character in a member of the bar of the supreme court of the United States, inherently arising as the result of the act of the highest court of a state, disbarring him from practicing in the courts of that state. for personal and professional misconduct amounting to moral wrong, should be recognized by the federal supreme court on motion to disbar unless, from an intrinsic consideration of the record of the state court, it appears (1) that the state procedure, from want of notice or opportunity to be heard, was wanting in due process, or (2) that there was such an infirmity of proof as to give rise to a clear conviction that the conclusion as to the want of fair private and professional character should not be accepted as final, or (3) that some other grave reason exists, impelling the conviction that to allow the natural consequences of the judgment to have their effect would conflict with the duty not to disbar unless constrained to do so by prin-ciples of right and justice. Selling v. Radford (U.S.) 1917D-569. (Annotated.)
- 67. An opportunity should be afforded to a member of the bar of the supreme court of the United States, where his disbarment is sought on the ground of a previous disbarment by a state court, to file the record of the state court, and by printed brief, considering the record intrinsically, to point out any ground within the limitations prescribed by the federal supreme court which should prevent that court from giving effect to the finding of the state court establishing the want of fair private and professional character. Selling v. Radford (U. S.) 1917D-569. (Annotated.)

## Note.

Disbarment in one court as affecting status of attorney in another court. 1917D-572.

# f. Right of Appeal.

68. Right of Appeal. One deprived by order of the court of chancery of his office of solicitor and of the right of exercising to the full extent, the office of counselor is aggrieved thereby within 1 Comp. N. J. St. 1910, p. 450, § 111, authorizing persons aggrieved by any order of the court of chancery to appeal from the same. In re Hahn (N. J.) 1918B-830. (Annotated.)

#### Note.

Right of attorney to review of disbarment proceedings. 1918B-836.

# 6. PERSONAL LIABILITY OF ATTORNEY.

69. Personal Liability for Incidental Expenses. An attorney at law is personally liable for the cost of printing briefs where it appears that in previous similar dealings with the same printers he has habitually paid for the printing on bills rendered to him personally. Judd and Detweiler v. Gittings (D. C.) 1917B-518.

(Annotated.)

- 70. Negligence in Trying Case. Where, in an action against an attorney for negligence in the trial of an action for plaintiff, suing his employer for a personal injury, the jury could find that the superintendent of the employer was negligent the defense of negligence of a fellow-servant, or that without the concurring fault of a fellow-servant the accident complained of would not have occurred, is not available to defeat the action. McLellan v. Fuller (Mass.) 1917B-1. (Annotated.)
- 71. An instruction in an action against an attorney for negligent conduct in the trial of an action brought by him for plaintiff against a third person, as to the attorney's neglect to anticipate and provide against the death of a third person, is properly refused, where the attorney, though without fault in that regard, might have been lacking in due care in other respects. McLellan v. Fuller (Mass.) 1917B-1. (Annotated.)
- 72. Failure to Produce Available Witness. Where, in tort for damages against an attorney for negligent conduct in the trial of an action brought by plaintiff, through the attorney, against his employer, the jury could find that there were available witnesses who would testify to facts to justify a finding that plaintiff was in the exercise of due care, and that the employer was negligent, and that the attorney failed to use the witnesses, the right to recover is for the jury, and a charge that there is not sufficient evidence to justify a verdict for plaintiff is properly re-McLellan v. Fuller (Mass.) 1917Bfused. (Annotated.)

73. In a suit against an attorney for negligence, the test of the sufficiency of the declaration is whether its allegations, if proved, would make out a case, and, if proof of the facts alleged as to the negligence and resulting loss would establish a cause of action, the declaration is not demurrable. Maryland Casualty Company v. Price (Fed.) 1917B-50.

(Annotated.)

74. Liability for Negligence. In a suit against an attorney for negligence, plaintiff must prove the attorney's employment, his neglect of a reasonable duty, and that such negligence resulted in and was the proximate cause of loss to the client. Maryland Casualty Company v. Price (Fed.) 1917B-50. (Annotated.)

# Notes.

Liability of attorney for negligence or breach of duty. 1917B-3.

Personal liability of attorney for incidental expenses of action. 1917B-520.

## ATTRACTIVE NUISANCES.

See Negligence, 23-28.

## AUCTIONS AND AUCTIONEERS.

- 1. In General, 97.
- 2. Authority of Auctioneer, 97.
- 3. Conduct of Sale, 98.

## 1. IN GENERAL.

1. Validity of Regulations. An ordinance of the city of Detroit prohibited the holding of public auctions except between the hours of 8 A. M. and 6 P. M., and also prohibited the use of musical instruments or criers to attract the attention of the public thereto. Defendant, being convicted of a violation of such ordinance, brought certiorari to determine its constitutionality. It is held that the prohibition in the ordinance being neither necessary nor proper for the public welfare or protection of society, it was a discrimination in restraint of trade and an unreasonable People v. Gibbs (Mich.) regulation. 1917B-830.

## 2. AUTHORITY OF AUCTIONEER.

2. Acting as Employee of Another. Where an auctioneer did not bona fide become the employee of another to conduct auction sales, but the arrangement was merely a subterfuge between the auctioneer and such other to evade payment of the auctioneer's license tax as such, the arrangement is no defense, in a city's action to recover the statutory penalty for carrying on the business without a license. Kimmins v. Montrose (Colo.) 1917A-407.

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3. Doing Business Without License. In a city's action against an auctioneer to recover a penalty for conducting his business without a license, the defense that the business was another's, who had a license, for whom defendant acted as agent, was a plea in the nature of confession and avoidance, which the burden was on him to establish by a preponderance of Kimmins v. Montrose the evidence. (Colo.) 1917A-407.

## 3. CONDUCT OF SALE.

- 4. By-bidding Effect on Sale. Where an owner does not, at a sale by auction, announce his intention to bid, by-bidding is illegal, and he cannot hold a purchaser where the price has been run up by means thereof, and this rule is adopted by Sale of Goods Act (Gen. Laws R. I. 1909, e. 262), § 5. Freeman v. Poole (R. I.) 1918A-841.
- 5. Rights of Highest Bona Fide Bidder. A bid at auction for the sale of real estate, without notice of reservation, is but an offer to purchase and not an acceptance of an offer, and where a bid is not accepted, there is no contract, and the knocking down of the property on a higher bid made by an agent of the owner must at least be given the effect of a withdrawal of the property from sale. Freeman v. Poole (R. I.) 1918A-841. (Annotated.)

## Note.

Right of action by highest bidder at auction sale for refusal of auctioneer to knock down property to him. 1918A-850.

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AUTOMOBILE INSURANCE. See Insurance, 45-49.

## AUTOMOBILES.

1. Regulation of Motor Vehicles, 98.

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- b. Licenses, 99.
- 2. Mutual Rights and Duties on Highways, 100.

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- b. Care Required of Operator, 100.
- c. Care Required of Pedestrians, 100. d. Responsibility of Owner for Driver's Acts, 101
- e. Effect of Non-registration, 101.

- f. Liability to Guests, 101. g. Imputed Negligence, 102. h. Actions, 102.
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- 3. Injuries to Motor Vehicles or Occupants, 104
- 4. Liability of Manufacturer for Injuries.
- 5. Crimes Incidental to Operation, 105.

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Proof of sales agency, see Agency, 21, 24. Ford automobile a "motor vehicle," see Homicide, 5.

Involuntary manslaughter, accident, see Homicide, 5-7.

Automobile insurance, see Insurance, 45-49.

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Unusual accident as evidence of negligence, see Negligence, 40. Running to catch runaway truck as negli-

gence, see Negligence, 54. Jitneys as nuisances, see Nuisances, 13. Garage as a nuisance, see Nuisances, 17. Speed laws, see Streets and Highways, 16. Law of the road, see Streets and High-

ways, 17, 18.

## 1. REGULATION OF MOTOR VEHI-CLES.

### a. In General.

- 1. Municipal Regulation of Speed. Ore. L. O. L., § 3206 et seq., being a general law for the organization of cities and towns, establishing the procedure therefor and investing enumerated civil and criminal powers in such municipalities, and Laws 1913, p. 541, amendatory thereof, does not affect the applicability of the Motor Vehicle Law (Laws 1911, pp. 265-278) to the city of Portland, which at the enactment of the latter act was acting under a special charter. Kalich v. Knapp (Ore.) 1916E-1051. (Annotated.)
- 2. Portland City Charter (Sp. Laws Ore. 1903, pp. 3-172), §§ 72, 73, gives the council all legislative powers and authority of the city of Portland, and gives power to exercise within the limits of the city the powers commonly known as police powers to the same extent as the state could exercise that power, to regulate and control the use of the streets for vehicles of all descriptions, and to control and limit traffic on the streets, avenues, and elsewhere. Pursuant thereto, the city adopted ordinances in 1904 and 1906, regulating the speed of automobiles on streets of the city. The Motor Vehicle Law (Laws 1911, pp. 265-278) regulates the use of motor vehicles throughout the state. Const. art. 11, § 2, provides that corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws, and that the legislative assembly shall not enact, legislative assembly amend, or repeal any charter or act of incorporation for any municipality. Held, that the Motor Vehicle Law is unconstitutional in so far as it attempts to regulate the speed of automobiles in Portland; such regulation being an amendment of the city charter. Kalich v. Knapp (Ore.) 1916E-1051. (Annotated.)

- 3. Ore. Const., art. 11, § 2, as amended, declaring that corporations may be formed under general laws, and that the legisla-ture shall not enact, amend, or repeal any charter of any municipality, but that the legal voters of every city and town are granted power to enact and amend their municipal charter subject to the constitution and criminal laws of the state, and article 4, § 1a, reserving the initiative and referendum powers to the legal voters of every municipality as to all local, special, and municipal legislation, insure to each municipality a full measure of home rule, and place beyond the power of the legislature to make any change in local, special, and municipal legislation and the legislature may not amend any municipal charter directly or indirectly where the amendment is the subject of municipal concern and regulation, and Motor Vehicle Law (Laws 1911, p. 365), regulating the use of motor vehicles throughout the state, is unconstitutional in so far as it attempts to regulate the speed of automobiles in municipalities, though the act contains a criminal provision, which is not a criminal law of the state within the constitution. Kalich v. Knapp (Ore.) 1916E-1051. (Annotated.)
- 4. Motorcycles. A regulation of the lights on "motor cars," excepting from its provisions bicycles and tricycles, is applicable to motorcycles. Webster v. Terry (Eng.) 1917A-226. (Annotated.)
- 5. Applicability to Sled. A sled is not a "motor vehicle," as that term is used in the statute referred to. Terrill v. Virginia Brewing Co. (Minn.) 1917C-453.

### Notes.

Municipal regulation of automobiles with respect to equipment, use of streets, or the like. 1916E-1047.

Motorcycles. 1917A-218.

Constitutionality of statutes and ordinances regulating speed of vehicles in streets and highways. 1916E-1067.

## Licenses.

- 6. Violation of License Law. Where defendant, a resident of Hamilton county, while driving his automobile in Hardin county, was arrested for operating the same without having number plates for the current year displayed, and it did not appear that he had ever operated the machine in Hardin county prior to that date, the fact that he may have operated it in Hamilton county while he was in default will not justify his conviction in Hardin county, under an information charging the commission of the offense in that county. State v. Gish (Iowa) 1917B-135.
- 7. Validity. A reasonable fee may be imposed by statute as an incident to the

- exercise of the state's police power to regulate the use of highways by motor vehicles. State v. Gish (Iowa) 1917B-135.
- 8. Official Delay in Furnishing Plates. Iowa Acts 34th Gen. Assem., c. 72, regulating automobiles, by section 3 requires the owner to register his machine with the secretary of state; and section 6 declares that on the filing of an application, and the payment of the fee, the secretary shall assign a number and without expense to the applicant issue and deliver, or forward by mail or express to such owner, a certificate of registration, and two number plates. Section 12 declares that no person shall operate a motor vehicle on the highways of the state after July 4, 1911, unless the vehicle shall have a distinctive number assigned to it by the secretary of state, and two number plates with numbers corresponding to those of the certificate of registration, conspicuously displayed, front and rear, section 22 declaring that a violation of sections 3-15, inclusive, of the act shall constitute a misdemeanor punishable by a fine. Held, that the gist of the offense was not the operation of a motor vehicle, but rather the failure to attach and display the number plates while so operating; and hence, where defendant had properly re-registered his machine for the year 1913 with the secretary of state, been assigned a number, and had paid the necessary license fee, but because of inability of the secretary to furnish plates, none had been received by defendant, his operation of his automobile with the plates for the previous year attached, by which it was properly identifiable until those for the year 1913 could be obtained, did not constitute a violation of the statute. State v. Gish (Iowa) 1917B-135.
- 9. Necessity of Uniformity. Miss. Laws 1914, c. 120, § 2, imposing a tax for the privilege of driving motor vehicles and motorcycles, is a pure privilege tax, and hence is not bad because there is a lack of uniformity and equality according to the value of the vehicles; the provisions for equality and uniformity applying only to ad valorem taxes. State v. Lawrence (Miss.) 1917E-322.
- 10. Effect of Excepting Nonresidents. That a nonresident, who has complied with the laws of his state as to registration, may drive a motor vehicle within the state for sixty days without paying the license tax or registration fee, does not render Laws Miss. 1914, c. 120, § 2, imposing upon those driving motor vehicles and motorcycles a tax for the privilege of using the road, invalid as discriminatory legislation. State v. Lawrence (Miss.) 1917E-322. (Annotated.)
- 11. Tax for Using Roads. Miss. Laws 1914, c. 120, § 2, imposing upon motor

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vehicles and motorcycles a tax for the privilege of using the public roads, is not bad as adopting an unreasonable classification; the classification being a natural one. State v. Lawrence (Miss.) 1917E-322.

- 12. Validity. The legislature, having full power over public roads, can provide means by which they are to be improved, and Laws Miss. 1914, c. 120, § 2, imposing a privilege tax upon motor vehicles and motorcycles for the use of public roads, and directing payment thereof into the road fund, is valid. State v. Lawrence (Miss.) 1917E-322.
- 13. Motorcycles. One who rides a motorcycle without first obtaining the license required by Rem. & Bal. Wash. Code, §§ 5562-5566, is not guilty of negligence preventing a recovery for injuries sustained in a collision with an automobile negligently operated; there being no causal relation between the failure to obtain a license and the accident. Switzer v. Sherwood (Wash.) 1917A-216.

(Annotated.)

14. Motorcycles. Chapter 179, Laws Idaho 1913, p. 558, is a law intended, among other things, to require those who operate motorcycles upon the public highways to cause such vehicles to be registered and to pay therefor a license or registration fee, which is in excess of the amount necessary to be raised for the purpose of policing such vehicles upon the public highways, and as such is valid. Matter of Kessler (Idaho) 1917A-228.

(Annotated.)

## Note.

Validity of inclusion or exclusion of nonresidents in statute regulating use of vehicles. 1917E-324.

# 2. MUTUAL RIGHTS AND DUTIES ON HIGHWAYS.

# a. In General.

15. Keeping to Right Side of Street. Where a municipal ordinance provided that vehicles, except when passing other vehicles ahead, should be kept as near the right-hand curb as possible, an automobilist should keep his machine on the right-hand side of the street, and, where he uses the left-hand side, his rights are inferior to those of travelers proceeding in the opposite direction. Hiscock v. Phinney (Wash.) 1916E-1044.

(Annotated.)

## Note.

Rights and duties of persons driving automobiles in highways. 1916E-661.

- b. Care Required of Operator.
- 16. Where a wagon or other vehicle obscures or obstructs his view of a street

crossing, when the presence thereon of others may reasonably be anticipated, extra vigilance and caution are required of the auto operator, in order to prevent injury to persons on such crossing. Deputy v. Kimmell (W. Va.) 1916E-656.

(Annotated.)

- 17. The vigilance and care required of the operator of an automobile vary in respect of persons of different ages or physical conditions. He must increase his exertions in order to avoid danger to children, whom he may see, or, by the exercise of reasonable care, should see, on or near the highway. More than ordinary care is required in such cases. Deputy v. Kimmell (W. Va.) 1916E-656. (Annotated.)
- 18. Because of the character of the vehicle and the unusual dangers incident to its use, a greater degree of care is required of the operator of an automobile, while on the public highway, and especially at street crossings, than is required of persons using the ordinary or less dangerous instruments of travel. He should exercise such care in respect to speed, warnings of approach and the management of the car as will enable him to anticipate and avoid collisions which the nature of the machine and the locality may reasonably suggest likely to occur in the absence of such precautions. Deputy v. Kimmell (W. Va.) 1916E-656. (Annotated.)
- 19. A person using an automobile on a public highway owes the double duty to avoid danger to himself by another having an equal right to such use, and the infliction of injury upon such other person. Both must exercise that degree of care which a reasonably prudent man would exercise under the same circumstances. Deputy v. Kimmell (W. Va.) 1916E-656. (Annotated.)
- 20. Leaving Motor Truck Unattended in Street. Automobiles and motor trucks, being lawful means of conveyance, may be used on the public streets and highways, and it is not negligence per se to leave a motor truck unattended in a public street, although it is the duty of the driver to exercise the care of a person of ordinary prudence under the circumstances. American Express Co. v. Terry (Md.) 1917C-650.
- 21. Duty in Approaching Crossing. Where one approaches a crowded crossing in an automobile, if it is imprudent or dangerous to use the crossing at the time, ordinary care requires the stopping of the car or seeking another crossing. Crawford v. McElhinney (Iowa) 1917E-221.

# c. Care Required of Pedestrians.

22. Rights and Duties as to Pedestrian. The rights of pedestrians and drivers of automobiles, when using streets or other public highways, are mutual, equal and co-

ordinate, except as varied by the nature of the appliance or mode of travel employed; and as long as each observes the reciprocal rights of the other neither will be liable for any injury his use may cause. Deputy v. Kimmell (W. Va.) 1916E-656.

(Annotated.)

# d. Responsibility of Owner for Driver's

23. Chauffeur Using Car Without Authority. Where a chauffeur was directed by the owner of an automobile to take it from the garage at a stated time and call at a house, but he started nearly an hour earlier, and in making a detour on an errand of his own an accident occurred at a point twice as far from, and beyond, the place to which he was directed to go as to the garage, having made a side trip of several blocks from the main trip of less than one block, he was not in his master's employ at the time of the accident, and his master was not liable; since while a mere disregard of instructions or deviation from the line of his duty by servant does not relieve his master of responsibility, if the servant for purposes of his own departs so far from the line of his duty that for the time being his acts constitute an abandonment of his service, the master is not liable. Eakins Administrator v. Anderson (Ky.) 1917D-1003. (Annotated.)

24. Liability of Owner for Negligence of Husband. Where an automobile owned by husband and wife as a community and used for the community was negligently operated by their daughter while the husband was riding therein, a judgment is properly rendered against husband and wife for the damages awarded, though the wife was not present at the accident. Switzer v. Sherwood (Wash.) 1917A-216.

25. Car Driven by Wife. Under Iowa Code, § 3156, providing that, for civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except where he would be jointly liable with her if the marriage did not exist, where defendant's wife, driving his automobile, which was her invariable custom, he never having driven it, upon a pleasure trip to which he had invited two guests, struck and killed a child, defend-ant husband is liable for his wife's negligence; she being engaged as his servant in a common enterprise with him. Crawford v. McElhinney (Iowa) 1917E-221.

(Annotated.)

26. Imputed Negligence. Although the negligence of the driver of an automobile cannot be imputed to one merely riding with him, yet where the driver is in an enterprise of any kind for the benefit of the party riding with him, is his employee or under his control, or where the automobile is under his control and direction and owned by him, and he has a right to control and direct it, whether he assumes such right or not, he is held for the negligence of the driver. Crawford v. Mc-Elhinney (Iowa) 1917E-221.

## Notes.

Liability of owner of automobile for act of driver other than his servant or child. 1917E-228.

Liability of owner of automobile for acts of his chauffeur or agent. 1917D-

## Effect of Non-registration.

27. Where an automobile is on the highway unregistered by defendant, its owner, or a dealer, as required by Mass. St. 1909 c. 534, the owner as a wrongdoer and creator of a nuisance is liable for all direct injury resulting from his unlawful act, though the resulting injury could not have been contemplated as the probable result of the act done, and so is not the result of an act of negligence. Koonovsky v. Quellette (Mass.) 1918B-1146.

(Annotated.)

28. Injury by Unregistered Automobile. If an automobile is unregistered by the owner or dealer, as required by Mass. St. 1909, c. 534, its presence on the highway is unlawful, and against the right of all other persons lawfully using the highway; it is outside the pale of travelers, and an outlaw. Koonovsky v. Quellette (Mass.) 1918B-1146. (Annotated.)

# f. Liability to Guests.

29. Since to charge a gratuitous bailee gross negligence must be shown, and since the measure of liability of one who undertakes to carry another gratis is the same as that of a gratuitous bailee, where a person invites another to ride in his automobile, in doing which the guest is injured she cannot recover, in the absence of showing of gross negligence. Massaletti v. Fitzroy (Mass.) 1918B-1088.

(Annotated.)

30. Injury to Guest. Where a person invites another to ride gratis in his automobile, there is a gratuitous undertaking not governed by rules as to liability of Massaletti v. Fitzroy (Mass.) licensors. 1918B-1088. (Annotated.)

31. The rule that to charge a person, who invites another to ride in his automobile, in doing which the guest is injured, with liability, gross negligence must be shown, does not mean that the same negligence must appear in every case as would charge a gratuitous bailee with liability for loss of the goods, but each case must be determined upon its own facts. Massaletti v. Fitzroy (Mass.) 1918B-1088.

(Annotated.)

# g. Imputed Negligence.

32. Imputation of Driver's Negligence. That the wife owned an automobile which she sent to another city for her husband to use, and on her casual visit to the city, while riding with him in the automobile, it was struck by a street car, at a crossing, while she was engaged in conversation with another passenger and exercising no control over its operation, does not render negligence of the husband, if any, imputable to her, since the husband was in effect her bailee. Virginia R., etc. Co. v. Gorsuch (Va.) 1918B-838. (Annotated.)

33. The mere fact that the mother, who was sitting by the side of her son and as his guest, did not protest against his action when he drove his automobile at an excessive rate of speed for the distance of a little more than a city block, at the end of which an injury was inflicted, cannot be held as culpable negligence on her part which would make her liable for his negligence and the resulting injury. Anthony v. Kiefner (Kan.) 1916E-264.

(Annotated.)

34. If the journey had been undertaken as a joint enterprise to accomplish a common purpose for the benefit of both, one of them might have been regarded as the agent of the other, and she might have been responsible for injuries inflicted by the negligent operation of the automobile but it is held that, her mere request of her son that some time during the ride he should call at a certain house and obtain a cake that a friend had promised to make for her did not make the trip a joint enterprise nor make her responsible for the negligence of her son nor for injuries to which she did not personally contribute. Anthony v. Kiefner (Kan.) 1916E-264.

(Annotated.)

35. Imputation to Occupant. A mother accepted the invitation of her son to ride in his automobile merely as his guest and as she had no control and took no part in the management of the automobile she is not responsible for injuries inflicted upon another by the negligence of her son in driving the automobile. Anthony v. Kiefner (Kan.) 1916E-264.

(Annotated.)

## Note.

Negligence of driver as imputable to occupant of automobile. 1916E-268.

## h. Actions.

## (1) Pleading.

36. Liability of Owner for Negligence of Son. A petition alleged, in brief, as follows: A woman owned an automobile, and had a minor son. She allowed her son to run and operate the car. On a day named the minor son was the chauffeur in charge

of the car, operating it for his mother, the owner, and running it on the public road with the knowledge and consent of his mother. The boy, "who was the agent of the said [owner], as hereinbefore alleged, driving said car," negligently caused it to collide with a buggy in which the plaintiff was riding, causing injury to him and to the buggy and harness. The injury was caused by the carelessness and negligence and by acts and omissions to act on the part of the mother and on the part of the son, "her agent and chauffeur in charge of said car." By amendment the plaintiff added the following: "Defendant kept said automobile for the comfort and pleasure of her family, including Jim Russell [the son], a member of said family. He was driving said automobile at the time of the injury herein complained of, and was driving the same for the comfort and pleasure of himself and friends, who were riding with him, by and with the consent of the owner of said car, the defendant." It is held that such petition was not subject to general demurrer. Griffin v. Russell (Ga.) 1917D-994. (Annotated.)

# (2) Evidence.

37. Registration—Use by Dealer. In an action for injuries when struck by an automobile, the evidence is held to be sufficient to justify a finding that the person, who, according to defendant's evidence, had charge of the machine at the time of the accident, was a dealer in automobiles. Koonovsky v. Quellette (Mass.) 1918B—1146.

38. In an action for injuries when struck by an automobile, the evidence is held to be sufficient to justify a finding that a dealer, a third person, was in control of the automobile for the purpose of sale, for renting, or for use. Koonovsky v. Quellette (Mass.) 1918B-1146.

39. Sufficiency of Evidence. In an action for the death of a motorcyclist, caused by a collision with an automobile operated by defendant's son, evidence examined and held to be sufficient to support a finding by the jury that the car was owned by defendant and that the son at that time was engaged in the father's business, so as to authorize a recovery under the instructions given. Ferris v. Sterling (N. Y.) 1916D-1161.

40. License Number as Evidence of Ownership. The prima facie case that defendant owned an automobile, and that his son, who was driving it when he collided with a motorcyclist, was engaged in defendant's service, which arises from proof that the license was in defendant's name, is not as a matter of law rebutted by testimony of defendant and his son that the car was licensed in the name of defendant instead of that of his son, the

true owner, by mistake, since the credibility of that testimony is for the jury. Ferris v. Sterling (N. Y.) 1916D-1161.

(Annotated.)

- 41. Declarations as to Ownership. Where defendant claimed that an automobile which killed plaintiff's intestate belonged to his son, who was in charge thereof at the time of the accident, and that the licensing of the car in defendant's name was a mistake, and plaintiff claimed that the son's ownership of the car was a recent fabrication to avoid liability by defendant, it was error to exclude letters written before the accident by the son to the secretary of state and by the secretary to the son, relating to the mistake in the license, and other declarations showing ownership by the son, since they were admissible both to refute the claim of recent fabrication and as explanation of defendant's acts apparently inconsistent with his position at the trial. Ferris v. Sterling (N. Y.) 1916D-1161.
- 42. Speed of Automobile. In an action for the wrongful death of plaintiff's son, killed in a collision with defendant's automobile, a nonexpert witness who had observed the speed of automobiles, but had not owned or operated one, may testify as to his opinion of the speed of defendant's machine. Hiscock v. Phinney (Wash.) 1916E-1044.
- 43. Opinion Evidence. While, under Ore. L. O. L., § 729, subd. 8, declaring that judicial notice is taken of the laws of nature, the court may reject testimony irreconcilable with physical facts, conclusively established, or instruct that it be disregarded, it cannot do so as to reasonable testimony, and so where there is a question for the jury whether or not witness' means of observation were such as to entitle his testimony, as to what was the speed of an automobile, seen at some distance and for a comparatively short space, the testimony is admissible. Kelly W. Weaver (Ore.) 1917D-611.

(Annotated.)

## Notes.

Opinion evidence as to speed of automobile. 1917D-613.

License number on motor vehicle as evidence of ownership thereof. 1916D-1163.

## (3) Questions for Jury.

- 44. In an action by one hurt in attempting to change the course of a motor truck, which had started from the side of the street where it had been left unattended, evidence of defendant's negligence is held to be for the jury. American Express Co. v. Terry (Md.) 1917C-650.
- 45. Negligence of Driver. In an action for death of a child, struck by defendants' automobile, the question of the negli-

gence of the driver of the car is held to be for the jury on the evidence. Crawford v. McElhinney (Iowa) 1917E-221.

46. Collision With Automobiles — Negligence for Jury. In an action for the wrongful death of plaintiff's son, killed in a collision with defendant's automobile, the question of the manner of the collision held, under the evidence, for the jury. Hiscock v. Phinney (Wash.) 1916E-1044.

## (4) Instructions.

- 47. Negligence in Operation. In an action for the death of a person struck by an automobile truck, an instruction that if, as the driver of the truck approached the place where deceased was injured, there was no apparent necessity appearing for him to stop or slacken the speed of the truck in order to prevent injury to deceased, then the law did not require him to stop or slacken its speed is erroneous. as the question was not whether there was an apparent necessity for stopping or slacking the speed of the truck, but whether or not the driver was operating the truck with that degree of care and skill which an ordinarily prudent and skilful driver would have exercised, having due regard to the location, circumstances, and surroundings. Devine v. Brunswick-Balke-Collender Co. (Ill.) 1917B-887.
- 48. In an action for the wrongful death of plaintiff's son, killed in a collision with defendant's automobile, which was either in the center or on the left-hand side of the street, the giving of an instruction that the rights of defendant and the son, who was riding a bicycle in the opposite direction, were the same is prejudicial, where an ordinance required travelers to keep as near the right-hand curb as possible, and the jury, after receiving the instructions, returned, requesting further instructions as to whether the defendant had the right to the center of the street. Hiscock v. Phinney (Wash.) 1916E-1044. (Annotated.)
- 49. Husband's Liability for Wife's Tort. In an action for death of a child, when struck by an automobile owned by defendant husband and driven by defendant wife, where the court instructed that the husband was liable for his wife's act if at the time of the matters complained of they were "engaged in a common enterprise," the charge was not improper because the quoted expression is broad and ordinarily applies to a business transaction, or because of a like use of the words "common purpose." Crawford v. McElhinney (Iowa) 1917E-221.
- 50. Negligence of Driver. Where defendant, in approaching a crowded crossing in an automobile, observes the position of a child looking away from the car, she is not justified in attempting to drive the

car across, unless a prudent person would have done so under the same circumstances, and a requested instruction is properly modified to include that feature of the care required. Crawford v. McElhinney (Iowa) 1917E-221.

51. Automobiles -- Negligence -- Duty at Crossing. In an action for death of a child, struck by an automobile at a crowded city crossing, where the court charged that the rights of travelers upon streets were mutual and co-ordinate, and that an automobile driver could rightfully pass over the crossing with his automobile, although it was crowded, provided he exercised due care in the management of his car, and that defendant was not obliged to seek another street, if by due care he might use the crossing without injury to others, but that, if it was imprudent or dangerous to use the crossing at the time, ordinary care required defendant to stop his car or seek another crossing, the last clause of the charge is proper, as stating the reverse side of a matter previously touched upon in a manner somewhat partial to defendant. Crawford v. McElhinney (Iowa) 1917E-221.

# 3. INJURIES TO MOTOR VEHICLES OR OCCUPANTS.

52. Where a motor car was injured through defendant's fault, the owner cannot, as damages for loss of use, recover the rental from week to week for a car, but should recover only the aggregate rental of a machine for a similar time. Perkins v. Brown (Tenn.) 1917A-124.

(Annotated.)

53. The owner of a motor car, held for pleasure driving and used only a small portion of each day, cannot, where the car was injured through the fault of defendant, recover as damages for the loss of the use of the machine the full daily rental value of machines in that vicinity. Perkins v. Brown (Tenn.) 1917A-124.

(Annotated.)

54. That the owner of a pleasure motor car did not hire another car while it was being repaired after a tortious injury by defendant does not prevent him from recovering damages for loss of use thereof. Perkins v. Brown (Tenn.) 1917A-124.

(Annotated.)

55. Compensation for injury being the rule, the owner of an automobile used for pleasure may recover substantial damages for loss of use while it is being repaired after a tortious injury by defendant. Perkins v. Brown (Tenn.) 1917A-124.

(Annotated.)
of Use of Damaged Property.

56. Value of Use of Damaged Property. The owner of a vehicle held for use may recover for his loss of use by reason of a tortious injury while being repaired, in addition to the cost of repairs. Perkins v. Brown (Tenn.) 1917A-124.

(Annotated.)

56½. The owner of a vehicle held for use may recover for his loss of use by reason of a tortious injury while being repaired, in addition to the cost of repairs. Perkins v. Brown (Tenn.) 1917A-124.

(Annotated.)

57. Pleading. A complaint, in an action for injuries in a collision on a street, which alleges that defendants negligently lost control of the automobile. and drove recklessly over a part of the street which was several feet from the usual traveled way, without warning of their approach and without slackening their speed, and negligently permitted the automobile to collide with plaintiff, and that the injury sustained by him was due solely to the negligence of defendants, pleads the ultimate and issuable facts as against a motion requiring plaintiff to specify the particulars of the negligence and in what respect defendants lost control of the automobile or were careless in operating it. Switzer v. Sherwood (Wash.) 1917A-216.

#### Note.

Liability of automobile owner to chauffeur for personal injuries, 1916E-1090.

# 4. LIABILITY OF MANUFACTURER FOR INJURIES.

58. In such action defendant should be allowed to show what inquiries it made as to the S. Co. before contracting with it for wheels, what answers it received, what reputation that company had as manufacturers, that their wheels were as high priced, if not higher priced than any in the market, and that no prior accident had ever been heard of. Cadillac Motor Car Co. v. Johnson (Fed.) 1917E-581.

(Annotated.)

- 59. In an action against an automobile manufacturer, which purchased the wheels of its automobiles from the S. Co., for injuries sustained by a purchaser from a dealer, due to a defect in one of the wheels, it is error to exclude evidence as to the practice of manufacturers of automobiles and of the trade concerning the examination of wheels, even on the theory, on which the case was tried, that the manufacturer was liable if it knew or ought to have discovered that the wheel was weak and insufficient. Cadillac Motor Car Co. v. Johnson (Fed.) 1917E-581.
- (Annotated.)

  60. Even though an automobile manufacturer's prospectus represented that it manufactured the wheels of its automobiles, when in fact it purchased them from

a manufacturer of wheels, such representation is not available to a purchaser from a dealer in automobiles, who had no contractual relation with the automobile manufacturer, in an action by him for injuries. Cadillac Motor Car Co. v. Johnson (Fed.) 1917E-581. (Annotated.)

61. Defect in Construction. A manufacturer of automobiles, which purchased the wheels used on its automobiles, is not liable to an injured person, who purchased an automobile manufactured by it from a dealer, and who had no contractual relations with it, for its negligent failure to discover that one of the wheels was defective, since, while one who manufactures articles inherently dangerous is liable to third parties injured by such articles, unless he exercises reasonable care, one who manufactures articles dangerous only if defectively made is not liable to third parties for injuries, except in case of wilful injury or fraud. Cadillac Motor Car Co. v. Johnson (Fed.) 1917E-581. (Annotated.)

62. Liability of Manufacturer to Purchaser—Defective Automobile. The manufacturer of an automobile is liable to a purchaser thereof from a dealer for injuries caused by a defective wheel, the defects in which could have been discovered by reasonable inspection, though the wheel was purchased by the automobile manufacturer from the maker thereof. MacPherson v. Buick Motor Car Co. (N. Y.) 1916C-440. (Annotated.)

# Note.

Liability of maker of automobile to third persons for defective construction thereof. 1917E-584.

# 5. CRIMES INCIDENTAL TO OPERA-TION.

- 63. Liability of Automobile Driver for Negligent Homicide. In a prosecution for involuntary manslaughter committed by reckless driving of an automobile, the evidence is held sufficient to show clearly the guilt of the defendant. People v. Falkevitch (Ill.) 1918B-1077. (Annotated.)
- 64. Identification of Defendant. On the trial of an indictment for a violation of the N. Y. Highway Law, § 290, subd. 3, testimony of a witness that he had seen an automobile near the time and place of the accident running at a high rate of speed, without being able to identify it or state any fact warranting an inference that it was the defendant's, is inadmissible. People v. Curtis (N. Y.) 1917E-586.
- 65. Admissibility of Evidence. Upon the trial of an indictment for a violation of the N. Y. Highway Law, § 290, subd. 3, while evidence may properly be given

showing how much a person was injured in an automobile collision as bearing upon the seriousness of the accident and tending to show that it should not escape the notice of the defendant, subsequent suffering of the injured person or the length of time he remained in the hospital and the details of the medical or surgical treatment which he received can have no legitimate bearing upon any of the issues arising on the trial of an indictment and are inadmissible. People v. Curtis (N. Y.) 1917E-586.

- 66. Necessity of Knowledge of Injury. It is essential to a conviction under N. Y. Highway Law, § 290, subd. 3, that the jury shall be satisfied beyond a reasonable doubt not only that an injury had been caused, but that the defendant knew that such injury had been caused, and, notwithstanding such knowledge, left the scene of the accident without complying with the law. People v. Curtis (N. Y.) 1917E-586. (Annotated.)
- 67. Failure to Give Name and Address to Person Injured. An indictment charging a violation of the Highway Law (N. Y. Consol. Laws, c. 25), § 290, subd. 3, added by Laws 1910, c. 374, providing that any person operating a motor vehicle who, knowing that an injury has been caused to a person or property due to his culpability, or to accident, leaves without giving his name, residence, and operator's license number to the injured party or a police officer, or reporting the same to the nearest police station or judicial officer, shall be guilty of a felony, need not allege that the accident occurred on a public highway. People v. Curtis (N. Y.) 1917E-586.

### Note.

Construction of statute requiring person operating automobile to give name and address to person injured. 1917E-588.

# AUTREFOIS ACQUIT.

See Former Jeopardy.

# AVENUE.

Avenue a public highway, see Streets and Highways, 1.

## AVERAGE ANNUAL EARNINGS.

Under Workmen's Compensation Act, see Master and Servant, 274, 275, 282.

# AVERAGE WEEKLY EARNINGS.

Under Workmen's Compensation Act, see Master and Servant, 271, 273, 274, 276, 277, 281.

## AVOIDANCE.

- Of preferences, see Bankruptcy, 18-20. Of benefit contract, see Beneficial Associations, 15.
- Of stock subscription, see Corporations, 64-70.

1916C-1918B.

Of release, see Release and Discharge, 2-5. Suit to rescind, see Rescission, Cancellation and Reformation.
For fraud. see Sales. 48.

## AWARD.

See Arbitration and Award.

#### BAIL.

- 1. Interest on Penalty. Interest should not be allowed on the amount of the penalty of a bail bond from the date of the forfeiture of the bond. People v. Parisi (N. Y.) 1916C-111. (Annotated.)
- 2. Enforcement of Forfeiture. A surety on a, forfeited bail bond cannot urge as a defense that he should have had notice of the time and place at which the principal was required to appear, as that should have been presented by a motion to relieve from the forfeiture. People v. Parisi (N. Y.) 1916C-111.
- 3. Necessity of Notice to Surety to Produce Principal. Though a person bound over before a magistrate may be indicted and tried either in the county court or the supreme court, a surety on his bail bond is not entitled to a notice of the time and place at which the principal must appear as a condition precedent to a forfeiture of the bond. People v. Parisi (N. Y.) 1916C-111.

## Note.

Allowance of interest on forfeited bail bond. 1916C-114.

# BAILIFF.

Disqualification as custodian of jury, see Jury, 29, 30.

## BAILMENT.

1. In General.

Liability of Bailee for Loss.

3. Limitation of Action by Bailee for Loss. See Escrow; Warehouses.

Care required of bailee, see Automobiles,

Special deposit, see Banks and Banking, 38-42.

Computation of time of rental period, see Time, 4.

## 1. IN GENERAL.

- 1. What Constitutes. An agreement, which recites that a party thereto has received from the adverse party sheep to keep, for rental annually of half the wool and increase, for three years, creates a bailment and imposes on the party the implied obligation to return the same sheep. In re Parsell's Estate (Mich.) 1917A-1160.
- 2. Termination of Bailment. Where a bailes for a definite term, does not, at the

expiration of the term, return the property, the bailment does not necessarily end as to him, and the bailor can resume the property or consider the bailment as continued or renewed; for possession retained without objection after the period originally fixed had expired, in connection with other circumstances, might raise a question of fact as to whether the bailment was terminated or continued and renewed. In re Parsell's Estate (Mich.) 1917A-1160.

3. Revocation. The delivery of a dog into defendant's possession by plaintiff, with consent of his wife, the owner thereof, created at most a bailment at will, revocable without demand or notice, at the pleasure of the bailor. Herries v. Bell (Mass.) 1917A-423.

## Note.

Acquisition by adverse possession of title to property in hands of bailee. 1917A-1163.

# 2. LIABILITY OF BAILEE FOR LOSS.

4. Death of Animal Bailed. A party receiving sheep of another to keep, for the rental annually of half the wool and increase, for three years, must exercise average diligence in caring for the sheep, and he is not an insurer, nor liable to replace any perishing from natural causes, by disease or accident, without his fault. In re Parcell's Estate (Mich.) 1917A-1160.

# 3. LIMITATION OF ACTION BY BAILEE FOR LOSS.

- 5. A party received sheep of the adverse party to keep, for the rental annually of half the wool and increase, for three years. The party continued to keep the sheep at the end of the three years. An indorsement on the written agreement showed that sheep were paid back five years after the party received the sheep. The sheep returned were lambs. Many years later the party admitted that he had the sheep and was indebted on that account. Held, that the question of a continuance or renewal of the bailment so as to prevent the running of limitations in favor of the party was for the jury. In Re Parsell's Estate (Mich.) 1917A-1160. (Annotated.)
- 6. Adverse Possession by Bailee. Mere retention of possession of property by a bailee, however long continued, does not work a change of ownership, and limitations do not run in his favor until he asserts an adverse claim. In re Parsell's Estate (Mich.) 1917A-1160.

(Annotated.)

# BAILMENT AT WILL.

See Ballment, 3.

## BALLOTS.

See Elections, 12-14, 26-28, 37-73.

# BANANA PEEL

Liability for passenger's fall, see Carriers of Passengers, 34.

## BANKRUPTCY.

1. Assets of Bankrupt, 107.

2. Title and Powers of Trustee, 108.

3. Liens, Fraudulent and Other Voidable Transfers, 108.

4. Claims Against Estate, 109.

5. Administration of Estate, 109.

6. Discharge, 110.

 Rights, Duties and Liabilities of Petitioning Creditors, 110.

8. Crimes Against Bankruptcy Law, 111.

Stockholders' liability, effect of discharge of corporation, see Corporations, 133. Effect on creditor's bill, see Creditors' Bills, 5.

Liability for instituting proceedings, see Malicious Prosecution, 4.

Priority of mechanic's lien, see Mechanics' Liens, 15.

Appointment of receiver, see Receivers, 3, 5.

## 1. ASSETS OF BANKRUPT.

- 1. Creditor Enforcing Lien. A mortgagee of a stock of goods not exceeding \$500 in value, on condition that the mortgagor should keep the stock to such value, who took from the mortgagor's trustee in bankruptcy goods valued at more than \$1,000 and disposed of them, was liable to account to the trustee for the excess in his hands over \$500. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D-1224.
- 2. Chattel Mortgage on Goods. In such case the mortgagee, whose right, if any, to follow the property was suspended by the appointment of the trustee in bankruptey, against whom he had no right of possession, had the burden of showing title to the goods claimed by him under the mortgage (that is, those in existence at the mortgage and those, if any, substituted for articles sold by purchase from the proceeds); and where the mortgagor's business during the intervening three years amounted to about \$5,000 a year, and much of his stock was purchased on credit from others than the mortgagee, and some was paid for in cash, and where one-third of the stock on hand upon his bankruptcy was received from defendant and twothirds from other sources, there was a necessary inference that no part of the original stock was left at the date of the mortgagor's bankruptcy. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D-1224.
- 3. Salary of Public Officer. The annual allowance made by way of compensation to members of the House of Commons is a "salary or income" a portion of which may, under the Bankruptey (Ireland) Amendment Act of 1872, \$51, be appro-

priated by an order of court to the payment of the creditors of a bankrupt member. Hollinshead v. Hazleton (Eng.) 1916D-615. (Annotated.)

- 4. Counterclaim. Bankruptey Act July 1, 1898, c. 541, § 1, (11) 30 Stat. 544 (1 Fed. St. Ann. 527; Fed. St. Ann. 1912 Supp. p. 464), declaring that the term "debt" shall include any debt, demand, or claim provable in bankruptcy, does not increase rights of counterclaim against the bankrupt's estate. Morris v. Windsor Trust Co. (N. Y.) 1916C-972. (Annotated.)
- 5. Neither under U. S. Bankruptcy Act, § 68, providing for the set-off of mutual debts, nor under general principles of equity, can a party sued for conversion of a pledge set off as a counterclaim rights based on contracts unconnected with the conversion and growing out of the indorsement of notes by the bankrupt to whose estate plaintiff had succeeded. Morris v. Windsor Trust Co. (N. Y.) 1916C-972.

  (Annotated.)
- 6. Right of Set-off. Bankruptcy Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (1 Fed. St. Ann. 696; Fed. St. Ann. 1912 Supp. p. 805), declaring that in all cases of mutual debts or credits the account between the parties shall be stated and one debt set off against the other, was not intended to enlarge the doctrine of set-off, and does not give a party rights which he did not enjoy under previous statutes or general equitable principles. Morris v. Windsor Trust Co. (N. Y.) 1916C-972. (Annotated.)
- 7. Right to Set Off Unliquidated Claim. In a bankruptcy proceeding, a claim for unliquidated damages for a tort could not be set off against a claim upon a judgment, whether the matter was controlled by Rev. Codes Idaho, § 4184, providing that a counterclaim must be a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, or, in an action arising upon contract, any other cause of action also arising upon contract, or by Bankr. Act, § 63 (1 Fed. St. Ann. 679; Fed. St. Ann. 1912 Supp. p. 753), specifying in subdivision "a" the claims which may be proved, and providing in subdivision "b" that unliquidated claims may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed against the estate, and section 68 (1 Fed. St. Ann. 696; Fed. St. Ann. 1912 Supp. p. 805) providing for a set-off of mutual debts and credits, and providing that a setoff or counterclaim shall not be allowed which is not provable against the estate, as section 63b does not enlarge the scope of subdivision "a," and unliquidated claims arising out of torts not covered by subdivision "a." Pindel v. Holgate (Fed.) 1916C-(Annotated.)

- 8. Set-off in Bankruptcy-Laches of Bankrupt. Where, at the time a bankrupt sought to set up a claim for damages from an attachment as a counterclaim against the judgment obtained in the action in which the attachment was issued, an action by the judgment creditor against the sheriff for his negligence in caring for the attached property, was barred by Rev. Codes Idaho, § 4055, subd. 1, requiring actions against sheriffs upon a liability incurred by the doing of an act in their official capacity, and by virtue of their office, or by the omission of an official duty, to be brought within two years, and an action against the judgment creditor would have been barred by section 4054, subds. 2, 3, requiring actions for trespass upon real property and for taking or injuring personal property to be brought within three years, the bankrupt is barred by his laches from setting up such claim. Pindel v. Holgate (Fed.) 1916E-983. (Annotated.)
- 9. Accounting for Assets. On a Saturday about two weeks before bankruptcy, the members of a partnership received a check for \$2,000, and instead of depositing it they drew it out in bills from the bank upon which the check was drawn. On returning to their place of business about 12:30 they dismissed their bookkeeper for the day, and, as they claimed, put the money in their safe. Though they were at the store nearly all the afternoon, and though the store was locked when they left, and though there was nothing to show that the store or the safe was broken open, or that anything unusual happened, they claimed the money was not there the following Monday. They told the bookkeeper on Monday to charge the \$2,000 to expenses, but later directed her to change the entry and charge it to materials, and one of them testified that he did this because he thought it would look better to creditors. It is held that, while the trustee, seeking to compel the turning over of this money to him, had the burden of proving that the money was in the bank-rupt's possession by evidence which was clear and convincing, he did this, and the burden was shifted to the bankrupts to show what became of the money. In re Graning (Fed.) 1917B-1094.
- (Annotated.)

  10. What Property Passes. As the holder of a life insurance policy, reserving to him the right to change the beneficiary, and which by its terms was assignable, had a transferable interest in the policy, if, notwithstanding an assignment thereof by him, an interest in the policy still remained in him, such interest passed to his trustee in bankruptcy as of the date of the adjudication, and a purchaser of his right, title, and interest acquired a right superior to that of the beneficiary. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.

11. Estoppel of Bankrupt. A voluntary bankrupt in his schedules listed the claim of a bank based upon a judgment with-out mentioning any offset, and stated that he held no unliquidated claims or choses in action of any kind against any person, and in a proceeding to sell land in which he had a homestead interest, in which the necessity for making the sale rested upon the assumption that the claim of the bank was valid, resisted a sale on other grounds. An order of sale was affirmed on appeal, and a sale had. On application for an order confirming the sale, the bank-rupt, more than four years after the petition was filed, for the first time set up an offset or counterclaim for wrongful attachment in the action in which the bank's judgment was obtained. It is held that he was estopped by the representations in the schedules and the order of sale from setting up such counterclaim, as a judgment is an adjudication, not only of all defenses actually interposed, but of all which might have been interposed. Pindel v. Holgate (Fed.) 1916C-983.

(Annotated.)
12. Avoidance in Bankruptcy—Property

Including Homestead. A conveyance of land in which a bankrupt had a homestead interest is voidable as to the excess of the land over the homestead right, where the deed was not recorded until within four months before bankruptcy. Sieg v. Greene (Fed.) 1917C-1006. (Annotated.)

### Notes.

Set-off under American bankruptcy acts. 1916C-975.

Salary or pension of public officer or employee as affected by his bankruptcy. 1916D-629.

- 2. TITLE AND POWERS OF TRUSTEE.
- 13. Title of Trustee. The trustee's title to the bankrupt's estate relates back to the date of the adjudication. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D-1224.
- 14. Custody of Trustee. Where a trustee in bankruptcy has taken possession, the property is in the custody of the law and cannot be removed therefrom by any private person or by any process out of any court, except one having a supervisory control or superior jurisdiction in the premises. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D-1224.
- 3. LIENS, FRAUDULENT AND OTHER VOIDABLE TRANSFERS.
- 15. Effect of Bankruptcy of Property Owner. Plaintiff sold defendant building material used in construction of buildings upon an unproven government homestead. Within 90 days after furnishing said material, defendant filed his petition in voluntary bankruptcy in the federal court, and

was adjudged a bankrupt. The amount owing for such building materials was scheduled among his debts. Thereafter, and 93 days after furnishing the last item of materials, plaintiff filed its mechanic's lien on the buildings. Subsequently defendant was discharged in bankruptcy. He pleads it as his only defense. Held, the filing of the petition and adjudication of bankruptcy did not defeat the right of plaintiff to, subsequently and after the expiration of the 90-day period, perfect its inchoate mechanic's lien by the filing of a lien statement. Moreau Lumber Co. v. Johnson (N. Dak.) 1917C-290.

(Annotated.)

- 16. Liens and Incumbrances on Estate. A trustee in bankruptcy takes the property of the estate subject to all equities, liens, and incumbrances existing against it in the hands of the bankrupt. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D-1224.
- 17. Under Bankruptcy Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (1 Fed. St. Ann. [2d ed.] 592) providing that that act shall not affect the allowance to bankrupts of exemptions prescribed by the state laws, state statutes and decisions control in determining whether a conveyance by a bankrupt of land in which he had a homestead interest was fraudulent as to creditors. Sieg v. Greene (Fed.) 1917C-1006.
- 18. What Constitutes Preference. A partnership manufacturing brick, being insolvent, applied for assistance to continue operations to S, who was formerly a partner, owned an undivided half interest in the brick plant, and had theretofore purchased the other half interest. S, knowing of the firm's condition, advanced it money under an agreement made in good faith that the firm would manufacture brick for him to the value of the amount advanced, to be taken by him in the yard as soon as they were burned. The laborers in the yard were paid with S's money, and they understood the bricks were being made for him. More than 30 days, but within 4 months, prior to bankruptey, S took possession of the plant and the brick already manufactured. It is held that the transaction was not a voidable preference, within Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (1 Fed. Ann. [2d ed.] 1004), making transfers by an insolvent within 4 months before bankruptcy, enabling a creditor to obtain a greater percentage of his debt than other creditors, preferential, and section 60b (p. 1026), making such preferences voidable if the transferee had reasonable cause to believe that the transfer would effect a preference, since S took possession in virtue of his right, created by the contract at the time it was made, and in satisfaction of an equitable lien. Sieg v. Greene (Fed.) 1917C-1006.

- 19. Avoidance of Preferential Transfer—Grantee. Where one to whom a brick plant was transferred by a bankrupt within four months before bankruptcy made large expenditures in putting in new muchinery and otherwise improving the plant, any property thus added is no part of the estate in bankruptcy. Sieg v. Greene (Fed.) 1917C-1006.
- 20. Voidable Transfer. While, in the absence of fraud, a bank having a bank While, in the rupt's funds on deposit may set off a debt owing it by the bankrupt against the trustee's claim for the deposit and may prove any balance against the estate, yet where a bank holding a depositor's notes accepts payment thereof by check against the deposit, within four months of the bankruptcy of the depositor and with full knowledge of his insolvent condition, it receives an "unlawful preference," within the meaning of Bankr. Act July 1, 1898, c. 541, § 60 (a) (b) 30 Stat. 562 (1 Fed. St. Ann. 672, 674; Fed. St. Ann. 1912 Supp. p. 729, 739), and its right to set off the notes is thereby forfeited, and it becomes liable to the trustee for the amount of the check. Knoll v. Commercial Trust Co. (Pa.) 1916C-988. (Annotated.)

## Notes.

Set-off by bank of deposit against debt due bank by depositor as voidable transfer under bankruptcy law. 1916C-990.

Effect of bankruptcy of owner of property on right to mechanic's lien. 1917C-292.

# 4. CLAIMS AGAINST ESTATE.

- 21. Review of Allowance of Claim. Under Bankr. Act July 1, 1898, c. 541, § 25 (3), 30 Stat. 553 (1 Fed. St. Ann. 602; Fed. St. Ann. 1912 Supp. p. 634), authorizing appeals as in equity cases from a judgment allowing or rejecting a debt or claim of \$500 or over, an order allowing such a claim is not reviewable by a petition to revise, as each method of procedure for the review of orders in bankruptcy is exclusive of the other. Pindel v. Holgate (Fed.) 1916C-983.
- 22. Review of Allowance of Claim in Conjunction With Another Order. Though an order allowing a claim is not, standing alone, reviewable on a petition to revise, where there was only one other small claim, and the necessity for a sale of land in which the bankrupt had a homestead interest depended mainly upon the validity of the claim in question, the allowance of such claim will be reviewed on a petition to revise the order confirming a sale of the homestead. Pindel v. Holgate (Fed.) 1916C-983.

# 5. ADMINISTRATION OF ESTATE.

23. Review of Confirmation of Sale. Under Bankr. Act, § 24b (1 Fed. St. Ann.

595; Fed. St. Ann. 1912 Supp. p. 611), providing that the several circuit courts of appeal shall have jurisdiction to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction, an order confirming the sale of the land of a bankrupt in which he had a homestead interest is properly reviewable in matters of law by a petition to revise. Pindel v. Holgate (Fed.) 1916C-983.

## 6. DISCHARGE.

24. Burden of Proof. A judgment creditor has the burden of showing that his claim is not barred by discharge in bankruptcy; and where the nature of the claim appeared only from the creditor's declaration, that instrument should be given the construction most favorable to the bankrupt. In re Grout (Vt.) 1917A-210.

25. Liability for Wilful and Malicious Injury. A default judgment was recovered under a declaration in trespass which alleged that the bankrupt assaulted another, charging that, while she was walking on the street with due care, he recklessly, carelessly, and negligently ran into her. Judgment was also recovered in another action for the same cause, under a declaration in case similar to the one in controversy, except that the averments of assault were omitted. Held, that the judgments were barred by defendant's discharge in bankruptcy, neither declaration showing that the wrong was intentional or malicious; the charge of assault and recklessness not denoting anything more than negligent violence. In re Grout (Vt.) 1917A-(Annotated.)~ 210.

## Note.

Effect of discharge in bankruptcy upon judgment for wilful and malicious injuries to person or property. 1917A-212.

# 7. RIGHTS, DUTIES AND LIABILITIES OF PETITIONING CREDITORS.

26. Liability of Applicant for Costs. Under Bankr. Act, \$ 3e (1 Fed. St. Ann. 2d ed. 565), providing that when a petition is filed to have a person adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt prior to the adjudication and pending a hearing on the petition, the appellant shall file a bond with sureties conditioned for the payment, in case the petition is dismissed, of all costs and expenses and damages occasioned by the seizure, taking, and detention of the property, and that if such petition be dismissed or withdrawn the respondent shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention, if no bond is given, or if a bond be given and it proves to be inadequate, the applicant for the appoint-

ment of the receiver is liable, and independent of the bond can be compelled to pay the costs and expenses of the receivership. T. E. Hill Co. v. United States Fidelity, etc. Co. (III.) 1917E-78.

27. Requiring Additional Bond. If at any time it becomes apparent that a bond given upon the application for the appointment of a receiver in a bankruptcy proceeding under Bankr. Act, § 3c (1 Fed. St. Ann. 2d ed. 565), is insufficient to indemnify the alleged bankrupt for all damages growing out of the seizure and detention of the property, he has the right to apply to the court to require the creditor who secured the appointment of the receiver to give an additional and sufficient bond. T. E. Hill Co. v. United States Fidelity, etc. Co. (Ill.) 1917E-78.

28. Indemnity to Bankrupt. Upon the appointment of a receiver on the application of a creditor of an alleged bankrupt under Bankr. Act, § 2, cl. 3 (1 Fed. St. Ann. 2d ed. 552), the alleged bankrupt can be indemnified only by the provisions of section 3e, and the bond there required to be given is the only bond he can look to to recover his damages and expenses upon the discharge of the receiver. T. E. Hill Co. v. United States Fidelity, etc. Co. (Ill.) 1917E-78.

29. Words and Phrases-"All Damages." In a bankruptcy proceeding, one of the petitioning creditors applied for and procured the appointment of a receiver. February 10th the bankruptcy petition was dismissed. On February 13th an appeal was allowed upon the petitioners giving bond in the sum of \$5,000; the bond reciting that if the petitioning creditors prosecuted their appeal with effect and answered "all damages and costs" the obligation was to be void. On February 14th an assignee under the voluntary assignment act applied to the bankruptcy court for a rule on the receiver to turn over the property of the alleged bankrupt to him. This application was denied, by an order which recited the fact that an appeal had been allowed from the order dismissing the petition, without prejudice to a renewal of the application if the appeal should not be prosecuted with effect. It is held that the bond on appeal did not operate as a supersedeas bond, and the surety was not liable for the bankrupt's damages from the receivership, as there was nothing to indicate that it was intended that the appeal bond should cover the expenses and damages occasioned by the continuation of the receivership, there was no occasion for a supersedeas, as, the receiver not having been discharged, there was nothing to be superseded, the penalty of the bond did not in itself indicate that the bond covered more than the ordinary costs and expenses of the appeal, especially as the penalty was fixed before the application for the discharge of the receiver was made and de-

nied, and the expression in the bond, "all damages and costs," evidently meant such damages and costs as were incidental to the appeal. T. E. Hill Co. v. United States Fidelity, etc. Co. (Ill.) 1917E-78.

(Annotated.)

Note.

Improbable testimony by bankrupt. 1917B-1096.

## 8. CRIMES AGAINST BANKRUPTCY LAW.

- 30. Concealing Assets. Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912 Supp. p. 646), provides that a person shall be punished by imprisonment for not to exceed two years on conviction of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bank-ruptcy. Cr. Code section 332 (Act March 4, 1909, c. 321, 35 Stat. 1152 [Fed. St. Ann. 1909 Supp. p. 495]), declares that whoever commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, demands, induces, or procures its commission, is a principal, and section 335 provides that all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. It is held that an indictment charging the president and manager of a bankrupt corporation with knowingly and fraudulently aiding and abetting the concealment of its assets charged a felony. Kaufman v. United States (Fed.) 1916C-466.
- 31. Where an alleged concealment of assets of a bankrupt corporation begins before the appointment of a trustee and continues after such appointment, it constitutes a concealment from him, within Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912 Supp. p. 646), making such concealment a felony. man v. United States (Fed.) 1916C-466.
- 32. Concealment of Assets. Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912 Supp. p. 646), providing that a person shall be punished, etc. on conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy, applies only to one who has been adjudicated a bankrupt, and not to one guilty, of aiding and abetting the bankrupt in knowingly and fraudulently concealing its assets. Kaufman v. United States (Fed.) 1916C-466.
- 33. In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting the concealment of its assets from its trustees, evidence held to sustain a conviction. Kaufman v. United States (Fed.) 1916C-466.

- 34. Abetting Concealment of Assets. In a prosecution of the president and manager of a bankrupt corporation aiding and abetting the concealment of its assets from its trustee, the fact that there is no evidence that defendant was holding the moneys under an agreement with the bankrupt to do with them what it requested does not impair the government's case. Kaufman v. United States (Fed.) 1916C-466.
- 35. Burden of Proof. While the burden of proving the concealment of assets by a bankrupt is upon the trustee, he is not required to produce positive proof of an agreement to conceal, followed by proof that the property was actually abstracted, and such proof is usually established by presumptions drawn from the facts. In re Graning (Fed.) 1917B-1094.
- 36. The bankrupts utterly failed to give any satisfactory or reasonable explanation as to what became of the money, and the court erred in refusing to adjudge them in contempt for failing to restore it to the estate. In re Graning (Fed.) 1917B-1094. (Annotated.)

## BANKS AND BANKING.

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Personal liability of commissioner. See Public Officers, 61.

Personal liability of State Banking Board, see Public Officers, 62.

National Banking Act, controls as to usury, see Usury. 4.

# BANKING BUSINESS IN GENERAL.

1. Power to Guarantee. There is no provision in either our state banking laws or in the federal banking laws that either expressly or by implication empowers such banks to guarantee the payment of a debt of a third party, solely for his benefit, and any such agreement when attempted by them is ultra vires, and void, and is not binding upon such bank when made by its cashier, since such cashier is not authorized to bind such bank by an agreement that is ultra vires as to such bank. Cottondale State Bank v. Oskamp Nolting Co. (Fla.) 1916D-564. (Annotated.)

- Ultra Vires Guaranty—Estoppel. A customer of defendant bank, having secured a contract to install electric fixtures in a federal building, purchased the fixtures from plaintiff's assignor on the representation that defendant bank could guarantee payment. Defendant sent plaintiff's assignor a telegram, agreeing to guarantee the contractor's bill to the extent of \$2,000, and, on receiving a letter in which plaintiff's assignor expressed doubts as to the legality of the bank's guaranty, replied that it had taken security and was in a position to make the guaranty; that its ordinary telegraphic guaranty was the usual order of business; was accepted by defendant's New York correspondent and other banks; that the doubt of plaintiff's assignor as to its legality was "too full a statement"; and that the telegram was a guaranty in fact. Plaintiff's assignor thereupon furnished the fixtures and obtained a judgment against the contractor for \$1,724, which it was unable to collect. Held, that, there being nothing in the statutes granting power to banks to make guaranties of that character or prohibiting them from doing so, plaintiff's assignor having acted thereon to his injury, the bank was estopped to deny liability on the ground that the guaranty was ultra vires. Creditor's Claim, etc. Co. v. Northwest Loan, etc. Co. (Wash.) 1916D-551. (Annotated.)
- 3. Validity of Contract of Guaranty. A guaranty made by a bank, without consideration, of an account in which it has no interest is not binding. Mackintosh v. Bank of New Brunswick (N. Bruns.) 1916D-566. (Annotated.)

# Note.

Liability of bank on contract of guaranty. 1916D-554.

# 2. REGULATION AND CONTROL.

- 4. State Supervision. It is the duty of a state banking board to require a bank to remove objectionable securities where, in its opinion, the safety of the depositors requires it. Youmans v. Hanna (N. Dak.) 1917E-263.
- 5. Review of Order of Board. If a banker feels aggrieved at the action of the state banking board in requiring him to remove objectionable securities, he should apply to the courts to have such order set

- aside under the provisions of paragraph 3, \$5146, Comp. Laws N. Dak. 1913. Unless this is done, such order will remain in force and be effective. Youmans v. Hanna (N. Dak.) 1917E-263.
- 6. Ordering Removal of Objectionable Securities. An order of the state banking board requiring the Savings Deposit Bank, of Minot, to remove objectionable securities, and closing the bank on account of the failure so to do, held to have been lawful and valid. Youmans v. Hanna (N. Dak.) 1917E-263.
- 7. Powers of State Officers. The legislature, in enacting section 3001, Rev. Codes Idaho, making it the duty of the bank commissioner to make an examination of state banks, imposed such duty for the benefit and protection of the depositors as well as the public. State v. American Surety Co. (Idaho) 1916E-209. (Annotated.)
- 8. Arbitrary power is not unconstitutionally conferred upon the state superintendent of banks and banking, contrary to U. S. Const. 14th Amend. by the provisions of Ohio Gen. Code, \$\$ 6373-1 to 6373-24, which require that official, as a condition of granting the license that such statute makes a condition precedent to dealing in corporate or quasi corporate securities, to be satisfied of the good repute in business of the applicant and its selling agents, and empower him to revoke the license or to refuse to renew it upon ascertaining that the licensee "is of bad business repute, has violated any provision of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions," since there is a pre-sumption against wanton action on his part, and the statute also affords judicial review of his action in cases where there may be a dispute of fact. Hall v. Geiger-Jones Co. (U. S.) 1917C-643. (Annotated.)
- 9. Banking Commissioner—Status and Powers. Under Laws Ky. 1912, c. 4, \$ 2, providing for a banking commissioner and prescribing his powers and duties, the commissioner is not a "receiver" nor an "assignee for the benefit of creditors," the powers of a receiver being limited by the appointing court, and of the assignee by the powers and rights of his assignor, but those of the commissioner are limited only by the statute. American Southern Nat. Bank v. Smith (Ky.) 1918B-959.
- 10. Power to Regulate. Banks are proper subjects of regulation by the police power, since they are the chief repositories of the money of the country, and their solvency should be safeguarded. American Southern Nat. Bank v. Smith (Ky.) 1918B-959.

### Note.

Bank examiners, 1916E-219.

# 3. OFFICERS AND AGENTS.

### a. In General.

- 11. A bank is held not to be bound by a contract signed by its manager as such. Griffin v. Union Savings, etc. Co. (Wash.) 1917B-267.
- 12. Unauthorized Act of Agent—Notice to Third Person. A person who knows that the manager of a branch bank is personally interested in a transaction wherein he attempts to bind the bank by a contract of guaranty is put on inquiry as to the extent of his powers. Mackintosh v. Bank of New Brunswick (N. Bruns.) 1916D-566.

# b. Criminal Liability.

- 13. Evidence of Insolvency. In the prosecution of a bank cashier for accepting deposits knowing the bank was insolvent, evidence by the receiver as to whether certain overdrafts were collective is erroneously excluded. Skarda v. State (Ark.) 1916E-586.
- 14. Receiving Deposit When Insolvent. A cashier who, pending a decision of the board of directors to liquidate the bank because of its financial condition, receives all deposits offered, but with intent to secure their return to the depositors keeps the same separate from the funds of the bank by pinning the money received from each depositor to the deposit slip and placing the same in a box, does not receive any deposit in violation of the statute, where, after the appointment of a receiver, the identical money is returned to each depositor with a single exception, and where the failure of that depositor to call for and receive his deposit results from his failure to receive a notice to call at the bank and receive the deposits. Sively v. State (Miss.) 1917B-1075. (Annotated.)
- 15. Variance as to Deposit. That an indictment of a bank cashier for accepting deposits, knowing the bank was insolvent, alleged the deposit of money, while the proof showed a deposit of a check, constitutes no variance. Skarda v. State (Ark.) 1916E-586.
- 16. An indictment against a bank cashier for accepting deposits, knowing the bank was insolvent, alleging a deposit of money, sufficiently describes the deposit of a check drawn upon the bank by a depositor. Skarda v. State (Ark.) 1916E-586.
- 17. When Bank is Insolvent. Under Kirby's Ark. Dig. § 1814, forbidding an insolvent bank to receive deposits, a bank is insolvent if, under ordinary circumstances, it is unable to raise the money to pay its debts or deposits as they become due and are presented for payment in the

- ordinary course of business. Skarda v. State (Ark.) 1916E-586.
- 18. Description of Deposit. An indictment against a bank cashier for accepting deposits knowing the bank was insolvent, alleging a deposit of \$55 of gold, silver, and paper money, but not stating that it circulated as money or was of value, charges an offense under Kirby's Ark. Dig. § 1814, forbidding an insolvent bank to receive on deposit any money, bank bills, or notes or United States treasury notes, gold, or silver certificates or currency or other notes, bills, or drafts circulating as money or currency. Skarda v. State (Ark.) 1916E-586.
- 19. Proof of Authority of Bank Officer. In the prosecution of a bank cashier for accepting deposits, knowing the bank was insolvent, an allegation that he was cashier when the deposit was made is sustained by proof that he had been elected cashier and remained in the bank ostensibly as such, notwithstanding that his assistant was actually in charge. Skarda v. State (Ark.) 1916E-568.
- 20. An indictment against a bank cashier for accepting deposits, knowing the bank was insolvent, need not, in terms, allege that defendant received the money as cashier, when it otherwise appeared from the indictment. Skarda v. State (Ark.) 1916E-586.
- 21. Proof of Insolvency of Bank. To sustain the conviction of a bank cashier for accepting deposits, knowing the bank was insolvent, the state must show the insolvency, and that the officer had knowledge thereof, and it is proper to show the nature of the bank's assets and liabilities, although such proof tends to show the commission of the offense by the receipt of other deposits. Skarda v. State (Ark.) 1916E-586.
- 22. In the prosecution of a bank cashier for accepting deposits knowing the bank was insolvent, a complaint for the appointment of a receiver, introduced to show insolvency, is inadmissible as hearsay. Skarda v. State (Ark.) 1916E-586.

## Notes.

Intent as element of offense of receiving deposit in insolvent bank. 1917B-1081.

Criminal liability of officer of insolvent bank for receiving deposit therein consisting of check on same bank. 1916E-592.

# 4. STOCK AND STOCKHOLDERS.

23. Sale of Assets of Bank—Transaction Sustained. The purchase of the controlling stock in the said bank by certain of the defendants after it has been closed

1916C-1918B.

held to have been a valid and legal transaction. Youmans v. Hanna (N. Dak.) 1917 E-263.

# 5. DEPOSITS.

## a. In General.

24. What Constitutes Deposit. Where the holder of a check drawn on a bank by a depositor presented it to the bank and demanded and was paid a part therefine cash, receiving a deposit slip showing a deposit to his credit for the balance, the transaction constitutes a receipt of the deposit within Kirby's Ark. Dig. § 1814, forbidding an insolvent bank to receive deposits. Skarda v. State (Ark.) 1916E-586. (Annotated.)

25. Interest on Deposits—Effect of Insolvency. A receiver of an insolvent bank who obtains judgment on a demand note given by a depositor cannot complain because the court disallowed interest on the check balance of the deposit and charged interest on the savings balance, as though the deposit agreement therefor remained in force; for, if it remained in force, the allowance was proper, while, if the agreement was broken by the insolvency, the allowance of the legal rate of interest, which was in excess of the contract rate, should have been made. Williams v. Johnson (Mont.) 1916D-595.

26. Payment of Depositor's Note. Since the relation of debtor and creditor exists between a bank and its depositor, that a depositor makes a note payable at a bank in which he has funds does not constitute the bank his agent to pay it. Baldwin's Bank v. Smith (N. Y.) 1917A-500.

27. Money deposited becomes part of

27. Money deposited becomes part of the bank's general funds, and the bank impliedly contracts to pay its depositors' checks, acceptances, notes made payable at the bank, and the like to the amount of his credit, but the payment is made out of the funds of the bank, not of the depositor. Baldwin's Bank v. Smith (N. Y.) 1917A-500.

28. Relation of Bank—Deposit as Trustee. Where one makes a deposit in his name as trustee, that designation does not change his true relation to the fund, which may be established. State Eanking Com'r. v. E. Jossman State Bank (Mich.) 1917C-1203.

# b. Joint Deposit and Right of Survivorship.

29. A joint ownership, with the incident of survivorship attaching as a matter of law, may be created in a bank deposit by agreement between donor and donee. Aennedy v. McMurray (Cal.) 1916D-515. (Annotated.)

30. Notwithstanding Acts Tenn. 1899, e. 94, § 8, subd. 5, declaring that a promis-

sory note may be made payable to one or some of several payees, a certificate of deposit payable to a husband or wife, naming them, must, in view of the fact that the husband used the word "or" as synonymous with "and," be construed as payable to the husband and wife. Smith v. Haire (Tenn.) 1916B-529.

(Annotated.)

31. A general finding that one of the alleged owners of a bank deposit was sole owner at his death was controlled by special indings as to the execution of an agreement between the parties constituting them joint owners of the deposit, with the incident of survivorship attaching as a matter of law. Kennedy v. Mc-Murray (Cal.) 1916D-515.

(Annotated.)

32. Evidence held to show that a father, in executing an instrument prepared by his savings bank, intended to create a joint tenancy in the ueposit with his daughter to which the right of survivorship should attach. Kennedy v. McMurray (Cal.) 1916D-515. (Annotated.)

33. In view of the fact that joint savings accounts are largely opened by near relatives so that the survivor shall take the fund, where such an account was opened by father and daughter, an agreement as to the nature of their interests, executed by them on a form provided by the bank for its own protection, is presumed a valid agreement between the parties furnished by the bank at their request, creating a joint ownership to which the legal incident of survivorship atached. Kennedy v. McMurray (Cal.) 1916-515. (Annotated.)

34. The mere fact that a bank deposit is made by one person in the name of himself and another is not conclusive as to his intention thereby to create such a joint ownership in the fund that the incident of survivorship will attach thereto as a matter of law, the absence of a declaration of intention leaving the matter for judicial determination. Kennedy v. Mc-Murray (Cal.) 1916D-515.

(Annotated.)

35. Where deceased deposited funds in bank under an instrument signed by himself and defendant, his daughter, declaring that such funds and those thereafter to be deposited were and should be joint between the parties as to time, title, and possession, that they were the separate property of neither, and were payable to either, and that the receipt of either therefor should be an acquittance of the bank as to the other, on deceased's death, defendant is entitled to the fund on deposit as against his personal representative; such a written instrument being conclusive of deceased's intention to create a joint ownership, the right of survivorship

following as a legal incident, and so not needing to be expressed. Kennedy v. McMurray (Cal.) 1916D-515.

(Annotated.)

36. That a husband who had a certificate of deposit made payable to himself and wife retained it in his possession does not show a reduction to possession destroying the wife's rights of survivorship. Smith v. Haire (Tenn.) 1916D-529.

(Annotated.)

37. Where a husband who had a certificate of deposit made payable to himself and wife made a will carrying with it disposition of such certificate, the execution of the will, which instrument was ambulatory and did not speak until the husband's death, did not amount to a reduction of the chose in action to possession, destroying the wife's right of survivorship. Smith v. Haire (Tenn.) 1916D-529. (Annotated.)

Note.

Rights of parties to joint deposit in bank, 1916D-519.

# c. Special Deposit.

- 38. What Constitutes. Where owner of savings account informed cashier that draft deposited was for purpose of paying contractor for building house and refused to let it be credited to her account, whereupon the cashier gave her a special receipt bearing the words, "Sp. Dept.," the deposit is a special deposit, and the money was charged with a trust in favor of the contractor, and the bank does not take title to the proceeds of the draft. Sawyer v. Conner (Miss.) 1918B-388.
  - (Annotated.)
- 39. Rights as to Special Deposit—Priority. In such case, the depositor is entitled to a preference against the receiver of the bank for the special deposit. Sawyer v. Conner (Miss.) 1918B-388.
- 40. A deposit in a bank is not a special deposit, where the banker is allowed to loan out or to use the money deposited. A special deposit involves safe-keeping merely, and the return of the identical money or articles deposited. State v. Bickford (N. Dak.) 1916D-140.
- 41. What Constitutes Special Deposit. A special deposit is a bailment of certain specified property, which can be and is to be identified and returned. State v. Bickford (N. Dak.) 1916D-140.
- 42. A special deposit as used in paragraph 14 of section 111, Rev. Codes N. Dak., 1905, implies the placing of money in a bank for safe-keeping, so that the banker is a bailee, and must keep the identical money without mingling it with the other funds of the bank, to be returned in kind to the state treasurer or such person or persons as he may direct. State v. Bickford (N. Dak.) 1916D-140.

## d. Withdrawal.

- 43. Partnership Deposit—Power of One Partner to Draw. Funds deposited in a bank to the credit of a partnership may be paid out on checks signed with the partnership name by one of the partners, since each of the partners is the agent for the partnership. Gish Banking Co. v. Leachman's Adm'r (Ky.) 1916D-525.
- 44. Joint Deposit How Withdrawn. Where funds are deposited in a bank to the joint account of a husband and wife, the bank cannot, without special authority, pay them out on checks signed by the wife alone. Gish Banking Co. v. Leachman's Adm'r (Ky.) 1916D-525.

(Annotated.)

- 45. Deposit in Representative Capacity—Notice of Want of Power. Where persons, as executors, make a deposit in a bank, the representation contained in such act that they are executors does not merely charge it with knowledge that the money belongs to the estate, and put it on inquiry as to the depositors being executors, but may, till it receives notice of its falsity, be relied on by it in paying out the funds on their orders as executors. Holden v. Farmers, etc. Nat. Bank (N. H.) 1917E-23.
- 46. A bank in which executors, as such, deposit money, is not liable to the estate for the part thereof with which they as executors pay off a mortgage held by it on the property of one of them, where, for all it knew, this was a legitimate payment by them; it not being bound to oversee the execution by them of their trust. Holden v. Farmers, etc. Nat. Bank (N. H.) 1917E-23.
- 47. Diligence Required. A bank which pays out money on the order of others than the depositor, on their false representation that they are his executors, does so at its risk. Holden v. Farmers, etc. Nat. Bank (N. H.) 1917E-23.

## e. Set-off of Deposits Against Debt.

48. Set-off of Deposit Against Debt to Insolvent Bank. In an action by a receiver, upon a note due an insolvent bank, the maker has a right to set off against the note money on deposit in the bank to his credit at the time the receiver was appointed, notwithstanding the note then due, and notwithstanding the bank had piedged it to secure the payment of a debt which it owed, and which was paid out of proceeds of other securities pledged at the same time, and the note returned to the receiver. Williams v. Burgess (W. Va.) 1917C-1185.

(Annotated.)

49. A depositor who is indebted to a bank on a demand note in excess of his deposit, is entitled to his discharge on

payment of the difference, notwithstanding the insolvency of the bank, and this does not give him a "preference" over any other creditor. Williams v. Johnson (Mont.) 1916D-595.

- 50. Deposits of one in an insolvent bank and his notes to the bank may be set off against each other against notes in the hands of the bank which are not yet due. Hence depositors who were indebted to the bank in excess of the deposits cannot claim dividends. State Banking Com'r v. E. Jossman State Bank (Mich.) 1917C-1203. (Annotated.)
- 51. When the debt of an insolvent bank, thus secured, has been paid out of the proceeds of a portion of the securities, the remaining ones become assets of the bank to be administered by the receiver, and they are subject to the right of set-off in favor of the obligors thereon against the bank, existing at the date of the receiver's appointment. Williams v. Burgess (W. Va.) 1917C-1185.

(Annotated.) 52. That the proceeds of a note, thus deposited as security, would have been consumed in payment of the debt, if the pledges had collected and applied the securities as they became due, does not affect the right of set-off, after payment of the debt and return of the note to the receiver of the pledgor. Williams v. Burgess (W. Va.) 1917C-1185.

(Annotated.)
53. Necessity of Demand. No demand is necessary for a deposit in an insolvent bank in order to set it off against a note of the depositor in the hands of the receiver. First National Bank v. Nye County (Nev.) 19170-1195.

(Annotated.)

### Notes.

Lien or set-off of insolvent bank against deposit for debt of depositor not yet due. 1917C-1205.

Right of depositor in insolvent bank to set off deposit against debt to bank. 1917C-1187.

# f. Action to Recover Deposit.

54. Equitable Lien on Deposit. In an action against banks to recover deposits held by them in satisfaction of notes given by an insolvent depositor, a claim of certain defendants to an equitable lien created on the deposits by an oral agreement that the depositor should maintain in its deposit account a balance equal to at least 20 per cent of its discounted notes is properly disallowed, where it was not agreed that the banks should have an option to appropriate the deposits to payment of discounted notes, or that they had attempted to make such an appropriation before the appointment of receivers for the insolvent, or that it had been agreed that

they should have a right to hold such deposits as collateral for discounted notes, or that any penalty was to be paid for failure of the corporation to keep such 20 per cent on deposit. Blum Bros. v. Girard National Bank (Pa.) 1916D-609.

55. Money Wrongfully Paid Out. One to whom a bank is liable on a deposit may maintain suit therefor without demand; it having paid it out on the order of others, and claiming that they are protected thereby. Holden v. Farmers, etc. Nat. Bank (N. H.) 1917E-23.

# g. Recovery of Payments.

56. Joint Deposit — Unauthorized Payment by Bank—Liability. Where funds which were deposited to the joint account of the husband and wife, but which were the sole property of the husband, were paid out on the checks signed by the wife alone, the husband could recover the entire amount of such payments from the bank, except those of which he had received the benefit. Gish Banking Co. v. Leachman's Adm'r (Ky.) 1916-525.

(Annotated.)

## 6. LOANS.

57. A bank is authorized to lend its money, but not its credit. Cottondale State Bank v. Oskamp Nolting Co. (Fla.) 1916D-564. (Annotated.)

58. The rule, upholding the liability of a bank which loaned money to another bank in excess of the borrower's charter powers and accepted a pledge of assets in security, to return such assets, without return of the money loaned, is the same regardless of how the creditor bank comes into court. American Southern Nat. Bank v. Smith (Ky.) 1918B-959.

(Annotated.)

- 59. A bank which lends money to another bank in excess of the borrower's charter powers cannot claim the right to be placed in statu quo, though it had no actual notice of the charter limitation, since the doctrine of constructive notice of such limitations applies. American Southern Nat. Bank v. Smith (Ky.) 1918B-959. (Annotated.)
- 60. Exceeding Debt Limit—Effect. A bank which lends money to another bank in excess of the borrower's charter powers cannot defeat recovery by the banking commissioner of assets pledged to secure such loan, on the ground that the contract is wholly void, and neither party can obtain relief under it, since the contract was merely in excess of charter powers, and not outside of the corporation purposes. American Southern Nat. Bank v. Smith (Ky.) 1918B-959. (Annotated.)

### Note.

Construction of debt limit provision in charter of private corporation. 1918B-966.

## COLLECTIONS.

- 61. Consideration for Agreement to Col-Where a bank takes notes for collection in the usual course of business without making any charge therefor, the general benefit from such business is sufficient consideration for its agreement to collect. Citizens Sav. Bank, etc. Co. v. Northfield Trust Co. (Vt.) 1918A-891.
- 62. The rule that a bank to which a note was sent for collection must protest it and give notice of dishonor is a rule of the law merchant, and not a custom, and need not be stated in the agreed statement of facts; but the sender of the note can rely thereon, unless the bank shows a particular custom of collecting, which was known to the sender. Citizens Sav. Bank, etc. Co. v. Northfield Trust Co. (Vt.) 1918A-891.

(Annotated.)

- 63. Where an action against a bank for failing to protest and give notice of dishonor of a note sent to it for collection is tried on an agreed statement of facts, it is for the defendant to show any special instructions as to the collection. Citizens Sav. Bank, etc. Co. v. Northfield Trust Co. (Annotated.) (Vt.) 1918A-891.
- 64. Protest and Notice of Dishonor. Where a note was sent to a bank for collection without any instructions as to the means of collection, the bank must use all ordinary legal means for collecting from any parties liable thereon, which include protest and giving notice of dishonor. Citizens Sav. Bank, etc. Co. v. Northfield Trust Co. (Vt.) 1918A-891.

(Annotated.)

- 65. Application of Deposit. Sending a note to a bank where made payable and in which the maker has funds is, in effect, an order or draft on the banker in favor of the holder for the amount of the note, and the maker need not direct that it be charged to his account. Baldwin's Bank v. Smith (N. Y.) 1917A-500.
- 66. Relation of Bank to Holder. The holder of a note, by sending it to the bank, where it is made payable, for collection and remittance, constitutes the bank its agent to collect the note and remit the proceeds. Baldwin's Bank v. Smith (N. Y.) 1917A-500.

# Note.

Duty of bank receiving paper for collection to protest same and give notice thereof in absence of express instruction. 1918A-892.

## 8. INSOLVENCY.

67. When Bank is "Insolvent." Within the meaning of Ga. Penal Code (1910) § 204, the insolvency of a bank is that condition in which its entire property and assets are insufficient to pay all of its

(a) If the entire property and assets of a bank are sufficient to discharge its liabilities, it is not insolvent, within the meaning of Penal Code (1910) § 204, although it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand.

(b) Ga. Civil Code (1910) § 2306, which provides for the winding up of a bank by the state bank examiner under certain circumstances therein declared, does not furnish a definition of insolvency to be applied in construing Penal Code (1910) § 204. Griffin v. State (Ga.) 1916C-80. (Annotated.)

- 68. In determining whether a bank is insolvent under Kirby's Ark. Dig, § 1814, forbidding insolvent banks to accept deposits, the capital stock and surplus must be considered as resources and not as liabilities. Skarda v. State (Ark.) 1916E-586.
- 69. "May" as Meaning "Must." The word "may," as used in Idaho Rev. Codes, § 3005, providing that, when the bank commissioner has reasonable cause to consider a bank insolvent, he may immediately apply for a receiver, must be construed to mean "must," where to construe it otherwise would give the bank commissioner such an absolute power that he would be incapable of an abuse of discretion. State v. American Surety Co. (Idaho) 1916E-209.
- 70. Presumption of Fraud. Properly construed, Ga. Penal Code (1910) § 204, which provides for raising a presumption of fraud against the president and directors of an insolvent bank chartered in this state, is not violative of the Fourteenth Amendment of the Constitution of the United States, on the ground that it abridges the privileges and immunities of citizens of the United States, or deprives the president and directors of an insolvent bank of the equal protection of the laws, or deprives them of life, liberty, or property without due process of law, on the ground that similar provisions have not been made in regard to the president and directors of other corporations than banks.

That section is not violative of the Fourteenth Amendment of the Constitution of the Uniced States for any of the reasons set out in the first question by the court of appeals. Griffin v. State (Ga.) 1916C-

71. Interest on Deposits. Since the effect of the insolvency of a bank is to make deposits, whether subject to check or in savings account for which a pass book is issued, due and actionable, a depositor indebted to the bank on a demand note in excess of the deposits of both 1916C-1918B.

classes is entitled, under Mont. Rev. Codes, § 6043, to interest on the deposits from the date of the suspension and declared insolvency to the date of the judgment on the note, less the amount of the deposits allowed as a set-off. Williams v. Johnson (Mont.) 1916D-595.

72. Powers of Commissioner. The receiver, or the banking commissioner who has taken charge of an insolvent bank, may disaffirm a contract under which the bank borrowed money in excess of its charter powers and pledged certain assets, and sue to recover the assets without returning the money borrowed, since he represents the creditors of the bank. American Southern Nat. Bank v. Smith (Ky.) 1918B-959. (Annotated.)

73. The right of the banking commissioner in charge of an insolvent bank to disaffirm an ultra vires contract by which the bank borrowed money in excess of its powers and pledged assets, and to sue to recover the assets, cannot be defeated on the ground that the bank received full value when the loan was made, so that its assets were not impaired and creditors could not complain. American Southern Nat. Bank v. Smith (Ky.) 1918B-959.

(Annotated.)

74. Under Ky. Laws 1912, c. 4, § 2, creating the office of banking commissioner and prescribing his duties and powers, the commissioner, on taking charge of an insolvent bank, may sue to recover its assets, the purpose of the act being to properly administer the affairs of insolvent banks, in doing which collection of assets is necessary. American Southern Nat. Bank v. Smith (Ky.) 1918B-959.

## Note.

When bank is "insolvent." 1916C-85.

## 9. SAVINGS BANKS.

75. What Constitutes Savings Bank. bank organized under Mont. Rev. Codes, §§ 3923-3944, with a capital stock represented by shares transferable on the books, and governed by directors, and authorized to engage in various kinds of business, not including the business of a savings institution, except that deposits may be received and held by it for accumulation at a rate of interest agreed on, with the right to divide the profits among the stockholders, who are liable for the debts incurred by the bank to the extent of the value of the shares held by them, is a commercial bank, and not a "savings bank," within sections 3945-3958, though it includes in its name the words "sav-ings bank." Williams v. Johnson (Mont.) 1916D-595.

76. Nature of Institution. A "savings bank" has no capital stock, and its incorporators have no property interest in the funds deposited, but their sole office is to manage and invest the same as trustees for the depositors, who alone are interested, and entitled to the profits of the business, and it is treated as a quasi charitable and benevolent institution. Williams v. Johnson (Mont.) 1916D-595.

## 10. NATIONAL BANKS.

77. Banks-Federal Reserve Act-Validity. Federal Reserve Act December 23, 1913, c. 6, § 11k, 38 Stat. 262 (Fed. St. Ann. 1914 Supp. p. 272), providing that the federal reserve board may grant to national banks applying therefor, where not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the board may prescribe, is not invalid as an attempted delegation of legislative power, in violation of Const. U. S. art. 1, § 1 (8 Fed. St. Ann. 290), declaring that all legislative power shall be vested in the Congress of the United States, since it was only left to the federal reserve board as a purely administrative matter to apply the provisions of the act to the banks which upon application are entitled to its provisions, and the legislation granting the power remained that of Congress. People v. Brady (Ill.) 1917C-1093. (Annotated.)

78. Exclusiveness of Federal Control. National banks are instrumentalities of the federal government in carrying out its governmental powers, and in the conduct of their affairs are not subject to the regulation or control of the state, in conflict with the laws of the United States; but Congress is the judge of the extent of powers to be conferred upon national banks, and has the sole authority to regulate and control their operations. People v. Brady (III.) 1917C-1093.

79. Federal Reserve Act December 23, 1913, § 11k, providing that the Federal Reserve Board may grant to national banks applying therefor, "when not in contravention of state or local law," the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules as the board may prescribe, in view of the board's rules requiring the trust department of a bank, granted permission to execute trusts, to be a separate department, under the management of officers whose duties shall be prescribed by the officers of the bank, that the funds, investments, etc., shall be held separate from the funds and securities of the bank, that examiners appointed by the comptroller of the currency or designated by the board shall make audits of

the cash, securities, accounts, and investments of the trust department, when examination is made of the banking department, reserving to the board the right to revoke permits where, in its opinion, a bank has wilfully violated its regulations or the laws of the state, conflicts with state laws as to state banks and trustees, and with the state's control over private property and its acquisition and disposition, and hence is within the exception, "when not in contravention of state or local law," and unauthorized. People v. Brady (Ill.) 1917C-1093. (Annotated.)

80. Federal Reserve Act. Federal Reserve Act December 23, 1913, § 11k, providing that the federal reserve board may grant to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar, etc., under such rules as the board may prescribe, is not within the power of Congress, as such functions belong exclusively to the states, and as the possession of such powers by national banks is not necessary to their continued existence or to their performance of governmental agencies. People v. Brady (III.) 1917C-1093. (Annotated.)

Note.

Validity and effect of Federal Reserve Act. 1917C-1099.

BAR EXAMINATIONS.

See Attorneys, 3, 5.

BARRING DOWER.

See Dower, 2-11.

BARRING ENTAIL

See Estates.

## BASTARDS.

Inheritance by, see Descent and Distribution, 5-7.

Inheritance through, see Descent and Distribution, 8.

## BASTARDY.

Invalidity of order, relief, see Habeas Corpus, 7. Wife as witness, see Witnesses, 7.

- 1. Nature of Proceeding as Civil or Criminal. A bastardy proceeding which is brought under the provisions of chapter 5, N. Dak. Rev. Codes, 1905, although quasi criminal in its nature, is governed, in so far as its trial is concerned, by the law regulating civil actions. State v. Brunette (N. Dak.) 1916E-340.
- 2. Mode of Ascertaining Facts. Section 9655, N. Dak. Rev. Codes 1905, which provides that in a bastaray proceeding

- and in cases of a verdict of guilty, the court "shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of such child until such time as the child is likely to be able to support itself. . . . The court may at any time upon the motion of either party upon ten days' notice to the other party, vacate or modify such judgment as junstice may re-quire' presupposes that the court shall reasonably acquaint himself with the necessities of the case. It nowhere, however, provides for the method of how the information shall be obtained. The taking of testimony, therefore, upon such questions and before the rendition of judgment is not necessary, where the station in life, age, and occupations of all of the parties interested have been fully exposed upon the trial, and especially where the defendant takes no exception to the methods pursued by the trial court until after the rendition of the judgment. State v. Brunette (N. Dak.) 1916E-340.
- 3. Cross-examination of Complainant. It is not error in a bastardy proceeding to refuse to allow the complainant to testity on cross-examination as to whether she had, outside of the period of gestation, asked the defendant to go with her to a house of prostitution. State v. Brunette (N. Dak.) 1916E-340.
- 4. Necessity of Corroboration of Complainant. It is not necessary to a conviction under chapter 5 of the Criminal Code of North Dakota (Rev. Codes 1905) that the testimony of the complainant should be corroborated by other evidence. State v. Brunette (N. Dak.) 1916E-340.
- 5. Reputation of Defendant. In a bastardy proceeding which is brought under the provisions of chapter 5, N. Dak. Rev. Codes 1905, evidence as to the reputation of the defendant for chastity is not admissible. State v. Brunette (N. Dak.) 1916E-340.
- 6. Proof of Promise of Marriage. It is not error in a bastardy proceeding to permit the complaining witness to testify that the defendant, before the acts of intercourse complained of, led her to believe that they were to be married, as such evidence tends to show the relationship of the parties and is corroborative in its nature. State v. Brunette (N. Dak.) 1916E-340.
- 7. N. Y. Code Cr. Proc. § 684, provides that neither a departure from the form or mode prescribed by the Code in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid unless it actually prejudices defendant or tends to his prejudice in respect to a substantial right. Section 861 provides, relative to bastardy proceedings, that a person deeming himself aggrieved may appeal to the county court, except

that a person executing an undertaking to obey an order of filiation and indemnify the public as provided in section 851 cannot appeal from any other part of the order than that which fixes the weekly or other allowance to be paid. It is held that the defendant in such a proceeding arrested in a county other than that in which the warrant was issued was prejudiced in a substantial right, where he was taken before the magistrate issuing the warrant without being first taken before the magistrate of the county in which he was arrested, who indorsed the warrant, as he was thereby deprived of the right to give an undertaking in the county or his residence and secure his discharge, and was subjected to the provisions of sections 851 and 852, which would not have been applicable if he had given an undertaking, and was denied the right to a full rehearing on an appeal to the county court. People v. Snell (N. Y.) 1917D-222.

- 8. Jurisdiction of Proceedings. An order of filiation in a bastardy proceeding is void unless all the material requirements of the statute are substantially complied with, since the power of a judicial tribunal to try or inquire and adjudge in a proceeding purely statutory is limited and confined by the statute, and the invalidity of the determination or adjudication will result from action in disobedience to, or contraventon of, the statutory requirements, as well as from a lack of jurisdiction of the subject-matter, or of the person. People v. Snell (N. Y.) 1917D-222.
- 9. Liability of Father for Support. The common law did not make the father of a bastard liable for the support of the child or its mother, and the father's liability exists solely by virtue of the statutes. People v. Snell (N. Y.) 1917D-222.
- 10. Procedure to Fix Liability—Necessity of Compliance With Statute. The proceedings by which the liability of the father of a bastard is determined and fixed are defined and controlled exclusively by statute, which must be in their substance strictly and fully complied with. People v. Snell (N. Y.) 1917D-222.
- 11. Child Born in Wedlock. A child born in wedlock is presumed legitimate, but the presumption is not conclusive. Kennedy v. State (Ark.) 1917A-1029.
- 12. Testimony Insufficient to Overcome Presumption. In bastardy proceedings testimony of the mother that defendant had intercourse with her and was the father of the child, and that she had a husband living, without more, is insufficient to overcome the presumption of legitimacy, and insufficient to sustain a verdict against defendant. Kennedy v. State (Ark.) 1917A-1029.

- 13. Necessity of Corroboration. In bastardy proceedings it is not necessary that the testimony of the mother be corroborated. Kennedy v. State (Ark.) 1917A-1029.
- 14. Jurisdiction-Person Illegally Brought Within Jurisdiction. N. Y. Code Cr. Proc. § 843, provides, relative to bastardy proceedings, that, if the defendant reside in a county other than that in which the warrant is issued, the magistrate issuing it must direct the sum in which defendant shall give security, and the officer must present it to a magistrate in the city or town in which defendant resides, who must indorse a direction thereon that it be served in that county. Section 844 provides that, when the defendant is arrested in another county, he must be taken before the magistrate indorsing the warrant, or another magistrate of the same city or county, who may take from him an undertaking that he will indemnify the county and the town or city, and every other county, town, or city against any expense, and pay the costs, or that the sureties will pay the sum indorsed on the warrant, or that he will appear and answer the charge at the next county court of the county where the warrant was issued. Section 845 provides that, when either of such undertakings is given, defendant must be discharged, and the warrant with the undertaking must be returned to the magistrate granting the warrant. Section 846 provides that if defendant does not give security he must be taken before the magistrate issuing the warrant. Section 848 provides for a hearing by such magistrate, and section 850 for an order of filiation, and section 851 provides that defendant must pay the costs and enter into an undertaking for the child's support, and to indemnify the county and the town or city, etc., or that he will appear at the next term of the county court to answer the charge, or that the sureties will pay full indemnity. Section 852 provides for the commitment of the defendant to jail if section 851 is not complied with. Sections 854 and 855 provide for a hearing and an order of filiation when security is taken out of the county. It is held that, where defendant was arrested in another county and taken before the magistrate issuing the warrant without being taken before the magistrate indorsing it, the magistrate had no power to commit defendant to jail for noncompliance with section 851, as the statute is imperative and mandatory, and it is only when defendant has been taken before the magistrate indorsing the warrant, and fails to give the required undertaking, that the magistrate issuing the warrant has jurisdiction to commit. People v. Snell (N. Y.) 1917D-(Annotated.)

15. Relation of Complainant With Others -Necessity of Specific Questions. It is not error to refuse to permit the complaining witness to testify as to presents given her by other men, when the questions asked are general and are not confined to the times in issue. State v. Brunette (N. Dak.) 1916E-340.

#### BATHING RESORTS.

Duty to keep life lines, see Negligence, 22.

BATTERY.

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BAWDY HOUSES.

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BEAVERS.

Injuries by, see Animals, 4. Statute protecting beavers, see Animals, 16.

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#### BEES.

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#### BENEFICIAL ASSOCIATIONS.

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Action on certificate, see Limitation of Actions, 12.

## 1. VALIDITY AND CONSTRUCTION OF CONTRACT GENERALLY.

1. Provision Against Use of Intoxicants. Defendant's contract provided that if any holder of a benefit certificate should "become addicted to the excessive or intemperate use of intoxicants" the defendant should not be liable thereon. Held, following O'Connor v. Modern Woodmen of America, 110 Minn. 18, 124 N. W. 454, that "the excessive or intemperate use of intoxicants," as used in this contract, means "that the conduct of a member in this respect was of such a nature, and the habit so intemperately followed, as to impair his health, mental faculties, or otherwise render the insurance risk on his life more hazardous." hazardous." Wising v. Brotherhood of American Yeomen (Minn.) 1918A-621.

(Annotated.)

- 2. Insurance Contracts Effect of Suicide-Application of Statute. Under Rev. St. Mo. 1909, § 7109 et seq., providing for the organization of fraternal beneficiary associations, and Rev. St. 1899, § 1408, declaring such associations exempt from the provision of the general insurance laws of the state, and that no law thereafter passed should apply to them unless expressly designated therein, Rev. St. 1909, § 6945, providing that in suits on policies of insurance on life issued in that state to a citizen of that state it shall be no defense that the insured committed suicide. unless he contemplated such act when he applied for the policy, and that any stipulation in the policy to the contrary shall be void, as construed by the Missouri courts, does not apply to fraternal beneficiary associations. Travelers' Protective Assoc. v. Smith (Ind.) 1917E-1088.
- 3. Contract Limitation of Time. Where the contract of the parties prescribes a limitation of time in which to bring action, which is shorter than the statutory period, such provision, if reasonable, is valid. Such provisions are, however, in derogation of law and are not especially favored, and should be construed strictly against the party invoking them. If the limitation applies only under certain conditions, such conditions must exist or it will not bar an Dechter v. National action. (Minn.) 1917C-142.
- 4. Restriction on Residence of Insured. The constitution of a fraternal society by which a member agreed in his application to be bound provided that no benefit certificate should be granted to any one resid-ing outside that part of the North American continent between the northern boundary of Mexico and the fifty-fifth parallel of north latitude, and that, if a member should remove from such territory, he should forfeit all right to any disability or death benefit. A member who had long resided in Memphis, where his wife and children continuously resided, was in Panama from October to December, 1908, and again from February to June, 1910, returning to his home in Memphis at the expiration of each of such periods. Held that, construing the constitution strictly against the insurer, and construing the provisions with regard to residence in, and

removal from, the specified territory in pari materia, the policy was not forfeited by the member's temporary sojourn in Panama; as the word "residing" referred to the member's domicil, and implied a legal residence, and not a mere transitory existence in the prohibited territory, and the prohibited removal referred, not to a mere removal of the member's person, but to a removal of his residence. Lane v. Grand Fraternity (Tenn.) 1917A-376.

(Annotated.)

5. What Constitutes Membership. Under Iowa Code 1897, § 1822, defining a "fraternal beneficiary association" as a corporation, society, or voluntary association, formed for the sole benefit of its members and their beneficiaries, and having a lodge system with ritualistic form of work and a representative form of government, a fraternal association need not require members to be initiated in order to entitle them to recover on their certificates. Schworm v. Fraternal Bankers Reserve Soc. (Iowa) 1913B-373. (Annotated.)

#### Notes.

What constitutes membership in beneficial association. 1917B-380.

Construction of restriction in contract of life or benefit insurance as to travel by or residence of insured. 1917A-381.

Construction of restriction in contract of benefit insurance as to use of intoxicants by insured. 1918A-623.

## 2. THE APPLICATION.

- 6. Misstatement in Application. A benefit insurance certificate was not avoided by misrepresentations in the application as to the number of the applicant's brothers and sisters and the number who were dead, where the examining physician, who prepared the application, was informed and stated in the application that the applicant had been absent from home for years and knew little about his family history, and where there was no purpose or attempt on the part of the applicant to deceive the company. Coplin v. Woodmen of the World (Miss.) 1916D-1295.
- 7. Misstatement of Name of Applicant. Where, because of the illiteracy of an applicant for insurance, his parents, and other members of his family, the family name was spelled in different ways, and the applicant was known by different given or Christian names, a misstatement of his name in the application did not avoid the benefit certificate. Coplin v. Woodmen of the World (Miss.) 1916D-1295. (Annotated.)

## 3. CONSTITUTION AND BY-LAWS.

#### a. Construction.

8. Law Governing Insurance Contract, Where the constitution of a fraternal bene-

- ficiary association provides that each application for membership must be forwarded to the national secretary at the home office in Missouri, who shall refer it to the national directors, and that, if approved, a certificate shall be issued by the national secretary upon which all benefits were payable there, the policy is a Missouri contract. Travelers' Protective Assoc. v. Smith (Ind.) 1917E-1088.
- 9. A Missouri association, which by its declaration, purposes, and plans was under the holding of the courts of Missouri, a fraternal association, does not, under the decisions of such courts, become an assessment company from the fact that it was authorized to make assessments. Travelers' Protective Assoc. v. Smith (Ind.) 1917E-1088.
- 10. Fraternal or Assessment Association. The act of a Missouri beneficiary association in coming into this state and complying with its assessment laws is not a declaration that it is an assessment association, since its real character was determined by its articles of association, policies, or certificates, or by the mutual character of the business it transacted, or attempted to transact; especially in view of the fact that Burns' Ind. Ann. St. 1914, § 4764, excepts fraternal associations from the operation of the assessment laws. Travelers' Protective Assoc. v. Smith (Ind.) 1917E-1088.
- Suspension of Member Officers Authorized to Suspend. The constitution of a fraternal society provided that the fraternity should be composed of a supreme governing council, and a board of directors, etc., and that the governing council should have power to try any member and expel or otherwise punish him. The by-laws made all the death and disability payments expressly subject to an agreement not to remove from the part of the North American continent between the northern boundary of Mexico and the fifty-fifth parallel of north latitude, and authorized the directors to cancel any benefit certificate for the breach of such covenant. Held, that neither the president of the fraternity nor its grand secretary had any authority to suspend a member or discontinue the acceptance of his dues because of his removal from the specified territory, and a letter written a local lodge by the secretary instructing it not to receive his dues did not suspend him. Lane v. Grand Fraternity (Tenn.) 1917A-376.

## b. Operation.

12. Statement in Constitution as Restrictive. The by-laws of the association having provided that policies may be made payable to the affianced wife of the insured, a policy so payable is valid, al-

though the object of the association, as stated in its constitution, is to provide insurance for the surviving relatives of its members. Christenson v. Madson (Minn.) 1916C-584.

13. Designation of Beneficiaries. The classes of persons eligible as beneficiaries under policies issued by a fraternal association are to be determined by the rules adopted for the express purpose of governing such matters, and not by general statements made for the purpose of indicating the general object of such association, and restrictions limiting the classes who may be so designated must be expressed in positive terms and cannot be inferred from general statements. Christenson v. Madson (Minn.) 1916C-584.

## c. Amendments.

- 14. Effect on Existing Contracts. Where the insurance contract between a fraternal beneficiary association and its members provided that if the insured committed suicide, sane or insane, within two years, the association should be liable for only one-fifth the amount of the benefit certificate, and that the insured should be bound by the laws of the order then in force or thereafter enacted, a subsequent amendment making the suicide provision effective for a period of five years is binding upon a member who commits suicide while sane, and upon those claiming under his benefit certificate. Ledy v. National Council (Minn.) 1916E-486.
- 15. Effect on Absentee Whose Death is Subsequently Presumed. In such case an insurer cannot avoid its contract of insurance on the life of such absentee because of an alleged violation by the insured of a by-law adopted by the insurer during such unexplained absence, without evidence that the insured was living when the by-law was adopted. McLaughlin v. Sovereign Camp (Neb.) 1917A-79.
- 16. Increase of Assessment. A Certificate, issued by a fraternal insurer, authorthe association to levy as many assessments as might be necessary to meet death losses. The by-laws under which the certificate was issued declared that the member should pay the same rate of assessment as long as he remained in good standing. The association reserved the right to change the by-laws. It is held that there was no contract in the ordinary sense, the insurance being but a mutual promise by every member to pay the certificate of every other member; hence the holder had no vested right, preventing the association from raising the assessment to such a rate as would pay death claims. Thomas v. Knights of Maccabees (Wash.) 1917B-(Annotated.) 804.

Note.

Validity of amendments to by-laws of fraternal benefit societies as applied to existing members. 1917B-814.

#### 4. ASSESSMENTS.

- 17. Under Laws Wash. 1911, pp. 281, 290, §§ 214, 228, respectively, declaring that no fraternal association shall transact business in the state which does not provide for periodical assessments sufficient to provide for meeting its mortuary obligations, and that the laws of such societies shall provide that if the stated contributions are insufficient, increased rates shall be collected, a fraternal order has the right to increase the rates of members so as to be able to meet death claims. Thomas v. Knights of Maccabees (Wash.) 1917B-804. (Annotated.)
- 18. Where a fraternal order increased the assessments, as was its right, a member is not entitled to rescind his contract and recover back the sums already paid in; the order not breaching its contract. Thomas v. Knights of Maccabees (Wash.) 1917B-804. (Annotated.)
- 19. In view of Laws Wash. pp. 279, 281, §§ 210, 214, declaring that fraternal associations may create and invest a surplus and grant paid-up insurance, not exceeding in value the proportion of the reserve to the credit of such members, and that no member shall have individual rights or become entitled to any part of the reserve otherwise, a member of a fraternal insurer, which accumulated a reserve to pay death claims, has no right to require the insurer to apply the reserve to current deficiencies assessments, where the reserve was not sufficient to make up the deficiency in assessments and pay the estimated claims. Thomas v. Knights of Maccabees (Wash.) 1917B-804. (Annotated.)
- 20. That a fraternal insurer, authorized to levy as many assessments as might be necessary to meet death losses, increased the amount of the assessments, but not their number, does not give a member any equitable rights; the effect being the same as if more numerous assessments were levied. Thomas v. Knights of Maccabees (Wash.) 1917B-804. (Annotated.)
- 21. Where the assessments paid by younger members were sufficient to pay their insurance, an older member cannot complain that an increase in assessments was made solely upon members of more advanced age. Thomas v. Knights of Maccabees (Wash.) 1917B-804.

(Annotated.)

22. As there was no contract, there could be no estoppel preventing the

society from raising the assessments. Thomas v. Knights of Maccabees (Wash.) 1917B-804. (Annotated.)

23. Waiver of Nonpayment of Assessment. In an action upon a certificate of insurance issued by a fraternal benefit association, the by-laws of which provide that a member who has failed to pay an assessment on or before the last day in the month for which assessments are due shall be suspended without notice and remain suspended until reinstated by filing a health certificate and the payment of delinquent dues and assessments, it is held (following Foresters v. Hollis, 70 Kan. 71, 78 Pac. 160, and Fenn v. Life Insurance Co., 90 Kan. 34, 133 Pac. 159) that the facts stated in the opinion show the adoption by the association of a custom and course of conduct, at variance with the by-laws, which estop the association from claiming a forfeiture, and that, the death of the assured occurring prior to the time at which the custom permitted her to pay the assessment, she was at the time of her death a member in good standing. Edmiston v. The Homesteaders (Kan.) 1916D-588. (Annotated.)

#### Note.

Waiver of forfeiture of benefit certificate for nonpayment of assessment or dues by acceptance of arrearages or similar act. 1916D-591.

# 5. RIGHTS OF SUSPENDED MEMBER.

- 24. Amount of Recovery—Deduction of Dues. Where a fraternal society wrongfully declared a benefit certificate forfeited and refused to accept dues thereunder, but it was kept alive by the tender of dues, the amount of the dues which the society should have received should be deducted from the amount recoverable under the certificate. Lane v. Grand Fraternity (Tenn.) 1917A-376.
- 25. Tender of Dues. Where a fraternal society wrongfully declared a benefit certificate forfeited, and refused to accept dues thereunder, the tender of such dues as they became due until the death of the member kept his rights alive. Lane v. Grand Fraternity (Tenn.) 1917A-376.

#### 6. BENEFICIARIES.

- 26. Designation of Beneficiary by Will. Designation of the beneficiary of the amount agreed by a benefit society to be paid on death of a member may be made by will, this appearing to be the plan of the society. Armstrong v. Walton (Miss.) 1916E-137.
- 27. Liability of Third Person for Inducing Change. Although a beneficiary

named by a member in a certificate issued by a benefit society may not have such a vested interest as to prevent the member from changing the beneficiary, where permitted so to do by the statute law, the charter, by-laws, or certificate, yet a beneficiary who has been so named is not an entire stranger to the contract, but has such an interest that if a third person, by false and malicious defamation of the beneficiary, fraudulently induces member to change the certificate and appoint such person as the new beneficiary, who receives the amount specified, upon the death of the member, when otherwise the fund payable at the death of the member would have been received by such original beneficiary, this will furnish a basis for an action on the case for damages by the injured person against the person so acting. Mitchell v. Langley (Ga.) 1917A-469. (Annotated.)

## 7. ACTION TO RECOVER BENEFITS.

- 28. Prematurity. Where defendant fraternal benefit society, after institution of suit on a death benefit certificate, passed unfavorably upon the claim before the case came to trial, repudiating it in toto and refusing to allow or pay it, defendant cannot be heard to complain of the premature institution of suit; there being no provision in the certificate or by-laws of the defendant restricting the institution of suits within any time after filing of proofs of loss. Werner v. Fraternal Bankers' Reserve Soc. (Iowa) 1918A-1005.
- 29. Burden of Proving Violation. The burden of proving the violation of such provision of the contract is on the defendant. Wising v. Brotherhood of American Yeomen (Minn.) 1918A-621.
- 30. Evidence Showing Nature of Association. In an action to recover for fraud in the settlement of a certificate issued by defendant to plaintiff's husband on the ground that plaintiff, the beneficiary, had been induced to accept a smaller sum by reason of defendant's fraudulent representations that that was all that was due or recoverable under the policy, which was a Missouri contract, the evidence is held to show that the defendant was not an accident insurance company or an assessment insurance company, but was a fraternal beneficial association under the laws of the state of Missouri. Travelers' Protective Assoc. v. Smith (Ind.) 1917E-1088.
- 31. Expulsion of Association. The evidence does not show that plaintiff acquiesced in a wrongful claim of expulsion. Dechter v. National Council (Minn.) 1917C-142.

32. Admissibility of Certificate Without Other Parts of Contract. The beneficiary certificate of a fraternal order may be received in evidence without offer of the application, the medical examination, or the laws of the order, though these documents form part of the contract between the member and the order. Dechter v. National Council (Minn.) 1917C-142.

(Annotated.)

33. Variance Between Pleading and Proof. The complaint in an action on a beneficiary certificate of a fraternal order alleged an absolute obligation to pay a certain sum on the death of the member. The certificate in fact contained some conditions. It is clear that defendant was not misled. Under Minn. Gen. St. 1913, \$ 7789, providing that the court shall disregard all defects in pleadings which do not affect the substantial rights of the adverse party, the variance was not fatal. Dechter v. National Council (Minn.) 1917C-142.

#### Note.

Admissibility of benefit certificate in evidence without other parts of contract. 1917C-145.

## BENEFICIARY.

See Life Insurance, 22-25.

## BEST EVIDENCE.

See Evidence, 43-50.

#### BEVERAGES.

See Intoxicating Liquors.

#### BIAS.

As disqualification of juror, see Jury, 16-18.

#### BIDS.

See Auctions and Auctioneers, 4. 5. On city contracts, see Municipal Corporations, 129, 130.

#### BIGAMY.

See Husband and Wife; Marriage.

- 1. First Marriage Voidable. Where defendant's marriage to the daughter of his half-sister was not void, but voidable, and no proceeding to have it declared invalid was ever commenced, his marriage to another woman after separation from his first wife is bigamous. State v. Smith (S. Car.) 1917C-149.
- Constitutes. Under Mich. 2. What Comp. Laws 1897, § 11691, declaring that if any person having a former husband or wife living shall marry another person

or continue to cohabit with such second husband or wife in the state, he or she shall be deemed guilty of "polygamy," the unlawful marriage must be contracted or the unlawful cohabitation must be continued in the state, each being a distinct offense, so that an information charging defendant with an unlawful marriage in another state, but not charging that he continued to cohabit with such second wife in this state, alleges no offense. People v. Devine (Mich.) 1917C-1140.

(Annotated.)

#### Note.

Cohabitation under foreign marriage as bigamy. 1917C-1141.

#### BILL BOARDS.

See Advertising.

BILL OF DISCOVERY.

See Discovery.

BILL OF EXCEPTIONS.

See Appeal and Error, 59-70.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF INTERPLEADER.

See Interpleader.

BILL OF PARTICULARS.

See Money had and Received, 1.

### BILL OF REVIEW.

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#### BILL OF RIGHTS.

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#### BILLS AND NOTES.

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- d. Evidence, 133.

- e. Instructions, 134. f. Damages, 134. g. Directing Verdict, 135. h. Judgment, 135.

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Issue of notes by county, see Counties, 14-17, 23.

Promissory note is property, see False Pretenses, 2.

Gift of note payable to donor's estate, see Gifts, 3.

Action on lost note, pleading and proof, see Lost Instruments, 1-3.

Effect of finding pending action, see Lost Instruments, 4.

Note as payment, see Payment, 2.

Payment of debt defense to pledged note, see Pledge, 2.

Reformation, see Rescission, Cancellation and Reformation, 2.

Effect of usury on renewal note, see Usury, 12-18.

## 1. CONSTRUCTION OF NEGOTIABLE INSTRUMENTS ACT.

- 1. Signature in Blank on Back. Under the Negotiable Instruments Law Code 1904, § 2841a, subsec. 63), the presence of a name on the back of a note without indication by appropriate words of an intention to be bound in some other capacity classes such signer as an indorser. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375.
- 2. Stipulation for Attorney's Fees. Under the Negotiable Instruments Law (Va. Code 1904, § 2841a), and in view of the fact that at its enactment the validity of the provision of a note for attorney's fees was unsettled in this state, and in view of the purpose and policy of the Negotiable Instruments Law and of the course of decision prevailing in a majority of the states having substantially the same law and of the importance of the uniformity of interpretation, a provision in a promis-sory note governed by the laws of the state for a ten per cent attorney's fee if suit should be brought thereon is valid. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375. (Annotated.)

- 3. Chapter 81 of the Acts of 1907, chapter 98 A (secs. 4172-4368) of the W. Va. Code, known as the Negotiable Instruments Law, does not legalize contracts expressly condemned and declared void by the statutes of this state, nor those forbidden by the policy of its laws. Raleigh County Bank v. Poteet (W. Va.) 1917D-(Annotated.)
- 4. Stipulation for Attorney's Fees. Provision in a note for an attorney's fee, if it be not paid without suit, by prior decisions held invalid as against public policy, but not rendering uncertain the sum payable nor affecting negotiability, is not validated by the Negotiable Instruments Law (Ark. Acts 1913, p. 260), which by section 2 declares that provision in a note for payment of an attorney's fee shall not prevent the sum payable being a "sum certain," necessary for negotiability, and by section 5, after declaring nonnegotiable an instrument which contains an order or promise to do an act in addition to the payment of money, and making certain exceptions thereto, provides: "But nothing in this section shall validate any provision or stipulation otherwise illegal." Bank of Holly Grove v. Sudbury (Ark.) 1917D-373.

(Annotated.)

- 5. Time of Taking Effect. Negotiable Instruments Law (Vt. Acts 1912, No. 99) by the provisions of section 185 does not apply to negotiable instruments made and delivered prior to June 1, 1913. First National Bank v. Bertoli (Vt.) 1917B-
- 6. Gaming Consideration. Chapter 81, Acts of 1907 (chapter 98a [secs. 4172-4368], of the W. Va. Code), known as the Negotiable Instruments Law, does not by implication or otherwise repeal, limit, or qualify, in any degree or respect, section 1 of chapter 97 (sec. 4168) of the Code, declaring void what are commonly known as gambling contracts. Twentieth Street Bank v. Jacobs (W. Va.) 1917D-695.
- 7. Transfer Who is "Holder" Negotiable Instruments Law. Rev. Stat. Mo. 1909, § 10001, providing that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof and, if payable to bearer, by the indorsement of the holder completed by delivery, and section 10004, providing that a special indorsement specifies the person to whom or to whose order the instrument is to be made payable, and that the indorsement of such indorsee is necessary to the further negotiation of the instrument, do not prescribe an exclusive method by which negotiable instruments may be transferred, but only prescribe the manner in which their nego-

tiability or independence of equities existing against the transferor may be preserved, and in other respects the law in force prior to the passage of the Negotiable Instruments Law, of which such sections are a part, remain untouched, except in so far as the rights of the transferee are enlarged by the terms of that section, especially in view of section 10019, providing that, when the holder of an instrument transfers it for value without indorsing it, the transfer vests in the transferee the title of the transferor, and in addition the right to the indorsement of the transferor, if omitted by accident or mistake, since "negotiated," as used in the Negotiable Instruments Law, is not equivalent to "assigned" or "transferred," in their broadest sense, nor is "holder" synonymous with "owner" or "party in interest"; the word "negotiate" being derived from "negotiable" and, when used in connection with the same subject, partaking of the same meaning, and the word "holder" re-ferring to such a title as constitutes a party a holder in due course. Carter v. Butler (Mo.) 1917A-483.

#### 2. FORM AND CONSTRUCTION.

- 8. A note of a corporation was signed by the corporation per secretary and treasurer, and then followed the signature of eight persons, each of whose signature was followed by the word "director." It is held that, as the name of the corporation was attested by the secretary and treasurer, it cannot be assumed that those who signed as directors did so for the purpose of attesting the signature of the corporation, and it must be assumed that they were individually liable as makers, the word "director" being mere description. Bank of Corning v. Nimnich (Ark.) 1917D-566. (Annotated.)
- 9. Person Signing as Officer of Corporation. Where a note is signed with the name of a corporation, followed by the names of officers, giving their official title, indicating that they are signing in their official capacity, the corporation alone is tion. Bank of Corning v. Nimnich (Ark.) 1917D-566. (Annotated.)
- 10. Note Secured by Mortgage Construction Together. In construing a note, a mortgage executed at the same time and as a part of the same transaction is to be considered along with the note, but that does not mean that the provisions of the mortgage become part of the note. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.
- 11. Construction—Necessity of Consent of Holder. A promissory note, containing the provision that "all parties hereto . . . agree that this note may be extended from

time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension, the liability of all parties shall remain as if no such extension had been made," grants no power to the maker or other parties to the note to extend the time of payment without the consent of the payee or holder. First National Bank v. Stover (N. Mex.) 1918B-145.

(Annotated.)

#### Notes.

Construction of extension of or agreement to extend time of payment of note. 1918B-157.

Liability of person signing negotiable paper as officer of corporation. 1917D-568.

#### 3. CONSIDERATION.

- 12. Discharge of Other Notes. Where a promissory note is given to discharge two other notes which are surrendered to the indorser of the note given, the note is supported by consideration. Travis v. Unkart (N. J.) 1917C-1031.
- 13. Inadequacy of Consideration. Inadequacy of consideration is no defense to an action on a promissory note, unless there was fraud also on the part of the promisee. Caldwell v. Ruddy, 2 Idaho (Hasb.) 1, 1 Pac. 339, cited and followed. Harshbarger v. Eby (Idaho) 1917C-753.
- 14. Pre-existing Debt. A pre-existing debt is a sufficient consideration for a note. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375.
- 15. Failure of Consideration. Where a note is not included within the conditional terms of a contract of sale of a business, but is given as the equivalent of cash for a preliminary payment, its consideration does not fail by reason of the recaption of the property by the vendor upon the vendee's default, and the vendor may still enforce it. Norman v. Meeker (Wash.) 1917D-462. (Annotated.)
- 16. Presumption of Consideration. Where the note sued on recites "value received," it is prima facie evidence of consideration, sufficient, if not rebutted, to maintain plaintiff's case. Palmer v. Blanchard (Me.) 1917A-809.

## 4. EXECUTION AND DELIVERY.

17. Delivery of Note. Findings by the trial court that after a joint maker signed the note it was left in the possession of his comaker, by whom it was altered so as to be payable to bearer, and that thereafter it was delivered to and accepted by plaintiff in payment of a debt, show that the note was delivered by the first maker to the plaintiff and that he held it as payee, not as indorser. Builders Lime, etc. Co. v. Weimer (Iowa) 1917C-1174.

18. Conditional Delivery. A promissory note delivered by a person who has executed the same upon the express condition that such note shall not be deemed the note of the party so executing it, or as delivered, unless it is also executed by another person as a comaker, cannot be enforced by the payee against the person so executing it, unless also executed by the other person so named in the condition as a comaker. First State Bank v. Kelly (N. Dak.) 1917D-1044.

19. Delivery. As a general rule, a negotiable promissory note, like any other written instrument, has no legal or operative existence as such until it has been delivered in accordance with the purpose and intention of the parties. First State Bank v. Kelly (N. Dak.) 1917D-1044.

- 5. NEGOTIABILITY AND TRANSFER.
- a. Effect of Various Provisions upon Negotiability.
- 20. Uncertainty as to Amount. Provisions of a mortgage given as security for a note executed at the same time and as a part of the same transaction, making the mortgage security for the payment of taxes and insurance by the mortgagor, but not containing any promise to pay the same, do not render the note non-negotiable for uncertainty in the amount payable, as such provisions in no way affect the obligation of the note. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.

(Annotated.)

21. Provision for Discount. A promissory note is not rendered non-negotiable by the insertion of the following provision: "A discount of six per cent will be allowed, if paid in full within fifteen days from date." Farmers Loan, etc. Co. v. Planck (Neb.) 1918B-598.

(Annotated.)

- 22. Provision for Extension of Time. A provision in a note for extending time does not render the note non-negotiable under the law merchant or the provisions of the Negotiable Instruments Law (Law N. Mex. 1907, c. 83). First National Bank v. Stover (N. Mex.) 1918B-145.
- 23. What Constitutes Uncertainty as to Amount. A provision in a mortgage that the mortgager would pay the taxes on the mortgage on a certain contingency did not render the note secured non-negotiable for uncertainty in the amount payable, since it did not entitle the mortgage to recover such taxes as a part of the indebtedness, but only made the mortgage a lien therefor. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498. (Annotated.)
- 24. A stipulation in a note that the payee may recover any taxes on the premises mortgaged as security therefor which

the payee shall pay renders it non-negotiable for uncertainty as to the amount payable, since no one can tell what future tax levies will be. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.

(Annotated.)

- 25. Uncertainty as to Date of Maturity. Under the Negotiable Instruments Act (Iowa Code Supp. 1907, § 3060a1), providing that an instrument to be negotiable "must be payable on demand or at a fixed or determinable future time," a clause in the mortgage given as security that the mortgage might declare the debt due for default of the mortgagor did not render the note non-negotiable for uncertainty as to the time of payment. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.

  (Annotated.)
- 26. A mortgage, giving the mortgagee the right to declare the debt due without regard to whether the mortgagor is in default, renders the note for which it is security non-negotiable for uncertainty as to the time of payment. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.

  (Annotated.)
- 27. Negotiability. A promissory note does not necessarily possess the quality of negotiability. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375.

#### Note.

Negotiability of note containing provision allowing discount if paid within certain time. 1918B-600.

#### b. Indorsement.

- 28. Under Iowa Code Supp. 1907, § 3060a-191, defining a "holder" as the payee or indorsee of a bill or note who is in possession of it, section 3060a52, par. 4, defining a holder in due course and providing that at the time it was negotiated to such holder he must have had no notice of an infirmity, and section 3060a30, providing that an instrument is "negotiated" when it is transferred from one person to another in such manner as to constitute the transferee the holder thereon and that if payable to bearer it is negotiable by delivery, while if payable to order it is nego-tiated by the indorsement of the holder completed by delivery, it is held that only one to whom a note has been negotiated after completion and delivery thereof is a "holder in due course," not one to whom a note payable to holder was delivered by the maker. Builders Lime, etc. Co. v. Weimer (Iowa) 1917C-1174.
- 29. Who is Indorsee. The fact that the first maker and two others indorsed the note before it was delivered to plaintiff did not make plaintiff an indorsee as to the other makers, even if it had been issued to the others and by them returned

to the first maker, since in such a case the redelivery to plaintiff would have the same effect as if it was an original issue. Builders Lime, etc. Co. v. Weimer (Iowa) 1917C-1174.

30. The "signature," which, under Colo. Rev. St. 1908, §§ 4494, 4526, constitutes indorsement of a note is not the mere written name, but includes genuineness. Marks v. Munson (Colo.) 1917A-766.

(Annotated.)

#### Note.

When note payable on demand is overdue as between maker and indorser. 1917B-842.

## 6. PRESENTMENT AND DEMAND.

31. Acceptance Payable When Funds are Available. Where a bill of exchange was "accepted payable out of proceeds of Northwestern Fisheries Company contract when same becomes available," the application by the acceptor of a remittance constituting part of such proceeds to the amount due on the drawer's indebtedness to the acceptor, owing before the acceptance, is a violation of the acceptance; "available" meaning merely "at one's disposal," in the absence of proof of a trade definition, while the holder of a conditional acceptance gets what the acceptance says he gets, even if exceeding the rights of the drawer. Schwabacher Hardware Co. v. Miller Sawmill Co. (Wash.) 1918A-940. (Annotated.)

32. Failure to Present for Payment. The failure to make demand at the time and place of payment agreed upon does not exonerate the debtor, whose readiness to pay at the specified time and place is merely equivalent to a tender. Baldwin's Bank v. Smith (N. Y.) 1917A-500.

## Note.

Construction of acceptance of bill of exchange conditioned on possession or availability of funds. 1918A-941.

# 7. PARTIES ENTITLED TO NOTICE OF DISHONOR.

33. Notice to Directors Indorsing Note of Corporation. That accommodation indorsers of a note are directors of the corporation, which is the maker, and constitute a majority of the board of directors, does not deprive them of right to notice of dishonor. Houser v. Fayssoux (N. Car.) 1917B-835. (Annotated.)

34. Accommodation. Accommodation indorsers of a note are entitled to notice of dishonor. Houser v. Fayssoux (N. Car.) 1917B-835.

#### Note.

Right to notice of dishonor of stockholder or officer indorsing corporate paper. 1917B-836.

## 8. DISCHARGE AND PAYMENT.

35. What Constitutes Payment. the holder of a note sends it to the bank where made payable for "collection and remittance," and on the date of maturity the bank is directed by the maker to charge the note to his account, he at all times having had sufficient funds therein to pay the note, the loss caused by the failure of the bank to remit and its insolvency seven days after maturity of the note must fall on the holder, the bank being his agent, in view of Negotiable Instruments Law (N. Y. Consol. Laws, c. 38) § 147, providing that when an instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor therein. Baldwin's Bank v. Smith (N. Y.) 1917A-500. (Annotated.)

36. Where the person to whom payment of the principal of a negotiable instrument is made is not in possession of the instrument, the burden is upon the party making the payment to show the agent's authority by clear and satisfactory evidence. Connell v. Kaukauna (Wis.) 1918A-247.

37. Payment of Negotiable Instrument. Payment of a negotiable instrument must be made to the party having possession of it, or duly authorized by the payee to accept payment. Connell v. Kaukauna (Wis.) 1918A-247.

# Note.

What constitutes payment of note at bank where it is made payable. 1917A-508.

## 9. RIGHTS AND LIABILITIES OF PARTIES.

## a. In General.

38. Effect of Renewal After Disability Removed. Where a married woman executed a note to a bank which was several times renewed, the fact of such renewals, and that the last note was executed by her when sold for a remaining balance of the debt, does not preclude her from urging any defense against it that she might have made against the original note. First National Bank v. Bertoli (Vt.) 1917B-590.

39. What Constitutes Fictitious Payee. Plaintiff, whose real name was John Storch, but who had assumed the name of M. Krause, and who loaned defendant money on a note payable to the order of M. Krause, suing in his real name after its resumption, can recover, as, it being the intention of plaintiff that the note should be payable to himself, he is not a "fictitious payee," which means a fictitious person who, though named in the note, has no right to it or to its proceeds, because it was not so intended when the note was

executed, and depends on the knowledge or intention of the party, against whom it is attempted to assert the rule, and not upon the actual existence or nonexistence of a payee of the same name as that appearing in the instrument, so that a real person may be a fictitious payee and a non-existing person may be real within the rule. Soekland v. Storch (Ark.) 1918A-668.

(Annotated.)

#### Note.

Fictitious payee of promissory note or bill. 1918A-669,

# b. Indorsers.

40. Renewal. A payment by the maker on a note before the bar of the statute does not operate as a renewal of the note as to mere accommodation indorsers, though it does as to sureties, as well as the maker. Houser v. Fayssoux (N. Car.) 1917B-835.

# c. Accommodation Makers.

- 41. Signer as Maker or Surety. The mere fact that the consideration for a note passed to the maker who first signed it does not show that the other signers were liable as sureties, and, if nothing more appears, they will be treated as makers. Builders Lime, etc. Co. v. Weimer (Iowa) 1917C-1174.
- 42. To Bona Fide Holder. In such case, notwithstanding plaintiff was not a holder in due course as defined by Md. Code Pub. Civ. Laws, art. 13, § 71, yet as section 14 declares that the term "holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, the Negotiable Instruments Act is applicable, though the suit was between the original parties, plaintiff, the payee of the note, being a holder within the act, as sections 43 and 45 declare that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and any person whose signature appears thereto to have been a party for value, and that where value has at any time been given, the holder is deemed a holder for value, and section 48 provides that an accommodation party is liable to a holder for value notwithstanding such holder knew him to be only an accommodation party. Jamesson v. Citizens National Bank (Md.) 1918'A-1097.
- 43. Nature of Liability. Negotiable Instruments Act (Md. Code Pub. Civ. Laws, art. 13), § 15, declares that the person primarily liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same, and that all other parties are secondarily liable. Section 138 declares that a negotiable instrument is discharged by payment in due course by or on behalf of the principal

debtor; by payment in due course by the party accommodated; by the intentional cancellation thereof by the holder; by any other act which will discharge a simple contract for the payment of money, and where the principal debtor becomes the holder of the instrument at or after maturity in his own right. Section 139 provides the methods by which a person secondarily liable on the instrument is discharged. Defendant as maker signed a joint and several note, although he was only a surety of the real principal. Upon bankruptcy of the principal debtor, defendant tendered to plaintiff the amount of the note, which tender was refused. Thereafter defendant tendered to the circuit court of the county in which suit on the note was pending the amount thereof, but before payment could be made, plaintiff dismissed the suit, thereafter proving the note as a claim in the bankruptcy proceeding. It is held that as plaintiff was one primarily liable, he was not discharged by reason of his tender. Jamesson v. Citizens National Bank (Md.) 1918A-1097.

- (Annotated.)
- 44. Renunciation of Rights against Accommodation Maker. Defendant, one of the makers of a note who was actually only a surety, tendered payment to plain-tiff upon the bankruptcy of the principal debtor, but such tender was declined. Negotiable Instruments Act (Md. Code, art. 13), § 141, declares that the holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity, and that an absolute renunciation of his rights against the principal debtor discharges the instrument, but a renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. It is held that a refusal of the tender was not a renunciation of the holder's rights against defendant. Jamesson v. Citizens National Bank (Md.) 1918A-1097.
- 45. Acceptance of Accommodation Maker as Surety. The payee of a note does not accept one of the makers as a surety merely, because he knows that he is not actually the principal debtor, the Md. Negotiable Instruments Act, § 48, declaring that an accommodation party is liable to a holder for value notwithstanding the holder at the time of taking the instrument knew him to be only an accommodation party. Jamesson v. Citizens National Bank (Md.) 1918A-1097.

# d. Bona Fide Purchasers.

- (1) Who are.
- (a) In General.
- 46. Note Containing Blank. Iowa Code Supp. 1907, § 3060a52, defines a holder in due course as one who, in good faith and

for value, has taken a note regular on its face, before it was overdue, and without notice of dishonor or of any infirmity or defect in the title of the party negotiating. A note recited that it was payable in "four—." Section 3060a6 declares that the validity of a note shall not be affected because it is undated. It is held that the holder of the note was not a "holder in due course," for it was not complete and regular on its face; the omission not falling within the exception. Estate of Philpott (Iowa) 1917B-839.

- 47. Under Iowa. CodeSupp. 1907, § 3060a14, providing that the person in possession has prima facie authority to complete a note by filling up blanks, and that if any such instrument after completion is negotiated to a holder in due course, it shall be effectual in his hands as if the blanks had been filled in in accordance with the authority given, the indorsee of a note payable in "four ——" is not a holder in due course; the blanks not having been filled. Estate of Philpott (Iowa) 1917B-839.
- 48. Bona Fide Purchase-Pleading Sufficient. Where, in an action against the joint makers of a note, defendant pleaded that his signature was procured by fraud of the payee, a replication stating that the note was indorsed by the payee before maturity to a bank to secure a loan made by the bank without notice of any defense, and that the bank, after due notice to the payee and pursuant to an agreement with him, sold the note to plaintiff after the payee's default, and applied the proceeds on the loan, brings plaintiff within the protection of Ala. Code 1907, §§ 5012-5014, relating to the rights of holders of commercial paper acquired in due course, and is therefore not demurrable. Jackson Georgia Fire Ins. Co. (Ala.) 1917A-807.
- 49. Circumstances Putting One on Inquiry. The general principles, running throughout the whole law, that notice of facts which should put one upon inquiry and which, if followed up with diligence and understanding, would lead to the truth, have no application to the question of good faith in the taking of negotiable instruments. The question in such cases is, Did the holder have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith? Suspicious circumstances, negligence, or wilful ignorance may be evidence of bad faith from which the jury may find the fact. The holder, however, will be protected unless, at the time he took the paper, he had reason to believe, and did believe, there was some defect or infirmity in the paper. The facts in this case examined and held not to authorize a finding that the appellant bank did not take the note in good faith; there being no substantial

evidence to support any such finding. First National Bank v. Stover (N. Mex.) 1918B-145.

# (b) Transfer as Security for Pre-existing

50. Consideration for Transfer. Under Rem. & Bal. Code Wash., §§ 3416, 3418, sections of the Negotiable Instruments Act, providing that "value" is any consideration sufficient to support a single contract, that a pre-existing debt constitutes value, and that, where the holder has a lien on the instrument, he is a holder for value to the extent of his lien; where plaintiff bank, suing the maker and indorser of a check, holds as collateral in part to an antecedent debt, it is a holder for value to the extent of such debt. German American Bank v. Wright (Wash.) 1917D—381. (Annotated.)

#### Note.

Transfer of negotiable note as security for antecedent debt. 1917D-386.

# (2) What Defenses Available Against.

51. Rights of Bona Fide Holder—Note Declared Void by Statute. While a merely illegal consideration in a negotiable instrument does not invalidate it in the hands of a holder in due course, a paper negotiable in form, but declared void by a statute, is not enforceable at the instance of anybody. Twentieth Street Bank v. Jacobs (W. Va.) 1917D-695.

(Annotated.)

52. Note for Illegal Consideration. Negotiable paper, the consideration whereof is money lost or bet in gaming, is void in the hands of the holder, even though he took it for value and without notice of the character of the consideration. Twentieth Street Bank v. Jacobs (W. Va.) 1917D-695. (Annotated.)

Note.

Validity in hands of bona fide holder of negotiable contract void by statute between original parties. 1917D-696.

## e. Forged Instruments.

- 53. Estoppel to Urge. Where one whose name was indorsed on a note promptly declined to pay it when first requested so to do, and persistently declined to pay, but did not lead the holder to believe that he would not rely on any legitimate defense, including the defense of forgery of the indorsement, the defense of forgery is available to his estate when the holder seeks to enforce the note against it. Murphy v. Skinner's Estate (Wis.) 1917A-817.
- 54. One who knowingly pays notes to which his name is forged does not thereby undertake to pay other forged notes, where

the holders thereof were not deceived by the prior payments because they had mo knowledge of the other forgeries. Murphy v. Skinner's Estate (Wis.) 1917A-

## f. Non-negotiable Instruments.

55. Set-off Against Holder. By express provision of Nev. Civ. Prac. Act, § 46, action on a non-negotiable note by its assignee is subject to any set-off or defense existing at the time of or "before notice of" the assignment. First National Bank v. Nye County (Nev.) 1917C-1195.

#### 10. ACTIONS.

#### a. Who may Sue.

- 56. Rights of Indorsee for Collection. Where the payees of a note indorsed it to a bank to enable the bank to collect it, and the bank for the same purpose indorsed it to another bank, neither indorsement gave the indorsee any interest in the note, and the indorsees are mere naked trustees to collect, and the payees remain the holders of the note with the right to sue for its collection. Carter v. Butler (Mo.) 1917A-483.
- 57. Nominal Holder. Under Mo. Rev. St. 1909, § 1730, providing that a trustee of an express trust may sue in his own name, the payees of a note having possession thereof through their agent have the right to contract orally or in writing with the cashier of a bank to whom the note had been delivered for collection that he should sue for their benefit and the benefit of others to whom they desired to appoint the proceeds. Carter v. Butler (Mo.) 1917A-483. (Annotated.)
- 58. Presumption from Possession of Note. In an action on a note by a person authorized to sue thereon by a contract with the payees, having possession of the note, it is not necessary to prove that the payees were the holders of the note, as the law raises a prima facie presumption to that effect from their possession. Carter v. Butler (Mo.) 1917A-483.
- 59. In an action on a note by a person suing as trustee of the G. Company, and of W. and L., a petition alleging the giving of the note to W. and L., that W. and L. entered into an agreement in writing transferring and assigning an interest therein to the G. Company, that such note was placed in plaintiff's hands, and that by such agreement he was authorized and directed to collect the note and out of the proceeds pay to the G. Company the amount of its interest, sufficiently presents the facts upon which plaintiff claims such a title to the note as to enable him to maintain the action, where the objection to the sufficiency of the petition is not

raised by motion or answer. Carter v. Butler (Mo.) 1917A-483.

- 60. Right of Assignee to Sue. Where there is a valid written assignment of a note, the assignee is authorized to sue, and the makers and sureties cannot question the consideration for the assignment. Sims v. Everett (Ark.) 1916C-629.
- 61. Necessary Parties. In an action against a county on its note, given a bank, by the assignee thereof, neither the receiver of the bank nor its preferred creditors are necessary parties; any questions of preference being for the receivership matter First National Bank v. Nye County (Nev.) 1917C-1195.

#### Note.

Right of action thereon of nominal holder of promissory note. 1917A-490.

## b. Joinder of Defendants.

62. Joint Makers or Indorsers. Under Va. Code 1904, § 2853, prescribing against whom an action may be brought, the holder of a note may sue defendant alone without joining other joint makers, whether defendant is a joint maker or an indorser. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375.

## c. Issues.

- 63. Proving Signature of Maker. The common-law rule requiring proof of the signature of the maker to recover on a note is in force in West Virginia except as it is affected by the statute (Code c. 125, § 40 [§ 4794]) dispensing with such proof in case a specific averment of execution is not expressly denied. Williams v. S. M. Smith Ins. Agency (W. Va.) 1917A-813. (Annotated.)
- 64. Making for Accommodation—Necessity of Plea. The party for whose accommodation a promissory note was executed is not entitled to recover from the accommodation party thereon, but such defense, in order to avail, must be specially pleaded. First State Bank v. Kelly (N. Dak.) 1917D-1044.
- 65. Actions—Necessity of Proving Signature. Plaintiff's cause of action to cancel a tax deed as a cloud on title depending on his being the owner and holder, as alleged in the complaint, of the note, made payable to another, secured by trust deed on the property, the general denial raises the question, putting plaintiff on proof, of the facts alleged, including the transfer of the note to him. Marks v. Munson (Colo.) 1917A-766.

(Annotated.) tion against an

66. Variance. In an action against an indorser, the defendant cannot prove a

failure of consideration contradictory to his verified plea in the cause averring that he was an original joint contractor with the makers. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375.

67. Equitable Defense. As a plea on equitable grounds is unavailing as a defense in an action at law, unless it sets up facts which would entitle the defendant to relief in equity as against a judgment at law, as provided in Md. Code Pub. Civ. Laws, art. 75, \$86, one who signed a note as maker cannot defend an action thereon upon the equitable ground that he was only a surety, though one of the parties primarily liable under the Negotiable Instruments Act, and that under the law prior to that act's taking effect he would have been discharged by the payee's extension of time to the principal debtor. Jamesson v. Citizens' National Bank (Md.) 1918A-1097.

## d. Evidence.

- 68. Evidence Held Properly Excluded. It is held that the court did not err in denying appellants' offer of certain proof. Harshbarger v. Eby (Idaho) 1917C-753.
- 69. Evidence Insufficient. In an action on a note, a special verdict, finding that the note was altered after delivery by a change in the date, held to be against the weight of the evidence. Palmer v. Blanchard (Me.) 1917A-809.
- 70. Proof of Bona Fides—Sufficiency. Sections 646, 649, 653, N. Mex. Code 1915, applied, and held that the plaintiff bank, under the circumstances, took the note in question charged with the burden of proof that it took the same in the course. Held further, that under the proof, that burden had been successfully met. Held further, that where the evidence was all one way, and the witness stands unimpeached in any way, his evidence is to be taken by this court as true in determining whether there is any substantial evidence to support the verdict. First National Bank v. Stover (N. Mex.) 1918B-145.
- 71. In an action on a note given for mining property, the testimony of one of the defendants, in answer to a question as to whether they had held the property ever since they received it from defendants, that he supposed that would be it, is sufficient evidence that possession was delivered, assuming that the burden of showing such delivery rests on plaintiff. Carter v. Butler (Mo.) 1917A-483.
- 72. Evidence of Notice. Evidence that a bank, which in due course of business took a note as security for a loan made to the payee, knew that the payee then was or had been in trouble with an insurance company concerning the application of funds received from insurance notes, is

- irrelevant, where the insurance company makes no claim to the notes sued on. Jackson v. Georgia Fire Ins. Co. (Ala.) 1917A-807.
- 73. Evidence Insufficient. In an action on a note, evidence held not sufficient to sustain a special verdict that the note was altered after delivery, by adding the signature of another maker. Palmer v. Blanchard (Me.) 1917A-809.
- 74. In an action on a note, evidence of want of consideration held not sufficient to overcome the recital of consideration contained in the note. Palmer v. Blanchard (Me.) 1917A-809.
- 75. Necessity of Proving Signature. Wis. St. 1913, § 4193, providing that, in actions on notes by indorsee, the possession of the note shall be presumptive evidence that the same was indorsed by the persons to whom it purports to be indorsed, permits the holder of a note showing his possession thereof to make a prima facie case against indorsers; but, where the defense is that the indorsements were forgeries, the holder has the burden of proving the genuineness of the indorsements by a preponderance of the evidence. Murphy v. Skinner's Estate (Wis.) 1917A-817.
- 76. Degree of Proof Requisite. To establish a defense that a note sued on after the death of the maker, so that neither party could testify regarding it, was a forgery, the testimony must be clear and convincing, because of the presumption against the commission of a felony. Palmer v. Blanchard (Me.) 1917A-809.
- 77. Evidence of Forgery Insufficient. In an action on two notes against the maker's administrator, a special verdict that the signature of the maker to the notes was a forgery held against the weight of evidence. Palmer v. Blanchard (Me.) 1917A-809.
- 75. Necessity of Proving Signature. In an action on a promissory note defended on the ground of forgery the burden is on the plaintiff to prove the genuineness of the signature. Palmer v. Blanchard (Me.) 1917A-809. (Annotated.)
- 79. Parol Evidence of Signature for Accommodation. One who signs a promissory note for the accommodation of another may show that fact by parol, in an action against him by the party accommodated. First State Bank v. Kelly (N. Dak.) 1917D-1044.
- 80. Parol Evidence as to Consideration. In an action by the original payes of a negotiable instrument, or by one having notice. the question of the consideration may be inquired into, and parol evidence is admissible to show the real consideration for the instrument. First State Bank v. Kelly (N. Dak.) 1917D-1044.

- 81. Parol Evidence—Conditional Delivery of Note. Evidence tending to prove the condition upon which notes were executed and delivered to the payee, and that such condition had never been complied with. is competent, and does not come within the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument. First State Bank v. Kelly (N. Dak.) 1917D-1044.
- 82. Evidence of Genuineness—Admissibility. Where an action against an indorser of a note is defended on the ground that the indorsement was a forgery, evidence of payments by the indorser of other notes bearing his indorsements and found in his possession is admissible as an admission that the indorsements of the other notes were genuine as bearing on the issue of the genuineness of the indorsement on the note sued on. Murphy v. Skinner's
- 83. Parol Evidence of Agreement to Belease. Parol evidence is inadmissible to show that prior to, or contemporaneous with, the execution of a note, the payee agreed to release the maker upon the happening of a certain contingency, and take a note of another person in lieu thereof. First State Bank v. Kelly (N. Dak.) 1917D-1044.

Estate (Wis.) 1917A-817.

- 84. Evidence Insufficient. In action on a note negotiated in breach of faith, evidence is held not to show conclusively that the plaintiff was a holder in due course. Estate of Philpott (Iowa) 1917B-839.
- 85. Burden of Proof as to Taking in Due Course. Iowa Code Supp. 1907, \$ 3060a55, declares that the title of one who negotiates a note in breach of faith is defective. Section 3060a59 declares that every holder is deemed prima facie a holder in due course, but when it is shown that the title of one of the persons who negotiated the instrument was defective, the holder has the burden of proving that he or some one under whom he claimed had acquired title in due course. It is held that on proof that a note was indorsed in breach of an agreement that it should be returned for cancellation, plaintiff has the burden of proving that he was a holder in due course. Estate of Philpott (Iowa) 1917B—839.
- 86. Where execution and indorsement of a note, on ownership of which by transfer depends plaintiff's cause of action, are put in issue by the answer, the note is not admissible without proof of the signatures. Marks v. Munson (Colo.) 1917A-766. (Annotated.)
- 87. Proof Sufficient. Where the president of a bank to which a note was given as security testified that the transaction was with him and he had no notice of any

defense thereto, the evidence was sufficient to justify a finding of want of notice to the bank, though the other officers did not testify, and though the burden of proof was on the bank under Iowa Code Supp. 1907, §§ 3060a55, 3060a59, because the payee negotiated the note in bad faith. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.

#### Notes.

Necessity of proving, in action on promissory note, signatures of maker and indorser. 1917A-770.

Parol evidence of conditional delivery of bill or note. 1917D-1049.

#### e. Instructions.

- 88. Necessity of Proving Signature of Maker. Where, in an action against the joint makers of a note, one defendant filed a plea of non est factum as to which plaintiff offered no proof, it is proper to give affirmative instructions for such defendant. Jackson v. Georgia Fire Ins. Co. (Ala.) 1917A-807. (Annotated.)
- 89. Reasonable Time for Transfer. Whether a demand note negotiated six months after date was negotiated an unreasonable length of time after issue, so that, under Iowa Code Supp. 1907, § 3060a-53, the holder was not a holder in due course, is held to be for the jury, in view of section 3060a193, requiring the facts of the particular case to be considered in determining what is a reasonable time. Estate of Philpott (Iowa) 1917B-839.

(Annotated.)

#### f. Damages,

- 90. Liability of Indorser. An indorser of a note, stipulating for payment of attorney's fees in case of suit, though he be an accommodation indorser, is liable for such fees, especially where he waives demand, protest, and notice. Franklin v. The Duncan (Tenn.) 1917C-1080.
- (Annotated.)

  91. Liability of Guarantor. The liability of a guarantor of the payment of a note, stipulating for payment of attorney's fees in case of suit, includes the liability of the maker for payment of the fees, especially where the contract of guaranty specified that the guarantor accepted all the provisions of the note. Franklin v. The Duncan (Tenn.) 1917C-1080.
- 92. Necessity of Suit on Note. The holder of a mortgage note, providing for payment of attorney's fees if the note was placed "in the hands of an attorney for collection, has to be sued upon, or if litigation arises in the course of its collection," is entitled to have the fees allowed, over objection that its suit was needless, since foreclosure out of court was provided

for in the mortgage, where a general creditors' bill was filed against the maker of the note and an injunction granted therein, which operated to enjoin the holder of the note from forcelosing the mortgage except in that cause, and, on the holder's intervening to set up its claim by crossbill, the complainant answered, denying the validity of the mortgage. Franklin v. The Duncan (Tenn.) 19170-1080.

93. Liability of Third Person. Where a note secured by chattel mortgage provided for attorneys' fees in case of suit for collection, an attorney's fee allowed the holder cannot be recovered from one liable because having obtained property subject to the chattel mortgage. Northern Brewery Co. v. Princess Hotel (Ore.) 1917C-621.

94. Stipulation for Attorney's Fees. A stipulation in a negotiable promissory note for the payment of "five per cent collection fees" on the principal thereof, and in addition thereto "\$10 attorney fee in addition to the attorney's fees taxed or allowed by law," is forbidden by the policy of the law and void and unenforceable. Raleigh County Bank v. Poteet (W. Va.) 1917D-359. (Annotated.)

#### Notes.

Validity of stipulation for attorney's fee in promissory note. 1917D-365.

Provision in note for payment of attorney's fees as binding indorser. 1917C-1082.

### g. Directing Verdict.

95. In this case, the amended answer being insufficient as a denial of the allegations in the complaint, and the court having instructed the jury to find for respondent, it is held that the instruction was right, as no evidence was required on the part of respondent to establish appellants' indebtedness on the note, and there was sufficient evidence to establish the attorney's fee. Harshbarger v. Eby (Idaho) 1917C-753.

## h. Judgment.

96. Action on Joint Note—Judgment Against One Maker. In an action against the joint makers of a promissory note, judgment may be rendered against one maker and in favor of the others. Jackson v. Georgia Fire Ins. Co. (Ala.) 1917A—807.

## BINDING SLIP.

See Fire Insurance, 4.

## BLACKLISTING.

See Labor Combinations, 4, 6-8.

## BLANKS.

See Alteration of Instruments, 2; Bills and Notes, 46, 47.

#### BLASTING.

Injury by concussion, see Explosions and Explosives, 4, 5.

## BLIND MAN'S WILL.

How attested, see Wills, 28, 101.

#### BLIND TIGER.

Defined, see Disorderly Houses, 1. Defined, see Intoxicating Liquors, 110.

#### BLOOD STAINS.

Admissibility, see Homicide, 21, 26, 28, 29.

#### BLOOD TEST.

Faiure to make before operation, see Physicians and Surgeons, 22.

#### BLUE SKY LAW.

See Licenses, 33, 34.

#### BOARDING CAR.

Person boarding not a passenger, see Carriers of Passengers, 12.

#### BOARD OF HEALTH.

See Health, 1.

#### BOARD OF UNDERWRITERS.

Liability for torts of employees, see Master and Servant, 365. Not a municipal corporation, see Munici-

pal Corporations, 5.

# BOAT.

Defined, see Master and Servant, 59.

## BOATABLE STREAM.

Meaning, see Evidence, 18.

#### BONA FIDE CITIZENS.

Meaning, see Corporations, 1.

## BONA FIDE PURCHASER.

See Bilis and Notes, 46-55; Sales, 57-60. Of altered note, see Alteration of Instruments, 7.

Of land, see Vendor and Purchaser, 21.

## BONA FIDES.

Criterion of official conduct, see Sheriffs and Constables, 14.

### BONDS.

See Public Contracts, 5, 6; Suretyship. Appeal bonds, see Appeal and Error, 481–484. Undertaking on attachment, see Attachment, 6, 7.

Bail bond, see Bail.

Bond to indemnify bankrupt, see Bankruptcy, 27-29.

Contractor's bond in building contract, see Contracts, 84, 85.

Corporate mortgages and bonds, see Corporations, 149-159.

County bonds, see Counties, 11, 12.

Of defaulting cashier, enforcement, see Equity, 2.

Of executors and administrators, see Executors and Administrators, 12.

Failure to give, effect on guardian's sale, see Guardian and Ward, 11, 12.

Injunction bond, see Injunctions, 41. Liquor dealer's bond, see Intoxicating

Liquors, 76-77.
Contractor's bond as waiving right to lien, see Mechanics' Liens, 29.

Municipal bonds, see Municipal Corporations, 109-119.

Action on detinue bond, see Replevin, 3.
Reformation, changing name of obligee,
see Rescission, Cancellation and

Reformation, 9.

Sheriff's bond, liability of sureties, see Sheriffs and Constables, 10, 11. Taxation of bonds, see Taxation, 45-47.

Bond issue for forest preservation, see Trees and Timber, 2-12.

- 1. Recovery by Beneficial Obligee. Where plaintiff sues as beneficial obligee on a bond of indemnity, he must prove that he had an interest in the performance of the duty and that the duty was imposed either for his sole benefit or jointly for the benefit of himself and others. Clark v. Nickell (W. Va.) 1917A-1286.
- 2. Pleading Delivery. Allegations of the execution of a surety bond sued on implied a delivery thereof. American Surety Co. v. Pangburn (Ind.) 1916E-1126.

## BOULEVARDS.

Exclusion of business vehicles, see Streets and Highways, 24.

#### BOUNDARIES.

Overhanging trees, cutting to line, see
Adjoining Landowners, 7, 8.
Establishment by estonnel see Eston-

Establishment by estoppel, see Estoppel, 1.

River as state boundary, see States, 3, 4. Of land bordering on navigable stream, see Waters and Watercourses, 4.

1. Establishment by Parol. A disputed boundary line between coterminous proprietors may be established by oral agreement, if the agreement be accompanied by actual possession to the agreed line, or is otherwise duly executed. Bunger v. Grimm (Ga.) 1916C-173.

2. Before the doctrine of estoppel can be invoked to settle a boundary line or the ownership of a fence as a boundary line, it must first be established that the parties have recognized the boundary line, or recognized the fence as the division line, and when the facts are resolved to the contrary, the doctrine of estoppel cannot operate. Wideman v. Faivre (Kan.) 1918B-1168.

#### BOYCOTTS.

See Labor Combinations, 4.

#### BRANDS.

See Trademarks and Tradenames.

#### BREACH OF PEACE.

Arrest without warrant, see Arrest, 3. Jurisdiction of military authorities, see Militla, 15-18.

Duty of sheriff to suppress, see Sheriffs and Constables, 7, 16.

- 1. What Constitutes Vulgar Language in Public Place. Where a clergyman in a sermon used the language: "Some men will stand around the depot, stores, the post office, and street corners, and watch the women pass, and size them up, the foot, ankle, and form, and they would ... give five dollars for the fork," such language constitutes a "breach of the peace," which is a generic offense, including all violations of the public peace or order, or acts tending to the disturbance thereof, possibly consisting of public turbulence or indecorum, in violation of the common peace and quiet, of an invasion of the security and protection which the law affords every citizen, or acts which tend to excite violent resentment, actual personal violence not being an element in the offense, but where the incitement of terror or fear of personal violence is a necessary element, the conduct or lan-guage of the wrongdoer must be of a character to induce such condition in a person of ordinary firmness, and for the public utterance of such expressions defendant was liable to punishment under Ky. St. § 1268, providing that, if any person shall be guilty of a breach of the peace, he shall be fined or imprisoned; the prosecution not being under Ky. St. § 1267, denouncing fine or imprisonment against any person who shall wilfully interrupt a congregation assembled for worship. Delk v. Commonwealth (Ky.) 1917C-884. (Annotated.)
- 2. Violence not Essential. It is not necessary that an act have in itself any element of violence in order to constitute a breach of the peace. State v. Reichman (Tenn.) 1918B-889.
- 3. What Constitutes. The word "peace," in the phrase "breach of the peace,"

means the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members; that invisible sense of security which every man feels necessary to his comfort, and for which all governments are instituted. State v. Reichman (Tenn.) 1918B-889.

- 4. "Breach of the peace," in view of the generally accepted definition, and of constitutional provision that all indictments shall conclude, "against the peace and dignity of the state," includes any violation of any law enacted to preserve peace and good order. State v. Reichman (Tenn.) 1918B-889.
- 5. Illegal Sale of Intoxicants as Breach of Peace. Shannon's Tenn. Code, § 993, subsec. 2, requiring every applicant for a liquor license to give bond to keep a peaceable and orderly house, is a legislative declaration that the liquor law is intended to preserve the peace, so that any violation thereof is a breach of the peace. State v. Reichman (Tenn.) 1918B-889.
- 6. Engaging in the sale of intoxicating liquors, declared by Tenn. Acts 1913 (2d Ex. Sess.), c. 21, to be a nuisance always among that class of nuisances always treated by the court as tending to disturb the peace and good order of the community. State v. Reichman (Tenn.) 1918B-889.
- 7. Unlawful Sale of Intoxicants. "Breach of the peace" being a generic term including all violations of public peace or order, includes unlawful sale, actual or threatened, of intoxicating liquors, and the sheriff may arrest without warrant therefor. State v. Reichman (Tenn.) 1918B-889.
- 8. While mere possession of intoxicating liquors in any quantity is not unlawful, it is a breach of the peace for one having liquors to prepare for sale thereof, that being a threat to violate the law against sales. State v. Reichman (Tenn.) 1918B-889
- 9. Powers of Notary. The authority of notaries public, as well as of justices, as conservators of the peace, not being otherwise prescribed by statute, is limited to the powers possessed by conservators of the peace at common law, prior to the enactment of W. Va. St. 1 Ed. iii, c. 16, authorizing the appointment of justices of the peace. Those duties were to prevent and arrest for breaches of the peace, in their presence, but not to arraign and try the offender. Howell v. Wysor (W. Va.) 1916C-519.

## Note.

Language constituting disorderly conduct or breach of peace. 1917C-889.

#### BREACH OF PROMISE OF MARRIAGE.

1. Actions, 137.

a. Defenses, 137.

- b. Admissibility of Evidence, 138.
- c. Sufficiency of Evidence, 138.
- d. Instructions, 138. e. Damages, 138.

#### 1. ACTIONS.

## a. Defenses.

- 1. Disease. An instruction, in an action for breach of marriage promise by defendant's intestate, that if he had pernicious anemia it would not excuse his breach, but if he believed it would be fatal after a year or so, or it would be reasonably certain to bring death in a few months, this could be considered in mitigation of damages, is sufficiently favorable to plaintiff. Parsons v. Trowbridge (Fed.) 1917C-750.
- 2. Offer to Marry. An offer to marry after a breach of promise to marry is no bar to an action for the breach. Stacy v. Dolan (Vt.) 1917A-650. (Annotated.)
- 3. Subsequent Offer to Marry. Offers of marriage, made by defendant in good faith after the breach and after the bringing of the suit, but while his character, condition, and circumstances remained unchanged, are admissible in evidence in mitigation of damages so far as the jury might think they should go in mitigation, and are improperly excluded. Stacy v. Dolan (Vt.) 1917A-650.

(Annotated.)

- 4. Death. Where performance of a contract to marry is rendered impossible by death of one of the parties, no cause of action arises for the breach of the contract, since there is an implied condition to the contract of marriage that the parties will be alive at the time appointed for performance. Estate of Oldfield (Iowa) 1917D-1067.
- 5. To justify a repudiation of the contract, however, upon such ground, the danger to life and health which will be caused by the consummation of the marriage must be reasonably certain, as the inevitable consequence of the marriage relation, and not a mere problematical or possible contingency. Estate of Oldfield (Iowa) 1917D-1067. (Annotated.)
- 6. Disease as Defense. Where a man engaged to marry becomes afflicted with disease whereby the performance of marriage duties would aggravate his disease and hasten his death, either party to the contract may repudiate without being subjected to liability therefor, since the consideration for an agreement to marry is the giving and receiving by marriage all that is implied in the relationship, en-

tailing mutual obligations of giving and receiving, for the failure of which by the act of God either party is entitled to refuse the performance. Estate of Oldfield (Iowa) 1917D-1067. (Annotated.)

7. One becoming afflicted with a loathsome disease, contracted subsequently to the making of the contract, which upon consummation of the marriage may be communicated to the spouse and offspring, may repudiate an agreement to marry. Estate of Oldfield (Iowa) 1917D-1067.

(Annotated.)

8. Where one, after contracting to marry, contracts a malady which will cause death within a few months, he may repudiate the contract, and his estate upon his death will not be liable in damages as for a breach. Estate of Oldfield (Iowa) 1917D-1067. (Annotated.)

#### Notes.

Disease as defense to action for breach of promise of marriage. 1917D-1084.

Effect of offer by defendant to marry plaintiff on action for breach of promise of marriage. 1917A-652.

# b. Admissibility of Evidence.

- 9. In an action for breach of promise of marriage, where it was not claimed and there was nothing in plaintiff's reply to a letter from defendant's sister written after the action was commenced and containing an offer of marriage, from which it could be claimed that she accepted the proposal, a question asked her as to whether she meant by expressions in the letter to refuse the offer is properly excluded. Stacy v. Dolan (Vt.) 1917A-650.
- 10. In an action for breach of promise of marriage, it appeared that before mailing her reply to an offer of marriage from defendant, made after the action was commenced, plaintiff submitted the reply to her counsel, and she was asked why she did so. She replied that defendant had so often promised to marry her and broken his word that she thought it best to have his statement in writing. Held, that her attitude and feelings in the matter, whether calculated to enhance or diminish damages, were material, and hence, though the answer was not exactly responsive, it was properly permitted to stand. Stacy v. Dolan (Vt.) 1917A-650.
- 11. Testimony that it was the understanding of the members of the family of plaintiff, in an action for breach of marriage promise, that she was to marry defendant is objectionable as an opinion or conclusion of the witness. Nolan v. Glynn (Iowa) 1916C-559. (Annotated.)
- 12. Explanation of Subsequent Offer to Marry. Where offers of marriage by defendant after the commencement of the

suit are admitted in mitigation of damages, defendant's testimony that they were made in good faith is not admissible to rebut the inference that such offers were an admission of a previous engagement, as the good faith of the offer could not rebut any inferences proper to be drawn therefrom. Stacy v. Dolan (Vt.) 1917A-650.

## Note.

Understanding of family or friends of party as evidence of agreement to marry. 1916C-564.

## c. Sufficiency of Evidence.

13. Understanding of Family. Proof of the understanding by members of the family of one of the parties that they were to marry may not, in an action for breach of marriage promise, be considered as evidence of an agreement to marry. Nolan v. Glynn (Iowa) 1916C-559.

(Annotated.)

#### d. Instructions.

14. As to Good Faith of Parties. Where the court gave defendant's requested instruction to find for defendant if when plaintiff requested defendant to marry her she was not willing to marry him, but made the request for an ulterior purpose, but added statements as to the willingness of either party to marry within a reasonable time after the original promise was made, to which no exception was taken, defendant cannot complain of what the court said in addition to the requested instruction. Stacy v. Dolan (Vt.) 1917A-650.

## e. Damages.

- 15. Abortion. While in an action for damages from breach of marriage promise alone seduction, accomplished through the promise, and-pregnancy, resulting from the seduction, may be shown, on the ground of the mental anguish and humiliation from the breach of being intensified thereby, abortion, though at the instance of defendant, may not be shown; this being an element of damages only in an action for seduction. Nolan v. Glynn (Iowa) 1916C-559.
- 16. Effect of Death of Defendant. Though one breaking a contract to marry dies before action therefor, plaintiff is not as matter of law entitled to recover one-third of the value of his estate. Parsons v. Trowbridge (Fed.) 1917C-750.
- 17. Nature of Action. Though an action for breach of promise of marriage is in assumpsit, the damages are determined on principles not applying in ordinary cases of assumpsit. Stacy v. Dolan (Vt.) 1917A-650.

## BREACH OF WARRANTY.

See Sales.

#### BREAKING.

Defined, see Burglary, 1.

#### BRIBERY.

- 1. Offer to Serve for Less than Legal Salary. A promise by a candidate for office that if elected he will turn back a certain portion of the salary into the public treasury constitutes bribery of electors within the meaning of a corrupt practice act, irrespective of the existence of a corrupt motive. Diehl v. Totten (N. Dak.) 1918A-884. (Annotated.)
- 2. Purpose in Offering Bribe. An information based upon section 3476 of the General Statutes of Florida, charging the defendant with an attempt to bribe a deputy sheriff of Dade county to permit the defendant "to sell liquors unlawfully in Dade county, Florida, without interference from" such officer, is fatally defective in that it fails to allege that the defendant had attempted to bribe an official to permit the derendant to sell "spirituous, vinous, or malt liquors in any county or precinct which has voted against the sale of such liquors, under the provisions of article XIX of the constitution of the state of Florida," without interference from such officer. Brunson v. State (Fla.) 1918A-312.
- 3. Allegation of Value of Thing Offered. An indictment or information for bribery or attempted bribery must allege that something of value was given, promised, or received, though it is not necessary to insert a description of the thing offered, all that is essential being an allegation that it was of value. An allegation that "a certain gift or gratuity, to wit, money," was offered, without alleging that the money was of value, is insufficient. Brunson v. State (Fla.) 1918A-312.

(Annotated.)

## Notes.

Promise to do certain things after election as bribery of electors. 1918A-888.

Sufficiency of indictment or information for bribery with respect to allegation of value of thing offered or received as bribe. 1918A-314.

## BRICK KILN.

As a nuisance, see Nuisances, 8, 9.

## BRICKS.

City regulation of manufacture, see Municipal Corporations, 82, 83. Warranty of color, see Sales, 18.

# BRIDGE COMMISSIONERS. Status, see Public Officers, 8.

#### BRIDGE.

Compensation for injury to land, see Eminent Domain, 30. Right of township to bridge tax, see Towns, 1, 2.

- 1. Injury by Vessel. In an action by a city for damages to a bridge caused by a steamer running into it, evidence examined and held to be sufficient to sustain a finding that the absence of such lights on the bridge as were required by the lighthouse board did not contribute to the col-lision. Marinette v. Goodrich Transit Co. lision. (Wis.) 1917B-935. (Annotated.)
- 2. In an action for damages to a bridge caused by a steamer running into it, certain negative evidence examined and held to be sufficient to sustain a finding that the whistles required of the steamer to signal for the opening of the bridge were not blown. Marinette v. Goodrich Transit Co. (Wis.) 1917B-935. (Annotated.)
- 3. Injury by Vessel—Liability. Where a collision occurs between a steamer and a bridge, the absence of such lights on the bridge as are required by the rules of the lighthouse board, made under authority of act of Congress, throws the burden on the party in default to show that the absence of such lights not only did not but could not have caused the injury. Marinette v. Goodrich Transit Co. (Wis.) 1917B-935. (Annotated.)
- 4. Injury by Vessel-Liability. In an action by a city for damages to a bridge caused by a steamer running into it, the question whether the absence of lights on the bridge, as required by the lighthouse board was the cause of the injury, is held to be, under the evidence, for the jury, both on a motion for nonsuit and on motion to direct a verdict. Marinette v. Goodrich Transit Co. (Wis.) 1917B-935. (Annotated.)

### Note.

Liability for injury to bridge caused by vessel. 1917B-938.

## BRIEFS.

Waiver of error by omission from brief, see Appeal and Error, 171-175. In disbarment proceeding, see Attorneys, 67.

Attorney liable for printing, see Attorneys, 69.

## BROKERS.

- 1. Real Estate Brokers, 140.
  - a. Contract of Employment, 140.

  - b. Authority, 140.c. Right to Compensation, 140.
  - d. Actions for Compensation, 140.
  - e. Liability to Principal, 141.
- 2. Stock Brokers, 141.
  - a. Right to Pledge Stock, 141.
- 3. Loan Brokers, 141.

See Pawnbrokers.

Regulation of commission merchants, see Constitutional Law, 43. Insurance brokers, see Insurance, 1-8.

Blue sky law, see Licenses, 33, 34.

#### 1. REAL ESTATE BROKERS.

## a. Contract of Employment.

1. Contract Strictly Construed. A contract of agency giving power to sell land is to be strictly construed, and if there is any doubt whether acts of the agent thereunder are within his delegated powers, they should be resolved against the agent and against any third party dealing with him. Springer v. City Bank, etc. Co. (Colo.) 1917Å-520.

## b. Authority.

2. Power to Make Contract of Sale. An agreement between G. and S. provided that S. was to be at the expense of obtaining title to certain land from the government and of finding a purchaser, and as compensation was to receive one-half of the proceeds after paying G. \$4 an acre, the title to remain in G., and the land not to be sold for less than \$8 an acre, and that should the land not be sold within one year the title should be fully vested in G. Held, that such contract merely authorized S. to find a purchaser and did not authorize him to make a contract binding G. to sell, since where real estate is placed in the hands of an agent to find a purchaser or with instructions in general terms "to sell," the agent is not authorized to enter into a contract of sale binding upon the principal. Springer v. City Bank, etc. Co. (Colo.) 1917A-520.

(Annotated.)

#### Note.

Power of real estate broker to make contract of sale, 1917A-522.

## c. Right to Compensation.

3. Contract for Commissions from Both Parties-Sale Prevented by One Party. A complaint, in a broker's action for commission, alleging that defendants and certain other owners entered into a written contract to exchange certain properties at stipulated values and that each of the parties was to pay plaintiff a commission upon the execution of the instrument effecting the exchange, that the other contracting parties had been ready, able, and willing to execute their instruments of conveyance, but that defendants refused to perform their contract, and rendered performance by the other parties impos-sible, states a cause of action against the defendants for the agreed compensation to be paid by both parties. Littlefield v. Bowen (Wash.) 1918B-177.

(Annotated.)

- 4. Contract for Commission from Both Parties—Sale Prevented by One Party. A real estate broker, who, as agent for all of the parties, procured a contract between himself, defendants, and other parties for an exchange of their properties, entitling him to a commission from each, payable on the execution of the instruments effecting the exchange, may, upon defendants' failure to carry out their contract, maintain an action against them for the loss of the commissions agreed to be paid by the other party. Littlefield v. Bowen (Wash.) 1918B-177.
  - (Annotated.)
- 5. Goods Rejected for Defects. A packer of corn wrote a broker of corn-packing products offering "10,000 cases fancy," at \$1 per dozen cases. The broker procured a purchaser subject to approval of a sample case, but upon receipt of the sample case, but upon receipt of the sample case the purchaser refused to accept the corn as not being of fancy quality. The evidence showed that "fancy" corn was of a higher grade than standard corn and consisted of the very best part of a good pack, packed from tender creamy corn with good consistency, and was sweet, tender, of extra flavor, not hard nor wet, and taken when the corn was "right in the milk," and that the corn in question was not fancy corn as regarded in the trade. It is held that the broker, having produced a customer ready and willing to buy on the packer's terms and able to buy, had earned his commissions. Dennis v. Waterford Packing Co. (Me.) 1917D-788.
- 6. Commissions from Both Sides. A real estate broker cannot recover an agreed commission from both sides in the absence of a showing of consent of both principals to the double commission; dual agency without such consent being against public policy, as prejudicial to the interest of the principals, since the law requires the utmost good faith and loyalty from agents. Leno v. Stewart (Vt.) 1917A-509. (Annotated.)

Liability on contract of buyer and seller to pay broker's commission jointly. 1918B-180.

# d. Actions for Compensation.

- 7. Performance by Broker—Refusal of Frincipal to Accept Trade—Necessity of Tender. In a broker's action for commission under a contract for the exchange of properties, the fact that the transfer by the other parties to the plaintiff was refused made it immaterial whether such other parties made any tender of a deed or not. Littlefield v. Bowen (Wash.) 1918B-177.
- 8. In a broker's action against defendants for a commission due under their contract with plaintiff and with other par-

ties for an exchange of properties, where it is only incumbent upon plaintiff to make a prima facie case, showing that the other parties were willing and able to comply with the contract, and that defendants refused to perform, the other party's ownership is provable by parol. Littlefield v. Bowen (Wash.) 1918B-177.

- 9. Refusal by Principal to Convey -Sufficiency of Evidence. The evidence in an action for a commission, payable under a contract for the exchange of properties whereby each of the exchanging parties was to pay plaintiff a commission, to recover a commission directly payable by defendants, and the commission due from the other party lost by defendants' breach, is held to support a finding that defendants refused to perform the contract, and rendered it impossible for the other party to perform, though ready and able to do so. Littlefield v. Bowen (Wash.) 1918B-177.
- 10. Compensation from Both Parties. Where the plaintiff, a broker employed to sell or exchange, seeks to recover on an agreement for half commissions with defendant, another broker employed by one who also wished to exchange, after receiving his commissions from his own employer, consent of the principals to the double commission is required, and the burden is on the plaintiff to show their consent. Leno v. Stewart (Vt.) 1917A-(Annotated.)
- 11. Ability of Purchaser. A person employed to arrange for, advertise, and conduct an auction sale of lands, whether called a sales manager, with a salary and expenses and a right to one-half the net profits or a broker, cannot recover, unless there is a sale or the production of some one able and willing to purchase according to the terms previously agreed upon between him and the owners or on terms agreeable to the owners; and hence, in an action for compensation, evidence as to the pecuniary responsibility of one to whom the property was struck off, but who was never in a position to buy the land, is properly received. Sotham v. Macomber (Mich.) 1916C-694.

## e. Liability to Principal.

12. Recording of Contract by Broker. The fact that plaintiff, a real estate broker, who had caused defendants to enter into a written contract to exchange certain properties with other parties, recorded such contract, which record did not colorably establish any right, claim, or lien in the broker, does not render him liable to damages for the recording of the contract. Littlefield v. Bowen (Wash.) 1918B-177.

## 2. STOCK BROKERS.

## a. Right to Pledge Stock.

13. Duty to Account for Pledged Stock, When stock is pledged by a customer with a broker, it is sufficient if the broker has in his possession or under his control an amount of stock equal to that hypothecated, which upon settlement he returns to the customer. Carlisle v. Norris (N. Y.) 1917A-429. (Annotated.)

#### 3. LOAN BROKERS.

14. Chattel Loans-Validity of Regula-Chattel loans on mortgage security or otherwise, the rate of interest on such loans, and the ways and means of assigning wages, are proper subjects for the exercise of the police power by the general assembly of the state. Wessell v. Timberlake (Ohio) 1918B-402.

(Annotated.)

Validity of state or municipal regulation of commission merchants. 1917B-631.

## BUILDING AND LOAN ASSOCIATIONS.

- Statutory Regulations, 141.
   Loans, 142.
- 3. Insolvency and Dissolution, 142.

## 1. STATUTORY REGULATIONS.

1. Exemption from Usury Laws. Laws Miss. 1912, c. 167, is "An act providing for organization of domestic and foreign building and loan associations, or other corporations whose business is loaning money on real estate to be paid in monthly instalments." Section 2 provides that the term "building and loan association" shall include all corporations and associations organized to enable members, "or borrowers who are not members," to acquire, make improvements on, or to remove incumbrances from realty, or to loan money on real estate, to be paid in monthly instalments on a loan for not less than two years, or for the "accumulation of the fund to be returned to its members who did not obtain advances thereon." Section 9 provides that all associations may contract for loans to members, or to borrowers who are not members, at the rate of interest not exceeding 10 per cent. It is held, that the business of such associations differentiates them from other lenders of money, so that the permission to charge interest at 10 per cent does not violate Const. 1890, § 90, prohibiting special law regulating the rate of interest on money. Halsell v. Merchants' Union Ins. Co. (Miss.) 1916E-229.

(Annotated.) 2. Supervision. In view of the purpose of building and loan associations to en142

able a large number of persons who are without ready means to build homes which are paid for in small instalments, and the benefit of the community derived from such associations, the state may, under its police power, exercise rights of supervision and inspection over such associations greater than over ordinary business associations. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.

#### Note

Constitutionality of statutes exempting building and loan associations from usury laws. 1916E-232,

3. Loan to Nonmember. Where a building and loan association is authorized to lend only to its stockholders to the amount of stock held, and, after a loan to a stranger by a third party, attempts to purchase the note and mortgage therefor, its act is ultra vires, since it cannot do indirectly that which it could not do directly. North Avenue Bldg., etc. Assoc. V. Huber (Ill.) 1917B-587.

(Annotated.)

## 2. LOANS.

4. When a building and loan association purchases a note and mortgage of one not a stockholder when it is authorized only to lend to its stockholders, it cannot foreclose a mortgage, its act in purchasing it being ultra vires; nor can its assignor be held a trustee and the mortgage be foreclosed by him for the association. North Avenue Bldg., etc. Assoc. v. Huber, (III.) 1917B-587. (Annotated.)

#### Note.

To whom building and loan association may loan money. 1917B-590.

## 3. INSOLVENCY AND DISSOLUTION.

- 5. Effect of Insolvency. Whenever a building and loan association is declared insolvent, its right to collect the instalments payable by its members ceases, and the mortgages of borrowing members at once become due and payable, and may be foreclosed. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.
- 6. Power to Appoint Receiver. The remedy given by Utah Comp. Laws 1907, § 400, which provides that when a domestic building and loan association is, in the opinion of the secretary of state, conducting its affairs illegally, or is unsafe, he shall notify the directors, and if the objections be not immediately remedied, shall advise the attorney general, who shall take the necessary steps to wind up its affairs, is exclusive, and the courts cannot appoint a receiver to wind up the affairs of the association at the request of one or more of the shareholders. Union Savings, etc. Co. v. District Court (Utah) 1917A-821. (Annotated.)

- 7. Utah Const. art. 1, § 11, requiring the courts to be open to all alike, does not prevent the state from reserving to itself the sole right to bring actions for the dissolution of building and loan associations, since that section is a limitation, not a grant of power, prohibiting any restrictions upon the common-law right of access to the court, but not enlarging that right. Union Savings, etc. Co. v. District Court (Utah) 1917A-821. (Annotated.)
- 8. Receivers—Complaint Presumption. Where a complaint for the appointment of a receiver for a building and loan association did not allege that the officers of the association or the secretary of state had failed to perform the duties imposed upon them by Comp. Laws Utah 1907, §§ 392-402, regulating such associations, it must be presumed that the officers have performed their statutory duties. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.
- 9. Right to Appoint Receiver. An action by a shareholder to secure the appointment of a receiver to wind up the business of a building and loan association, while not technically an action to dissolve the association, has practically that effect, and cannot be entertained by the courts. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.
- (Annotated.)

  10. The danger that a shareholder in a building and loan association may suffer irreparable injury through the failure of the attorney general to wind up the affairs of the association, as required by Comp. Laws Utah 1907, § 400, does not authorize an action for that purpose by the shareholder, since it is presumed that every officer will do his duty, and if the duty is clear the attorney general may be required by the courts to perform it. Union Savings, etc. Co. v. District Court (Utah) 1917A-821. (Annotated.)
- 11. Action by Public Officer. Before an action for the dissolution of a building and loan association is brought under Comp. Laws Utah 1907, \$400, the association should be given an opportunity to correct any abuses in its management, unless its affairs are such that, in the opinion of the secretary of state or attorney general, they cannot be corrected. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.
- 12. Duty to Bring Proceeding. Under Comp. Laws Utah 1907, § 400, providing that if the secretary of state is of the opinion that a building and loan association is violating the law or is unsafe, he shall advise the attorney general, who must bring an action to dissolve the association, if the secretary of state refuses to perform his duty; it nevertheless is the duty of the attorney general to bring the action, if it is made to appear to him by

any shareholder that the association is not complying with the law. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.

#### Note.

Appointment of receiver for building and loan association, 1917A-827.

BUILDING OR WORKING CONTRACTS. See Contractors, 78-99.

## BUILDING RESTRICTIONS.

See Landlord and Tenant, 13; Vendor and Purchaser, 22-26.

#### BUILDINGS.

1. Definition, 143.

- 2. Validity and Construction of Regulations, 143.
- 3. Enforcement of Regulations, 143.

School buildings, see Schools, 9-12.

a. Who may Sue, 143.b. Defenses, 144.

Damage by excavation, see Adjoining Landowners, 9-11. Fire escapes, see Fires, 1-5. Sale of building, see Frauds, Statute of, 5. Action for collapse, see Negligence, 76.

## 1. DEFINITION.

1. Meaning of "Tent." An organizate of the city of St. Louis defined a "building" as any structure for the support, shelter, or inclosure of persons, and defined buildings of the fourth class as any building not of the first three classes, and provided that no fourth-class building should be built within the fire limits. Defendant constructed a moving picture theater. ninety-seven feet long, fifty-eight feet wide, with a height along the center of thirty feet, using telegraph poles joined by a wire cable and guy cables to support and attach a canvas covering and at the rear built a stage of wood, with wings composed partly of wood and partly of canvas, made a floor of boards nailed to cross-pieces sunk in the ground, equipped the stage and the whole structure with electric lights, the front with doors of wood and glass, and a ticket booth of wood, and furnished it with stoves for heating and with benches to seat 640 persons, which, if a building, was a building of the fourth class. Rev. St. Mo. 1909, \$ 8057, declares that words in statutes are to be regarded as used in their plain, usual, and everyday meaning. It is held that the structure was not a "tent," defined as a pavilion or portable lodge consisting of canvas, etc., supported and sustained by poles used for sheltering persons from the weather, especially soldiers in camp, in that it lacked the element of portability and was constructed of other materials than those ordinarily used in

tents, but was a "building" within the intent of the ordinance. St. Louis v. Nash (Mo.) 1918B-134. (Annotated.)

#### Note.

Legal meaning of "tent." 1918B-138.

- 2. VALIDITY AND CONSTRUCTION OF REGULATIONS.
- 2. Force and Effect. The building regulations of the District of Columbia as to party walls are neither statutes nor ordinances, but are mere rules for the enforcement of existing rights, and have no force outside the limits of the city of Washington as they existed at the time the regulations were promulgated. Fowler v. Koehler (D. C.) 1916E-1161.
- 3. Construction of Building Ordinance. A provision in a building ordinance that in the rear of every tenement subsequently erected there shall be a yard not less than 15 feet in depth, measured in the clear from the porches to the rear line and the provision that no tenement shall cover more than 80 per cent of a lot bounded by two or more intersecting streets must be construed together and in harmony with each other, and a proposed tenement may not violate either provision. Building Commission v. Kunin (Mich.) 1916C-959.
- 4. Reasonableness of Building Ordinance. A provision in a building ordinance of a city that in the rear of every tenement subsequently erected there shall be a yard across the entire width of the lot open from the ground to the sky, un-obstructed except by fire escapes, or uninclosed outside stairs and porches, and the depth of the lot measured in the clear from the porches to the rear line of the lot shall not be less than 15 feet in any part is reasonable, and the court cannot adjudge it invalid under its power to adjudge ordinances invalid when clearly unreasonable or oppressive. Building Commission v. Kunin (Mich.) 1916C-959.
- 5. Burden of Showing Invalidity of Ordinance. One asserting the invalidity of a municipal ordinance has the duty of establishing the invalidity, and the court must, if it can consistently do so, give to the ordinance such a reasonable construction as will sustain it, but it may not invade legislative power. Building Commission v. Kunin (Mich.) 1916C-959.

# 3. ENFORCEMENT OF REGULATIONS.

## Who may Sue.

6. Injunction Against Violation of Ordinance. A building ordinance which authorizes the department of buildings to stop the construction or removal of any building constructed in violation of the ordinance, and, if the order be not obeyed, to apply to any court to restrain any person from disobeying the order, empowers the department of buildings to sue to enjoin a threatened violation of the ordinance by the erection of a building Building Commission v. Kunin (Mich.) 1916C-959. (Annotated.)

7. Estoppel to Enforce Ordinance. The granting by the building department of a city of a building permit under a misconception of the building ordinance not requiring a permit does not thereby estop the department from suing in equity to enjoin the construction of the building in violation of the ordinance. Building Commission v. Kunin (Mich.) 1916C-959.

## b. Defenses.

- 8. Where one constructing a building disregarded provisions of the building ordinance, and had early notice thereof, but continued the construction, he could not rely on an equitable estoppel to prevent the building department of the city, consenting by mistake of law to the erection of the building, from maintaining a suit to enjoin the construction because violative of the ordinance. Building Commission v. Kunin (Mich.) 1916C-959.
- 9. Owners of Premises—Liability for Collapse of Building—Violation of Building Ordinance. Where, when a permit to erect a two-story building was applied for, the plans and specifications submitted to the city building inspector provided that the building should be so constructed that a third story might be added at some future time, no causal relation appears between the failure to obtain a permit for the erection of a third story which it was subsequently decided to add, as required by a city ordinance, and an injury resulting from the collapse of such building, as, if any inference might be drawn, it would be that the permit would have been granted, had application been made. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474. (Annotated.)

#### BULK SALES LAW.

See Fraudulent Sales and Conveyances, 15-20; Sales, 66-70.

BURDEN OF PROOF. See Evidence, 146-148.

BURIAL INSURANCE. See Insurance, 59.

# BURSTING WATER PIPE,

Liability irrespective of negligence, see Waterworks and Water Companies, 11.

BURYING GROUNDS. See Cemeteries.

#### BUSINESS.

Meaning, see Master and Servant, 41.

#### BY-BIDDING.

Effect on sale, see Auctions and Auctioneers. 4.

#### BY-LAWS.

See Beneficial Associations, 11-16; Corporations, 9-11.
Of cities, see Municipal Corporations, 48-108.

#### BYSTANDERS.

Effect of on privilege, see Libel and Slander, 56, 57.

## BURGLARY.

- 1. Opening Partly Opened Door. One who finds the door of a freight car partly open and pushes it further open in order to effect an entry for the purpose of committing larceny therein commits a "breaking" which is sufficient to support a charge of burglary, since the breaking is the removal of an obstruction which, if left as found, would prevent an entrance, and the fact that a portion of the space needed for the entrance is already open will not relieve the defendant from the penalty. State v. Lapoint (Vt.) 1916C-318.
  - (Annotated.)
- 2. Unauthorized Entry by Employee. Where an employee of a harness company was given a key to the building so that he might open up in the morning, but was not given permission to enter the building before or after hours, his entry out of hours by means of the key constitutes a breaking, and when it is accompanied by larceny of goods in the building, the employee is guity of burglary. State v. Corcoran (Wash.) 1916E-531.
- (Annotated.)

  3. Proof of Other Offenses. In a prosecution for a burglary by an employee of a harness company, who was given a key to the building, evidence that on prior trips he carried away other articles, that he padded an inventory of the stock, and that articles secreted around his work bench were removed, is admissible to show a general scheme, notwithstanding the rule that evidence of other distinct criminal acts cannot be introduced to prove accused guilty of an independent crime. State v. Corcoran (Wash.) 1916E-531.

## Notes.

Burglary by opening, sufficiently to gain entrance, door or window partly open. 1916C-320.

Unauthorized entry of premises by employee of owner as burglarious entry. 1916E-534.

#### CALL MEN.

In city fire department, see Municipal Corporations, 165, 166.

#### CANALS.

See Water and Watercourses; Irrigation. Liability for drowning of trespassing child, see Negligence, 93.

- 1. Grant of Water Power—Construction. Complainant, the owner of all the water power of a river near a certain point, contracted to sell all his rights to defendants, who thereafter organized a power company, erected a dam above complainant's old dam and power plant, after which complainant executed a deed to the power company conveying all his rights except a reservation of a certain amount of water for his mill; the deed closing with: "[Complainant] his heirs and assigns shall be entitled to receive his portion of any water which at any time hereafter, passing the dam of said company, may be caught by the aforesaid dam [old dam,]" etc. Held, in view of the situation of the parties, the subject-matter, and the object which the parties had in view, that the quoted clause was not a reservation of a right to the overflow from the dam with reference to the height of the dam (18 feet), when the deed was executed so as to prevent the power company from thereafter increasing its height so as to meet the growing demands of its business; the quoted clause not controlling nor limiting the height of the dam nor the power company's use of the water, but itself being controlled and limited by the use which the company may make of the water power for its purposes. Bridgewater Milling Corp. v. Fredericksburg Power Co. (Va.) 1916D-1027. (Annotated.)
- 2. By a deed executed in 1874 defendant power company agreed to furnish complainant milling company 50 cubic feet of water per second for its mill; the power company agreeing to repair and put in order the canal to complainant's mill, and to raise the embankment, and complainant agreeing "to keep in good order, at their costs and charges, the said race from and after the time when it shall have been put order as hereinbefore prescribed." Held, in view of the clear language of the quoted clause and the interpretation placed thereon by the parties as shown by their actions, that it was unquestionably complainant's duty, after defendants had put the canal in order, to keep it in repair, at its own cost. Bridgewater Milling Corp. v. Fredericksburg Power Co. (Va.) 1916D-1027. (Annotated.) (Va.) 1916D-1027.
- 3. Grant of Water Power—Construction. In a lease involving the right to draw water from a canal, the use of the term "horse power" to designate the standard

by which the water so drawn was to be measured shows that the contracting parties intended that the water should be used solely for producing power, not for consumption. Eastern Pa. Power Co. v. Lehigh Coal, etc. Co. (Pa.) 1916D-1000.

(Annotated.)

#### CANCELLATION.

See Rescission, Cancellation, and Reformation, 11-35.
Of lease by act of parties, see Landlord and Tenant, 44.

#### CANDIDATE FOR OFFICE.

Criticism of, see Libel and Slander, 10, 14, 33, 37, 45-47, 146, 156.

## CANDIDATES.

See Elections.

#### CANVASS.

Of votes, see Elections, 29-81.

## CAPITAL PUNISHMENT.

Effect on incontestable clause, see Life Insurance, 27.

## CAPPERS.

Solicitation by, see Attorneys, 22.

## CARE.

Degrees of care defined, see Negligence, 4, 5.

### CARPENTER.

As within Federal Employers' Liability Act, see Master and Servant, 53.

## CAR REPAIRER.

As within Federal Employers' Liability Act, see Master and Servant, 51.

## CARRIERS.

 Regulation and Control of Common Carriers, 145.
 a. In General, 145.

b. Regulation of Rates, 147.2. Contracts Limiting Liability, 147.

See Carriers of Goods; Carriers of Live Stock; Carriers of Passengers; Interstate Commerce; Public Service Commissions; Railroads; Street Railways. Combination of ocean carriers to restrain competition, see Monopolies, 16, 17.

# 1. REGULATION AND CONTROL OF COMMON CARRIERS.

#### a. In General.

1. Validity of Discriminatory Regulations of Carriers. Mo. Const. art. 12, § 14, DIGEST. 1916C—1918B.

and Mo. Rev. St. 1909, § 3232, forbidding discrimination, is binding upon the state, notwithstanding that by the Constitution railroads are declared to be public highways. State v. Missouri, etc. R. Co. (Mo.) 1916E-949.

2. Penalty for Failure to Pay Claim. Congress has so far taken over the subject of a carrier's liability for loss or damage to interstate shipments by the act of Congress of June 18, 1910 (36 Stat. at L. 539, c. 309 (Fed. St. Ann. 1912 Supp. p. 112), and the act of June 29, 1906 (34 Stat. at L. 584, c. 3591 (Fed. St. Ann. 1909 Supp. p. 271), amending respectively §§ 1 and 20 of the act of February 4, 1887 (24 Stat. at L. 386, c. 104), as to invalidate the provisions of S. C. Civ. Code 1912, § 2573, in so far as they may subject a terminal carrier to the prescribed penalty of \$50 for failure to pay promptly a claim for damages to an interstate shipment, no matter where the loss occurred unless the carrier proves that the shipment never came into its possession, or succeeds within the forty days allowed in shifting the loss by giving notice as to when, where and by which carrier the property was damaged, or by showing that it used due diligence, but was unable to discover where the damage occurred; nor is the statute saved by calling it an exercise of the police power, nor by the proviso in the act of June 29, 1906, saving the rights of holders of bills of lading under existing law. Charleston, etc. R. Co. v. Varnville Furniture Co. (U. S.) 1916D-333.

(Annotated.)

- 3. Bringing into the state property to be used in violation of its laws is a legitimate subject of punitive legislation akin to that of bringing in stolen property. State v. Missouri Pacific R. Co. (Kan.) 1917A-612. (Annotated.)
- 4. Regulation by Public Service Commission-Requiring Particular Class of Serwice. A provision, whether made by statute or order of a commission, which fixes rates for the carriage of passengers or freight by a railroad company is to be distinguished from an order which requires it to furnish a particular facility or perform a duty imposed by reason of exercise of rights and franchises which it has acquired from the state; the fact that some loss would result from compliance with the latter does not in and of itself conclusively establish the unreasonableness of the order, but is an important element to be considered with all the other facts bearing on that question. Hocking Valley R. Co. v. Public Utilities Commission (Ohio) 1917B-1154. (Annotated.)
- 5. Where a railroad sought to restrain the enforcement of an order of the public service commission fixing the maximum charge for commutation tickets, and the

- evidence as to whether such rate was unreasonable and confiscatory was unsatisfactory and inconclusive, the rate should be allowed to go into effect to determine hy actual experience its character, subject to the right of the road at any future time to seek its abrogation by judicial action for cause shown. Pennsylvania R. Co. v. Towers (Md.) 1917B-1144.
- 6. In a suit by a railroad to enjoin enforcement of an order of the public service commission fixing the maximum charge for commutation tickets, evidence is held to be insufficient to show that such rate was unreasonable and confiscatory. Pennsylvania R. Co. v. Towers (Md.) 1917B-1144.
- 7. In fixing railroad charges for any specific class of service, the point of injustice is reached before that of confiscation, and to give the constitutional prohibition against confiscation any beneficial effect, it must be read to prohibit the fixing of rates at a point at which the railroad property will return to its owners enough to pay operating expenses and a fair profit on the investment. Pennsylvania R. Co. v. Towers (Md.) 1917B-1144. (Annotated.)
- 8. The mere fact that the rate fixed by the public service commission for commutation tickets is discriminatory, is not conclusive of its invalidity. Pennsylvania R. Co. v. Towers (Md.) 1917B-1144.

  (Annotated.)
- 9. In determining whether the action of the public service commission in fixing a railroad commutation rate was reasonable, the entire net revenue of the road, from whatever character of service derived, is not to be looked to, since the specific service regulated must have its charges so fixed as to return the road a normal profit on such specific branch of the service by itself, to avoid confiscatory action, which would ultimately defeat the end the regulation was intended to accomplish, the pro-

motion of the public good and convenience.

Pennsylvania R. Co. v. Towers (Md.)

(Annotated.)

1917B-1144.

- 10. The action of the state in establishing, through the public service commission, a single fare rate does not exhaust its power to regulate transportation charges, and, after establishing a single fare rate, it may thereafter make any reasonable regulation affecting mileage or commutation rates, leaving them so as to bring a proper return to the railroad for the specific service, independent of the return to it from other services. Pennsylvania R. Co. v. Towers (Md.) 1917B-1144.

  (Annotated.)
- 11. Regulation by Public Service Commission Commutation Rates. Although the public service commission has no power to make any order except so far as author-

ity is conferred by the legislature, under Md. Code Pub. Civ. Laws. art. 23, § 435, creating the commission, as amended by Acts 1912, c. 162, the commission has full power, so far as the legislature could grant it, to supervise all railroad tariffs and transportation charges within the state, including commutation rates. Pennsylvania R. Co. v. Towers (Md.) 1917B-(Annotated.) 1144.

- 12. Excessive Rates—Invalidity. that is confiscatory or insufficient to pay the cost of transportation and other necessary outlays, as well as to return the carrier a reasonable profit on the investment, is invalid as depriving the carrier of its property without due process of law. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.
- Joint Rates. 13. Apportionment of Where joint rates charged by interurban and street railroad companies are confiscatory as to one and excessive as to the .. other, the public utilities commission may adjust and apportion the joint rates so as to make them just and reasonable and sufficient to be reasonably remunerative to both companies. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.
  - 14. Power to Fix Rates-Prior to Public Utilities Act. After passage of the public utilities act, but before it went into effect, street railway and interurban railway companies might without consent of the public utilities commission increase their rates, provided the rates established were reasonable and just. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.

#### Notes.

Validity of statute imposing penalty on carrier of goods or live stock for failure to pay claim within certain time. 1916D-335.

Power of public service commission to compel carrier to furnish particular class of service. 1917B-1160.

Validity of order by public service commission regulating commutation rates. 1917B-1153.

## b. Regulation of Rates.

- 15. If the difference in railroad rates is based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination. State v. Missouri, etc. R. Co. (Mo.) 1916E-949.
- 16. It needs neither a statute nor a constitutional provision to make an unjust discrimination in railroad rates unlawful, for such discrimination is forbidden by common law. State v. Missouri, etc. R. Co. (Mo.) 1916E-949.

17. Under Mo. Const. art. 12, § 14, forbidding unjust discrimination in railroad rates, it does not follow that because a discrimination is apparent it is an unjust discrimination. State v. Missouri, etc. R. Co. (Mo.) 1916E-949.

## 2. CONTRACTS LIMITING LIABILITY.

18. Power to Limit Liability. mon carrier cannot relieve itself from the liability imposed by section 8994-1, Ohio General Code, by any rule or regulation contained in the schedule filed by it with the state public utilities commission. Erie R. Co. v. Steinberg (Ohio) 1917E-661.

(Annotated.)

## CARRIERS OF GOODS.

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- c. Penalty for Failure to Adjust Loss,
- 3. Liability as Warehousemen, 148.
- 4. Limitation of Liability, 148.

a. In General, 148.

- b. Consent to Limitation, 149.
- 5. Waiver of Liability, 149.

6. Charges, 149.

7. Connecting Carriers, 150. Actions Against Carriers, 151.

- a. Actions for Loss, Injury or Delay,
  - (1) In General, 151.(2) Evidence, 151.

  - (3) Instructions, 152,
  - (4) Damages, 152.

See Carriers; Carriers of Live Stock; Carriers of Passengers; Interstate Commerce.

Recovery of undercharge in rate, see Interstate Commerce, 11. 12.

# 1. DELIVERY TO CONSIGNEE.

- 1. Right to Inspection. Every consignee is entitled to an inspection of goods shipped in carload lots before he is bound to accept or reject the shipment. Burkenroad Goldsmith Co. v. Illinois Central R. Co. (La.) 1917C-935.
  - LOSS OF OR INJURY TO GOODS.

## a. In General.

- 2. Carriers of Goods-Duty of Consignee to Receive Damaged Goods. From the time that a carrier refuses to pay for damage to a shipment of goods, it is the consignee's duty to take them, they not having become worthless by the carrier's act, with right to sue for damages; so that not taking them he is liable for storage charges. Holoman v. Southern R. Co. (N. Car.) 1917E-1069.
- 3. Right to Assume Common-law Liability. The U.S. Interstate Commerce Law

1916C-1918B. Feb. 4, 1887, c. 104, 24 Stat. 379). scribe

(Act Feb. 4, 1887, c. 104, 24 Stat. 379). which was designed to prevent preferences, does not prohibit a carrier from assuming the common-law liability in carrying goods from one state to another. Grice v. Oregon-Washington R. etc. Co. (Ore.) 1917E-645.

#### Note.

Liability of carrier for damages caused by act of God co-operating with its own negligence. 1918A-581.

## b. Loss by Floods.

- 4. Delay by Carrier Co-operating With Act of God. Whether a common carrier is hable for injury to goods, where, after being negligently delayed in transit, the goods, while still in transit, are injured by an act of God, such as an unprecedented flood, depends upon whether the negligent delay of the carrier has a proximate causal relation or a mere remote or casual relation to the subsequent injury. Seaboard Air Line Ry. v. Mullin (Fla.) 1918A-576. (Annotated.)
- 5. A merely negligent delay in transporting goods, which delay causes the goods to be at a point in transit where they are injured or destroyed by an unprecedented flood that could not have been foreseen at the time of the delay, does not render the carrier liable for the direct consequences of the flood upon the goods, if there was no malconduct by the carrier, and negligence of the carrier in providing reasonably safe and adequate facilities for and attention to the safety of the goods does not directly contribute to the injury, even though the goods would not have been at the point where they were injured, and would have escaped the flood but for the negligent delay of the carrier at a time when the flood could not have been foreseen. Such an injury is not an ordinary natural sequence of the delay. Seaboard Air Line Ry. v. Mullin (Fla.) 1918A-576. (Annotated.)
- 6. Act of God. Where in the course of transportation goods are injured by an unprecedented flood and there is no negligence on the part of the common carrier in taking care of the goods or otherwise, the loss is attributable to the flood as an act of God and the carrier is not liable. Seaboard Air Line Ry. v. Mullin (Fla.) 1918A-576.
  - c. Penalty for Failure to Adjust Loss.
- 7. Rights of Undisclosed Principal as Against Carrier. Under N. C. Revisal 1905, § 2634, as amended by Revisal Supp. 1913, § 2634, providing, relative to claims for loss of or damage to property while in the possession of a carrier, that failure to adjust and pay such claims within the periods therein de-

scribed shall subject the carrier to a penalty of \$50, to be recovered by "any consignee aggrieved" or the consignor, when he was the owner of the property at the time of shipment and at the time of suit, and is therefore the party aggrieved, but that unless such consignee or consignor recover the full amount claimed no penalty shall be recovered, where the nominal consignee was acting for his wife, who was the real party in interest, and the owner of the goods, she could recover the pre-scribed penalty, though she was not disclosed as principal, as the right to recover the penalty is incidental to the right to recover for the loss or damage, and there is no real danger of the carrier being subjected to a double liability, since, if the agent sues and recovers before the principal is disclosed, the principal is bound by his act. Horton v. Southern R. Co. (N. Car.) 1918A-824. (Annotated.)

## 3. LIABILITY AS WAREHOUSEMEN.

- 8. Duty of Carrier After Arrival at Destination. Though a carrier is authorized by S. Dak. Civ. Code, § 1557, to retain the goods until the bill of lading is surrendered or indemnity furnished, it is not relieved from its duty to properly protect and care for the property in the meantime. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805.
- 9. Refrigeration of Fruit. Where a carrier refused to deliver a car of apples to plaintiff on arrival at destination because of plaintiff's inability to surrender the bill of lading, due to its loss, and continued to hold the apples in the car, for which demurrage was charged, and during the time the apples were so held the car was not properly ventilated or iced, the carrier's liability is not changed to that of a mere warehouseman after tender of delivery on production of the bill of lading. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805.
- 10. Where apples were shipped in a refrigerator car requiring icing and ventilation, failure to properly ice and ventilate the car while the terminal carrier was holding the goods, because of its refusal to deliver without a surrender of the bill of lading which had been lost, did not constitute ordinary care, and hence it is liable for the injury sustained, though regarded as a warehouseman under S. Dak. Civ. Code, § 1377, requiring a depositary for hire to use at least ordinary care for the preservation of the thing deposited. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805.

## 4. LIMITATION OF LIABILITY.

## a. In General.

11. Burden of Proof. A carrier, seeking to reduce its liability for goods lost in

transit, must allege and prove facts entitling it to the reduction. Grice v. Oregon-Washington R., etc. Co. (Ore.) 1917E-645.

#### b. Consent to Limitation.

12. Authority to Consent to Limitation. A transfer company, authorized to deliver household goods to a particular railroad company for shipment, has no authority to consent to a reduction of the carrier's common-law liability, and the agreement reducing the liability is not binding on the shipper. Grice v. Oregon-Washington R., etc. Co. (Ore.), 1917E-645.

(Annotated.)

## 5. WAIVER OF LIABILITY.

13. Authority to Consent to Limitation of Liability. For a waiver of liability made by a drayman to an express company to become binding on a shipper by ratification, the company must show that the shipper was fully advised regarding the waiver soon enough to have rejected it. Grice v. Oregon-Washington R., etc. Co. (Ore.) 1917E-645. (Annotated.)

14. Custody of goods at the moment of shipping is not such indicia of authority that agency to waive liability on the part of an express company by which he is shipping them will be presumed. Grice v. Oregon-Washington R., etc. Co. (Ore.) 1917E-645. (Annotated.)

#### Note.

Rights as against carrier of undisclosed principal of person shipping goods or live stock. 1918A-826.

## 6. CHARGES.

15. Implied Liability of Consignee. Where peaches were consigned to defendant to be sold on commission, defendant to remit the proceeds to his principal, less commission and freight charges, and the plaintiff railroad company. without knowledge of defendant's agency, charged defendant by mistake less freight than was called for by the rate filed with the Interstate Commerce Commission, the fact that the mistake was not discovered and the additional freight demanded until after settlement between the defendant and his principal does not affect plaintiff's right to recover, since under such circumstances the plaintiff has the right to treat defendant as the owner of the goods, and the defendant, in allowing plaintiff to act on that assumption and deliver the goods, impliedly agreed to pay the transportation Pennsylvania R. Co. v. Titus charges. (N. Y.) 1917C-862. (Annotated.)

16. Duty to Collect Lawful Charge. Under the U.S. Interstate Commerce Act the freight rate on an interstate shipment is

the lawful rate existing at the time of the shipment, which rate the carrier is required to collect. Central of Ga. R. Co. v. Southern Ferro Concrete Co. (Ala.) 1916E-376.

17. Liability for Undercharge. Liability for the fixed freight charges is not affected by the carrier's waiver or loss of its lien on the goods by delivery without collecting the lawful rate, and conference ruling No. 314 of the Interstate Commerce Commission of May 1, 1911, governing a carrier's rights to collect freight undercharges, properly left it to the courts having jurisdiction to declare in each case whether the consignor or consignee is legally liable for the undercharges. Central of Ga. R. Co. v. Southern Ferro Concrete Co. (Ala.) 1916E-376.

(Annotated.)

18. Liability of Consignee for Undercharge. The consignee's acceptance and removal of the goods sold to it f. o. b. its station with knowledge that the carrier was giving up a lien thereon for freight undercharges does not create an obligation on its part to pay the freight charges at the request and for the convenience of the consignor beyond the amount stated. Central of Ga. R. Co. v. Southern Ferro Concrete Co. (Ala.) 1916E-376.

(Annotated.)

19. Reasonableness. A state commission having adopted demurrage rules under authority conferred by Pub. Acts 1911, No. 173, § 1, amending Pub. Acts 1909, No. 300, §§ 3, 8, such rules though applicable to interstate commerce, are valid and applicable to intrastate shipments, in the absence of evidence presented by an objecting carrier to show their unreasonableness, under Pub. Acts 1909, No. 300, § 26, providing that, in all actions under such section to avoid orders of the Commission, the burden of proof shall be on the complainant to show, by clear and satisfactory evidence, that the order is unlawful or unreasonable. Michigan Central R. Co. v. Michigan R. R. Com. (Mich.) 1916E-695. (Annotated.)

20. Demurrage, Power of State to Regulate. By Act of Cong. June 20, 1906, c. 3591, 34 Stat. 584 (Fed. St. Ann. 1900 Supp. p. 255) the Interstate Commerce Commission Act was amended by section 1 so as to define the term "transportation" to include cars, vehicles, and all instrumentalities and facilities for the carriage of goods and all services in connection with the receipt, delivery, elevation, and transfer in transit, etc., requiring that the carrier shall provide such transportation on reasonable request and establish just and reasonable rates applicable thereto. Section 6 declares that the schedules printed and filed by the carrier shall contain a classification of freight in force, and shall state separately all terminal, storage, icing charges, or the value of service rendered to the passenger, shipper, or consignee. Held, that terminal and storage charges include demurrage, and, the Interstate Commerce Commission having tentatively approved the revised car demurrage rules adopted by the American Railroad Association, the state legislature has no jurisdiction to pass Pub. Acts 1911, No. 173, 1, amending Pub. Acts 1909, No. 300, §§ 3, 8, so far as they attempted to confer on the State Railroad Commissions power to adopt and enforce different demurrage rules applicable to interstate commerce. Michigan Central R. Co. v. Michigan R. R. Com. (Mich.) 1916E-695. (Annotated.)

21. Where a rate or charge, based upon the value of the articles transported, is provided in the schedule filed with the public utilities commission of the state, it is the duty of the transporting company to require the shipper to declare the value and to demand, collect, and receive from him the rate fixed in its schedule filed with the state commission. Erie R. Co. v. Steinberg (Ohio) 1917E-661.

22. Where a copy of such schedule is printed and filed as provided by sections 505 and 506, Ohio General Code, shippers and travelers are charged with notice of the tariffs named in this schedule and must abide thereby, unless the same be found unreasonable by the public utilities commission of the state. Erie R. Co. v. Steinberg (Ohio) 1917E-661.

23. Necessity of Adhering to Published Schedule. Where a railroad has filed a schedule under the provisions of sections 505 and 506, Ohio General Code, showing all rates, fares, and charges for transportation of passengers and property, and any service in connection therewith, such rates, fares, and charges named in the schedule become the legal rate for the service rendered, and must be charged by it and paid by the shipper or passenger without deviation therefrom. Erie B. Co. v. Steinberg (Ohio) 1917E-661.

#### Notes.

Implied agreement by consignee of goods to pay freight charges. 1917C-864.

Validity of statute, ordinance or rule providing for reciprocal demurrage. 1916E-701.

Liability as between consignor and consignee for payment of freight undercharges on interstate shipment. 1916E-378.

#### 7. CONNECTING CARRIERS.

24. Injury to Goods. Where freight has been delivered in good order to a common carrier for transportation, its then existing condition is presumed to continue to exist until the contrary is shown, and where it has been transported by successive connecting carriers, and delivered to the con-

signee in a damaged condition, it will be presumed that the injury has been received while in the possession of the last carrier, and the burden is on it to show the contrary. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805.

25. Where plaintiff shipped certain apples to M., and without delivery directed that the shipment be continued to F. over defendant's line, transportation should not be regarded as involving two separate and distinct shipments, but a continuous shipment from starting point to final destination, within the rule that where property is delivered to an initial carrier for transportation in good condition, and is delivered in bad condition by the terminal carrier, it will be presumed that the injury occurred on the line of the terminal carrier. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805.

26. Duty of Carrier as to Refrigeration. Where apples were shipped in a refrigerator car over lines of connecting carriers, defendant terminal carrier is charged with knowledge that the contents of the car required cooling and ventilation, and, by accepting the car at the junction point without opening or examining its contents, defendant assumes the risk as against the consignee of its having been kept properly cooled and ventilated up to that time, and, by undertaking to continue the transportation to destination, defendant assumes the obligation of keeping it cooled and ventilated until it was delivered. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805.

27. Liability of Initial Carrier. Under the Carmack amendment to the U. S. interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [3 Fed. St. Ann. 850] as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [Fed. St. Ann. 1909 Supp. p. 273], the initial carrier, as principal, is liable not only for its own negligence, but that of any agency which it may use, and is considered to have adopted its connecting carrier as its agent. Burkenroad Goldsmith Co. v. Illinois Central R. Co. (La.) 1917C-935.

(Annotated.) 28. Where a carload of feed was waterdamaged in transit, and the scaled car was delivered at the point of destination to a branch railroad for delivery to the consignee, and was by him rejected on account of said damage, and the loaded car was thereupon returned to the delivering carrier, and the feed suffered further depreciation, before it was sold by said carrier, held, that the initial carrier is liable for the damages to the feed not only from water, but from the failure of its agent, the delivering carrier, to promptly dispose of the feed to the best advantage. Burkenroad Goldsmith Co. v. Illinois Central R. Co. (La.) 1917C-935. (Annotated.)

29. Liability of Initial Carrier. If intrastate freight, addressed to a place beyoud the usual route of a common carrier who first received it, is lost or injured, or if the shipper is damaged by the unnecessary and unreasonable delay in said shipment, it must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss, injury, or damage did not occur while it was in its charge, or because of unnecessary and unreasonable delay caused by it, or it will be liable therefor. The demand for such proof must be direct and specific, and a simple request or demand for payment of the loss or damage does not bring the shipper within the requirements of the statute, which provides for a demand for proof that the damage or injury was not caused by the initial carrier. Missouri, etc. R. Co. v. Foote (Okla.) 1917D-173.

30. The only liability assumed by an initial common carrier of intrastate commerce in this state, unless it contracts for a greater responsibility, is that it will deliver the shipment to the end of its route, in the proper direction of its destination, to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and when it has done that its responsibility ceases, subject, of course, to a proper response to the demand of the shipper for proofs that the loss, injury, or unnecessary delay did not occur on its line. Missouri, etc. R. Co. v. Foote (Okla.) 1917D-173.

31. Liability of Initial Carrier. The Carmack Amendment to the Hepburn Act of Cong., approved June 29, 1906 (34 Stat. 593 [Fed. St. Ann. 1909, Supp. p. 273]), c. 3591, § 7, pars. 11, 12, declaring that every railroad company receiving property for transportation from one state to another shall issue a receipt therefor, and shall be liable for any loss caused to it by any carrier to which the property may be delivered or over whose lines it may pass, makes an initial carrier liable for delay by a connecting carrier, though the bill of lading otherwise provided. Southern Pacific R. Co. v. A. J. Lyon & Co. (Miss.) 1917D-171

## 8. ACTIONS AGAINST CARRIERS.

# a. Actions for Loss, Injury, or Delay.

# (1) In General.

32. Remedies of Shipper. Where goods have been delivered to a common carrier for transportation and the common carrier converts the property to its own use, the shipper may maintain an action for damages for breach of contract of carriage or may sue for conversion. Eric R. Co. v. Steinberg (Ohio) 1917E-661.

33. Where neither the shipper nor the carrier had any reason to believe that the

shipment of beans would spoil after four or five days in a closed car, and the beans spoiled in consequence of negligent failure to transport them within a reasonable time, the carrier cannot relieve itself from liability on the ground that it had no notice that the beans were in an abnormal condition. Lyons v. Grand Trunk R. Co. (Mich.) 1917D-162. (Annotated.)

## (2) Evidence.

34. Authenticity of Reply Letter. In an action for damages to shipments of tobacco, where it appeared that the shipper wrote a letter to the agent of the terminal carrier in the state advising him of the damage, the consignee's or agent's refusal to accept it, and presenting a claim for a certain amount, and that he later received a typewritten letter on a letterhead of the terminal carrier, office of its freight claim adjuster, and signed by such adjuster, addressed to the shipper and relating to its claim, and denying responsibility because the damage was due to a flood, stating its sale for shipper's account and balance to his order, such letter is prima facie genuine and admissible in evidence without proof of the handwriting or other proof of its authenticity. Louisvile, etc. R. Co. v. O'Brien (Ky.) 1917D-922. (Annotated.)

35. Agreed Valuation of Goods. of lading provided that the amount of any loss or damage for which the carrier was liable should be computed upon the basis of the value of the property, being the bona fide invoice price, unless a lower value had been represented in writing by the shipper, or agreed upon, or is determined by the classification or tariff upon which the rate was based. A carrier lost goods delivered under such a bill. Neither the bill of lading nor the statement of facts on which the cause was tried showed the valuation of the property. The statement of facts failed to show that a value lower than the invoice price had been represented by the shipper, or that a lower value had been agreed upon, or the value as determined by the classification or tariff upon which the rate was based. It is held that, as none of these matters were disclosed by the pleadings or statement of facts, the carrier was liable for the actual value of the goods under the common-law rule. Grice v. Oregon-Washington R., etc. Co. (Ore.) 1917E-645.

36. Proof of Value. Where, in an action against a carrier for injuries to apples in transportation, it appeared that the apples in their damaged condition had no market value, and plaintiff's agent was only able to get one offer of \$2.75 a barrel from one who intended to peddle the apples in the country, to whom he sold them at such price, the fact of such sale, assuming that it was fairly made, is admissible to

show prima facie that such was the actual value of the apples in their injured condition. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805. (Annotated.)

37. Presumption from Injury to Part of Goods. Where apples shipped in a car were in first-class condition when placed in the car, and all of which were subjected to exactly the same conditions from that time until the car was opened at destination, when a few of the barrels were opened, the contents examined, and all uniformly found to have been seriously damaged, it will be presumed that all of the apples in the car were similarly damaged, and the carrier cannot successfully claim that there was no proof of damage except as to the barrels examined. Dunlap v. Great Northern B. Co. (S. Dak.) 1916D-805.

## (3) Instructions.

- 38. In such case, where the evidence showed that the longer tobacco was permitted to remain wet the greater the damage, and there was no evidence to the contrary, the court did not err in assuming that the tobacco was further damaged by the delay, and in leaving the extent of the damage to the jury. Louisville, etc. R. Co. v. O'Brien (Ky.) 1917D-922.
- 39. Where tobacco in transit was damaged and delayed by flood, and it appeared that even after the shipment was started from that point to destination the tracks were in bad condition, though it did not appear that such condition was the cause of the delay, that there was a through train to destination, and that the usual shipping time between the place of origin and delivery was about five days, and that there was a delay of twenty days from the intermediate point, the court did not err in assuming that the delay was unreasonable. Louisville, etc. R. Co. v. O'Brien (Ky.) 1917D-922.
- 40. Where, in an action for damages to a shipment of beans, due to negligent delay in transportation, it appears that defendant retained the money for which the beans were sold, and the contract price is the only evidence of the market price at the place of delivery, it is proper to instruct that plaintiff, if entitled to recover, should recover the contract price at the place of delivery at the time the shipment should have been delivered. Lyons v. Grand Trunk R. Co. (Mich.) 1917D-162. (Annotated.)

#### (4) Damages.

41. In an action for damages occasioned by unnecessary and unreasonable delay in the shipment of freight, only such damages may be recovered as were contemplated, or might reasonably be supposed to have entered into the contemplation of the parties

- to the contract of carriage, and if the shipper expects to charge the carrier with any special damages, he must communicate to the carrier, at or prior to the time of shipment, all the facts and circumstances of the case which do not ordinarily attend the carriage of such freight, or the peculiar character and value of the property carried; otherwise, such peculiar circumstances cannot be contemplated by the carrier. Missouri, etc. R. Co. v. Foote (Okla.) 1917D-173. (Annotated.)
- 42. Delay in Transportation—Damages. In an action for damages to shipments of tobacco, limited by the trial court to the damages resulting from an unreasonable delay between an intermediate point and destination, and to the difference between the market value of the damaged shipment when delivered and its market value when it should have been delivered, the evidence is held to sustain a verdict for plaintiff for \$1,000. Louisville, etc. B. Co. v. O'Brien (Ky.) 1917D-922.
- 43. Delay in Transportation. Where goods were sold at a stipulated price if they arrived on schedule time, but the carrier was not informed of that arrangement, the measure of damages is the difference between the market price of the goods at the time when they should have arrived and when they did. Southern Pacific R. Co. v. A. J. Lyon & Co. (Miss.) 1917D-171. (Annotated.)
- 44. Delay in Transportation. The measure of damages for delay in transporting goods to market is the difference between the market value at the time and place at which delivery should have been made and the same value when delivery was actually made, whether the difference was the result of a decline in the market or of an injury suffered by the goods in consequence of the delayed delivery. Lyons v. Grand Trunk R. Co. (Mich.) 1917D-162. (Annotated.)
- 45. Delay in Transportation—Damages. Under section 2869, Okla. Rev. Stat. 1910 Ann. the detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered and the day of its actual delivery. Missouri, etc. R. Co. v. Foote (Okla.) 1917D-173.

(Annotated.)

## Note.

Measure of damages for carrier's delay in transporting goods resulting in depreciation in value. 1917D-164.

## CARRIERS OF LIVE STOCK.

- 1. Loss or Injury to Live Stock.
- 2. Limitation of Liability.
- 3. Actions.

### 1. LOSS OR INJURY TO LIVE STOCK.

1. Improper Loading by Shipper. Where a carrier furnishes a car to a shipper for the purpose of shipping live stock, and the shipper loads the live stock himself and in doing so overcrowds the animals or places in one compartment animals of different kinds, the risk of loss or injury is upon the shipper, though the manner of loading is discoverable if it is not actually discovered, by the carrier. Illinois Central R. Co. v. Rogers (Ky.) 1916E-1201.

(Annotated.)

2. Injury Due to Propensity of Animals. A carrier of live stock may stipulate for exemption from liability for injuries due to the natural propensities of the animals. Adams Express Co. v. Allendale Farm (Va.) 1916D-894. (Annotated.)

#### Note.

Liability of carrier of live stock for injury to stock where shipper loads stock improperly. 1916E-1203.

# 2. LIMITATION OF LIABILITY.

3. A express company may stipulate, in a contract for the carriage of live stock, for exemption from liability for delay, injuries to, or loss of, the animals, unless caused by the negligence of its agents or employees. Adams Express Co. v. Allendale Farm (Va.) 1916D-894.

## 3. ACTIONS.

- 4. Evidence of Negligence Insufficient. Evidence, in an action for injuries to live stock en route, held not to show, as against a demurrer thereto, any injury in transit to which the alleged paralysis of the animal could be reasonably attributed. Adams Express Co. v. Allendale Farm (Va.) 1916D-894.
- 5. Burden of Showing Negligence. The mere fact that a cow shipped by express was found to be sick after being unloaded at an intermediate point in apparently good condition, was not such proof in injury to the cow as to shift the burden upon the express company of proving its freedom from fault under Va. Code 1904, § 12941, making the fact of damage or loss prima facie evidence of negligence by the carrier, even if the statute is applicable to an interstate shipment. Adams Express Co. v. Allendale Farm (Va.) 1916D-894.
- 6. One suing for damages to cattle shipped must show some injury to the animal which did not result from its inherent nature or defects, in order to require the

carrier to show that the injury was not through its fault. Adams Express Co. v. Allendale Farm (Va.) 1916D-894.

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## 1. DUTY TO RECEIVE FOR CAR-RIAGE.

- 1. Refusal to Carry Disabled Person. Any person is entitled to be received as a passenger on payment of fare, notwithstanding a seeming incapacity on his part to take care of himself, if, in fact, he is competent to travel alone without requiring other care than that which the law requires a carrier to bestow on all persons alike. The disability which will disentitle a person to transportation may be mental or physical, and in respect to physical disability the carrier is under no obligation to receive as a passenger one who, without an attendant, is unable because of extreme age or tender years to care for himself, and the same test applies as to other physical disabilities. Hogan v. Nashville Interurban R. Co. (Tenn.) 1916C-1162. (Annotated.)
- 2. A man about 26 years of age, who has always had to walk with two crutches, but who for 10 years has continuously traveled alone and unattended in trains, street cars, etc., and who only requires ordinary care, cannot be excluded from a passenger train on the ground of his physical disabilities. Hogan v. Nashville Interurban R. Co. (Tenn.) 1916C-1162. (Annotated.)
- 3. Statute Requiring Free Transportation of Police Officers. The N. J. Act of May 26, 1912 (Pamph. L. p. 235), in so far as it requires street railway companies to grant free transportation to police officers when in uniform or on duty, is a constitutional exercise by the legislature of its police power. State v. Sutton (N. J.) 1917C-91. (Annotated.)

# 2. CONSTRUCTION AND VALIDITY OF STATUTORY REGULATION.

4. Acts 1875, c. 130 (Shannon's Tenn. Code, § 3046), abrogating the common-law rule as to rights of action for exclusion from public conveyances, and declaring that no carrier of passengers need carry or admit any person whom it chose not to, was abrogated by Acts 1897, c. 10, § 14, declaring all corporations, etc., operating railroads to be "common carriers," which term depends upon whether the carrier determine who he will carry or whether he is bound to carry all alike, and which, under Acts 1907, c. 433, declaring that any incorporated interurban railroad company shall have the same powers and privileges as railroad companies, subject to the same duties and obligations, includes an interurban street railway company. Hogan v. Nashville Interurban R. Co. (Tenn.) 1916C-1162. (Annotated.)

- 5. Power to Regulate Rates—Validity of Grant. Public utilities act, providing for the regulation of the rates of street railway companies, does not violate Ill. Const., art. 11, § 4, declaring that no law shall be passed by the general assembly granting a right to construct and operate a street railroad within a city without requiring the consent of the local authorities, for the prohibition does not deprive the general assembly of the right to regulate the rates. State Public Utilities Com. v. Chicago, etc. B. Co. (Ill.) 1917C-50. (Annotated.)
- 6. Burden of Showing Reasonableness. Where rates of a public utility as a street railroad are attacked as unjust, it has the burden of showing that the rates are reasonable and not excessive. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.
- 7. The public utilities act, providing for the regulation of the rates of street car companies, is not affected by Ill. Const., art. 4, \$34, authorizing the passage of any law, local, special, or general, providing a scheme or charter for the territory embraced within the limits of the city of Chicago; the section expressly excepting article 11, \$4, giving the legislature rate-making powers, from its operation. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.

(Annotated.)

## 3. TICKETS AND FARES.

#### a. Rate of Fare.

- 8. Reduced Fare for Militia. The onecent militia fare law (Mo. Rev. St. 1909. § 8396) providing that railroads shall carry between points in the state the National Guard when ordered in military duty by the Governor at one cent a mile for each officer and enlisted man, with not to exceed 100 pounds of baggage or camp equipage, constitutes unjust discrimina-tion under Mo. Const., art. 12, § 14, provid-ing that the general assembly shall pass laws to prevent unjust discrimination in passenger rates, in view of Rev. St. 1909, § 3232, fixing the maximum fare for adult passengers at two cents a mile and for children under 12 at one cent a mile, as such rate is prima facie a reasonable rate. and there is nothing to show that the cost of transporting the National Guard would be cheaper than carrying any other passenger. State v. Missouri, etc. R. Co. (Mo.) 1916E-949. (Annotated.)
- 9. Reduced Fare for Militia. The onecent militia fare law (Mo. Rev. St. 1909, § 8396) is not in violation of Mo. Const., art. 12, § 23, forbidding discrimination between or in favor of transportation companies and individuals, as it is a case of discrimination in favor of the state or the

United States if it should be found that the latter recoups the state for the outlay. State v. Missouri, etc. R. Co. (Mo.) 1916C-949. (Annotated.)

10. The one-cent militia fare law (Mo. Rev. St. 1909, § 8396) violates Mo. Const., art. 12, § 14, providing that the general assembly shall pass laws to prevent unjust discrimination in passenger tariffs, etc., conceding that a one-cent fare is unjust discrimination, as the legislature may not fail to carry out the command of the Constitution and do the diametrically contary thing. State v. Missouri, etc. R. Co. (Mo.) 1916E-949. (Annotated.)

## 4. WHO ARE PASSENGERS.

- a. Persons Intending to Ride.
- 11. When Intending Passenger Becomes Such. One who attempts to board a moving train is not a "passenger," though he may have purchased a ticket entitling him to passage thereon. Kentucky Highlands R. Co. v. Creal (Ky.) 1917C-1205.

(Annotated.)

12. Person Attempting to Board Moving Car. Where plaintiff left a street car, when it stopped at a point where passengers were received and discharged, and after it was in motion attempted to board the car again, he was not then a passenger, and the conductor was under no duty to render him assistance, though bound, if he saw him in danger, to use ordinary care to prevent injury. Jonas v. South Covington, etc. St. R. Co. (Ky.) 1916E-965.

#### Note.

When intending passenger actually becomes such. 1917C-1206.

## b. Person Attending Live Stock.

13. A person in charge of live stock, riding under a contract which evidences his right of transportation on the train transporting the stock shipment, and contemplates his carriage to care for the stock, is a "passenger for hire." McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141. (Annotated.)

## c. Person Alighting.

14. A passenger alighting from a street car is still a "passenger" until he has had a reasonable opportunity to reach a place of safety. Louisville R. Co. v. Kennedy (Ky.) 1916E-996.

# 5. DUTY IN CARRIAGE OF PASSENGERS.

- a. Duties and Liabilities in General.
- 15. Duty to Anticipate Unusual Peril. A carrier of passengers need not antici-

pate unusual and unexpected perils to its passengers. Louisville, etc. R. Co. v. O'Brien (Ky.) 1916E-1084.

- 16. Violation of Rule not Enforced. By failing to enforce a rule, a railroad company may allow it to become a dead letter, and in effect waive, abandon or abrobate it. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299. (Annotated.)
- 17. Degree of Care Required. To provide for the safety of passengers, a carrier must exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the character of the conveyance adopted, and consistent with the practical operation of the business. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924.

#### Note.

Operating car or train with insufficient number of employees as negligence on part of carrier of passengers. 1917C-73.

## b. To Provide Safe Cars and Premises Generally.

- 18. A person so traveling will be deemed to have assumed all risks reasonably incident to the mode of transportation utilized, but not those risks and dangers produced by unnecessary and unusual occurrences not incident to the proper handling of a train of that kind. McGregor v. Great Northern B. Co. (N. Dak.) 1917E-141. (Annotated.)
- 19. A railway company is not relieved from its obligation to exercise great care for the safety of such passenger. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141. (Annotated.)
- 2. A carrier, though required to inspect its trains for the safety of its passengers, need not keep up a continuous inspection and is not chargeable with knowledge at each moment of the condition of every part of its train. Louisville, etc. R. Co. v. O'Brien (Ky.) 1916E-1084.
- 21. From the mere fact that the regulations of the United States required defendant, as the operator of a steamship carrying passengers to place lifeboats so that they could be launched safely in less than two minutes, it cannot be ruled, as a matter of law, that an easily removable chain bridging the unguarded space in the rail, through which a lifeboat passed when launched, is the only practicable protection, since that is a question of fact; it being possible that the jury may find that passengers should have been excluded from the neighborhood. Hanley v. East-Corporation Steamship (Mass.) 1917D-1034. (Annotated.)

22. Where the steamship on which deceased traveled carried several hundred passengers, in view of the high responsibility resting on the defendant steamship company as a common carrier, negligence may be found in its failure to inspect the vessel, by which a gap in the rail, to allow the launching of a lifeboat, was left unguarded by the usual chain for several hours. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034.

(Annotated.)

23. Liability to Person in Charge of Live Stock. It is held that, under the terms of the contract and the circumstances of the case, a caretaker of a shipment of horses who at the time of the accident was riding in the stock car, instead of in the caboose, was not guilty of contributory negligence as a matter of law. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141. (Annotated.)

24. Injury to Passenger — Negligence—Duty as to Passenger on Step. Where a street-car passenger rode on the step thereof and was injured by the street railroad's bringing the car into collision with another standing still, in broad daylight, without obstruction to view, the railroad is guilty of negligence, since, if a passenger, on account of the crowded condition of a street car, takes up his position on a side step or platform, he voluntarily assumes the natural, obvious risks attending his position, but the company, in accepting his fare with knowledge of the increased danger of his position, is under greater obligation to use greater precaution in the operation of the car for his protection. Kelly v. Santa Barbara Consol. R. Co. (Cal.) 1917C-67.

## Notes.

Liability of carrier by water for injury to or death of passenger falling overboard. 1917D-1038.

Liability of carrier to person riding on drover's pass or in charge of stock. 1917E-149.

Act of carrier in permitting cars to be overcrowded as constituting nuisance. 1918A-994.

## c. To Protect Passengers.

## (1) From Carrier's Servants.

25. Insulting Language to Passenger. Objectionable remarks, addressed by a street-car conductor to a patron of the road, referring to her personal appearance, while on the car, which mortify and humiliate her, are actionable, and the car company will be held in damages therefor Haile v. New Orleans R., etc. Co. (La.) 1916C-1233. (Annotated.)

26. The only negligence for which a passenger steamship company is responsible, in an action for conscious suffering of a passenger, drowned when flung overboard by the lurching of the ship, is that of the company's servants or agents. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034. (Annotated.)

27. The act of the motorman in inviting a boy nine years old to ride on the car is within the scope of his employment, and the street railway company is liable for his negligent operation of the car causing injury to the child. Solomon v. Public Service B. Co. (N. J.) 1917C-356.

(Annotated.)

## (2) From Arrest.

28. Liability-Arrest of Passenger by Conductor. Under Ore. Laws 1911, c. 135, providing that to be intoxicated or to drink intoxicating liquor in an ordinary passenger car is a punishable crime, and L. O. L., § 6959, declaring that the conductor of a railroad train, while actually engaged as such, shall have the power of a sheriff, in each county through which the train passes, to protect the public peace and arrest violators thereof on or near the train, where defendant railroad's conductor arrested a sober passenger on the pretext that he was drunk, the rail-road cannot escape liability for the tort on the ground that the conductor was acting as sheriff and had laid aside his character as defendant's servant. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.

## d. To Sick Passenger.

29. Duty to Passenger Taken Sick in Transit. Where a passenger becomes sick and unable to care for himself, and the carrier's servants know, or have notice of facts requiring them, in the exercise of reasonable prudence, to know, that he is sick and needs attention, it is their duty to give him such reasonable attention as the circumstances and their obligations to other passengers permit; and if they know, or should know, he is too ill to remain on the car, it is their duty, if practicable, to remove him and put him in the custody of an officer or some one who can look after him. Middleton v. Whitridge (N. Y.) 1916C-856. (Annotated.)

Where the evidence is only that deceased's life could have been saved if he had received proper care within an hour or two after his first attack of apoplexy, while on defendant's car, defendant is entitled to an instruction that any omission of duty of its servants to him after that time cannot be made the basis

of a finding of actionable negligence. Middleton v. Whitridge (N. Y.) 1916C-856. (Annotated.)

31. Duty to Insane Passenger. A railroad company must bestow upon a passenger any special care and attention beyoud that given to the ordinary passenger which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or that might have been reasonably anticipated from one in his mental and physical condition, tending to increase the danger to be apprehended and avoided, and if the employees of a railroad company, after discovering the condition of a passenger who became insane while on the train, failed to use such care when they could have reasonably done so, and thereby prevented her from jumping from the car window, the company is liable in damages for her death, caused by injuries thereby sustained. Weirling v. St. Louis, etc. R. Co. (Ark.) 1916E-253, (Annotated.)

#### Notes.

Duty and liability of carrier to passenger taken sick during transit. 1916C-862.

Duty and liability of carrier with respect to insane passenger. 1916E-256.

## e. To Announce Station.

32. Cars. An adult passenger, apparently of ordinary intelligence, and in full possession of her senses, is bound to take notice of her route and make the necessary change of cars, and the carrier is not required to give her special notice of the necessity therefor, so that, if it announces the arrival at a junction where it is necessary to change for points on the line of the connecting carrier, it is not liable for carrying the passenger beyond the junction. St. Louis, etc. R. Co. v. Needham (Ark.) 1917D-486. (Annotated.)

## Note.

Duty of carrier to give passenger notice of and time to make change of cars. 1917D-488.

## f. To Stop at Passenger's Destination.

33. Duty to Stop at Passenger's Destination—Contract. Where plaintiff boarded a through train which did not stop at his destination, under an alleged special contract made with defendant's ticket agent that the train would stop there to set plaintiff down, plaintiff is not entitled to have the carrier's breach of such alleged contract submitted to the jury as a basis for a recovery, in the absence of any evidence that the agent's statement was re-

lied on and that plaintiff suffered damage as the proximate result thereof. Bradley v. Atlantic Coast Line R. Co. (S. Car.) 1916E-1219. (Annotated.)

Note.

Duty of railroad to put passenger off at destination not stopping station. 1916E-1220.

## g. To Passenger Boarding or Alighting.

## (1) In General.

34. Liability for Injury—Banana Peel on Car Step. A carrier is not liable for injuries to a passenger slipping on a banana peel on a car step while alighting, unless the trainmen knew of its presence on the step, or it had been there such a length of time before the accident as would impute notice to them. Louisville, etc. R. Co. v. O'Brien (Ky.) 1916E-1084.

(Annotated.)

35. Degree of Care. Carriers are held to the highest degree of care for the safety of passengers, and passengers should use ordinary care to protect themselves in getting on or off trains, when safe and suitable means of boarding or alighting from trains are provided. They must take the responsibility of the ordinary incidents of travel, including the stoppage of cars required by statute at railway junctions, and must govern themselves accordingly. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

36. As to one attempting to board a moving train a carrier owes no duty except that which it owes to a trespasser, and upon discovery of his peril must exercise ordinary care to avoid injury to him; and hence, where there is no failure on the part of the engineer to do all that can be done to prevent injury after discovery of plaintiff's peril, there is no actionable negligence. Kentucky Highlands R. Co. v. Creal (Ky.) 1917C-1205.

(Annotated.)

Note.

Liability of carrier for injury to passenger caused by slipping on banana peel or the like. 1916E-1087.

## (2) Assisting Passenger.

- 37. Negligence of Conductor Seizing Person Attempting to Board Car. Where the conductor of a street car, in attempting to assist plaintiff to board it while it was in motion, seized plaintiff by the arm and dragged him along, the conductor was guilty of negligence, and the company was liable for injuries received by plaintiff from a fall resulting when the conductor loosed his hold. Jonas v. South Covington, etc. St. R. Co. (Ky.) 1916E-965.
- 38. Alighting at Place not Regular Station. Where passengers habitually get off

the trains at a point where they are not invited to get off, and no effectual means are attempted to be used to prevent them from doing so, there is a duty on the company to see that they have a safe opportunity to alight. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

## h. Passenger's Assumption of Risk.

39. From the mere fact that a space on the deck of defendant's vessel between a raft and a lifeboat was unguarded by any rail, it cannot be said as matter of law that a passenger, flung through such opening when the ship lurched, had assumed the risk. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034.

(Annotated.)

40. Boarding Moving Car. Where a person was injured while attempting to board a moving trolley car, and the fact that the car was in motion was the sole producing cause of the accident, the risk of its occurrence was one which the person assumed. Solomon v. Public Service R. Co. (N. J.) 1917C-356.

## i. Duty Respecting Appliances.

41. A carrier must use every precaution for the safety of its passengers that human skill and foresight could suggest; and, if there are known and satisfactory tests by which latent defects may be discerned in those appliances on the soundness and strength of which safety of passengers depends, they must be used. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924.

#### Note.

Liability of carrier of passengers with respect to appliances purchased from manufacturer. 1916E-929.

# j. Duty to Provide Safe Place for Baggage Delivery.

42. In an action for injuries to a passenger alighting from a railroad company's train at his destination in the depot of an independent terminal company sustained by the falling of a trunk from a pile on the trunk platform, while the passenger was engaged in identifying his baggage for delivery, a plea that the terminal company "is a separate and independent corporation, engaged in receiving and delivering baggage to passengers" at the terminal depot over whose employees and over which corporation the defendant railroad company has no control, and is not engaged in any way in its management, and that the terminal company, its agents and servants are not the agents and servants of the defendant railroad company except for the purpose of storing and delivering baggage discharged from defendant's

trains, does not state a defense to the action, since the duty of the defendant railroad company to provide a safe place for the delivery of baggage to passengers at their destination on the defendant's line cannot be delegated to another Johnson v. Florida East Coast R. Co. (Fla.) 1916C—1210. (Annotated.)

- 43. A primary duty of a railroad common carrier imposed by law is to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on the carrier's line; and, in so far as it affects the safety of passengers in the delivery of their baggage, this duty cannot be delegated to another, whether it be a separate and independent corporation or a mere employee, so as to relieve the carrier of its legal liability for an injury to the passenger caused by the negligence of those engaged in delivering baggage to a passenger on the premises used by the carrier for that purpose. Johnson v. Florida East Coast R. Co. (Fla.) 1916C-1210. (Annotated.)
- 44. Whatever may be the rule of liability where injury is caused by the negligence of the employees of an independent contractor in other instances and circumstances, it does not operate to relieve common carriers from their primary duty to maintain safe accommodations for their passengers in the delivery to them of their baggage at the point of destination; nor does the rule exempt such carriers from the legal consequences of the negligence of those engaged in the delivery of baggage to passengers, whether those em-ployed in such delivery be the employees of the carrier or other independent corporations using and directing their own employees in the delivery of baggage to passengers at their destination on the depot premises used by the carrier. Johnson v. Florida East Coast R. Co. (Fla.) 1916C-1210. (Annotated.)
- 45. The duty of the carrier to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on the carrier's line is not changed when the carrier uses the premises, employees and facilities of another independent corporation as its agency for such delivery of baggage to passengers. Johnson v. Florida East Coast B. Co. (Fla.) 1916C-1210. (Annotated.)
- 46. Whether the carrier owns or controls the premises or not, and whether the carrier exercises any authority or direction over the employees so engaged ont, the carrier is not relieved of the legal consequences of the negligence of the employees resulting in injury to a passenger of the carrier while properly engaged with the employees in receiving his baggage on the depot premises at his

destination. Johnson v. Florida East Coast R. Co. (Fla.) 1916C-1210.

(Annotated.)

#### Note.

Duty of carrier to provide safe place for delivery of baggage to passenger. 1916C-1213.

## RIGHT TO MAKE RULES.

- 47. Power to Make Rules. Railroad companies have the power to make reasonable regulations for the management of their trains, and one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of the trains upon which he proposes to travel. He should inform himself when about to take passage on a railroad train when, where and how he can go, or stop, according to the regulations of the railroad company. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.
- 48. A street railroad company has a right to make and enforce reasonable rules. Taylor v. Spartanburg R., etc. Co. (S. Car.) 1916D-585.
- 49. Rule as to Use of Transfers. A rule of a street-car company requiring a person holding a transfer ticket to take the next succeeding car at the point designated on the transfer is reasonable, as a protection against imposition and fraud. Taylor v. Spartanburg R., etc. Co. (S. Car.) 1916D-585. (Annotated.)

## Note.

Validity of rule of street railway with respect to use of transfer. 1916D-586.

# 7. EJECTION FOR INVALIDITY OF TICKET.

50. A street-car company whose regulations require persons holding transfers to take the next succeeding car at the point designated is justified in refusing transfers of passengers boarding the car at about 200 yards from such point, and in demanding fare from them, and, on their refusal to pay, is not liable for their ejection. Taylor v. Spartanburg R., etc. Co. (S. Car.) 1916D-585. (Annotated.)

## 8. CONTRIBUTORY NEGLIGENCE.

## a. In General.

51. Extending Arm Outside Car. Plaintiff, while riding on an interurban car, to flick the ashes from his eigar thrust his hand over the guard rail a sufficient distance beyond the side line of the car to bring it in contact with the trunk of a tree standing beside the track; the force of the blow breaking his wrist. Held, that he was guilty of contributory negli-

gence as a matter of law. Malakia v. Rhode Island Co. (R. I.) 1916C-1216. (Annotated.)

52. Where a railroad company fails to enforce one of its rules and a passenger is injured in neglecting to observe it, under our statutes the mere contributory negligence of the passenger is not an absolute bar to recovery. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

(Annotated.)

#### Notes.

Failure of carrier to enforce rule as affecting contributory negligence of passenger in violation thereof. 1916E-1308.

Contributory negligence of passenger in permitting part of his body to protrude from car. 1916C-1218.

## b. Riding on Steps or Platform.

- 53. Boarding Moving Car. A boy nine years old, who on the invitation of the motorman boarded a car going so slowly that the boy could grasp the handle bar with his right hand and place both feet on the step of the car, but who was thrown from the car by the sudden acceleration of the speed, was not guilty of contributory negligence as a matter of law. Solomon v. Public Service R. Co. (N. J.) 1917C-356.
- 54. Preparation for Alighting—Moving Car. That a passenger on a street car went upon the platform or steps of the moving car preparatory to alighting does not alone show contributory negligence. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

## Note.

Contributory negligence of passenger in alighting from street car and passing to rear of it across parallel tracks without looking for approaching car. 1916E-998.

## 9. ACTIONS FOR INJURIES.

## a. Pleading.

- 55. Enforcement of Right to Carriage. A complaint alleging that a common carrier's refusal to accept complainant was a persecution of complainant for having brought a suit for damages against it and an attempted intimidation shows a palpable abuse of a public franchise, which a court of equity will enjoin. Hogan v. Nashville Interurban R. Co. (Tenn.) 1916C-1162.
- 56. A complaint alleging that a common carrier had wrongfully refused to accept complainant as a passenger and threatened to continue such wrongful act sets out a right to relief by injunction, on the ground that a single action is a

more adequate remedy than an action or actions at law for damages. Hogan v. Nashville Interurban R. Co. (Tenn.) 1916C-1162.

- 57. Act as Exclusive Remedy Pleading as Defense to Action. Where the complaint, in an action for a personal injury, alleged that the relation of passenger and carrier existed between plaintiff and defendant at the time of the accident causing the injury, defendant could plead and prove that the relation of master and servant existed, and that plaintiff must resort to the relief afforded by the Workmen's Compensation Act. Susznik v. Alger Logging Co. (Ore.) 1917C-700.
- 58. Pleading Contributory Negligence. An answer, in an action for injury to a passenger, which alleges that plaintiff was transported by defendant on its logging train gratuitously solely for the benefit of plaintiff and defendant in connection with the business in which defendant was engaged, and that plaintiff, on reaching his destination, ran in front of the engine and was injured, sets forth plaintiff's contributory negligence, though it does not admit any negligence of defendant. Susznik v. Alger Logging Co. (Ore.) 1917C-700.
- 59. Construction of Pleading. In an action for wrongful death of a street-car passenger, where the petition alleges that the decedent was injured "by starting the car while she was attempting to alight therefrom," the allegation is not an admission that decedent negligently alighted from a moving car, but only that she was ready to alight. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

## b. Presumption of Negligence.

- 60. Effect of Presumption. In a passenger's action for injuries from a collision between two trains on the same track, plaintiff need not prove any specific act of negligence, but may rest his case entirely on the presumption of negligence arising from the collision. Niebalski v. Pennsylvania R. Co. (Pa.) 1917C-632.
- 61. Presumption of Negligence from Accident. Proof of injury, without contributory negligence, to a passenger in an elevator, from its fall due to a defective bolt, raises a presumption of negligence of the carrier, requiring it to show that all required precautions to safeguard passengers had been taken. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924.
- 62. Proof of Negligence. Where a passenger is injured from a collision between

the train on which he is riding and another train on the same track, a presumption of negligence on the part of the company carrying the passenger arises, regardless of any question as to his negligence. Niebalski v. Pennsylvania R. Co. (Pa.) 1917C-632. (Annotated.)

#### Note.

Presumption of negligence from collision resulting in injury to passenger, 1917C-634.

## c. Burden of Proof.

63. Contributory Negligence of Passenger. In a passenger's action for injuries from a collision between two trains on the same track, plaintiff's contributory negligence is a matter of defense, the burden of proof as to which is on defendant. Niebalski v. Pennsylvania R. Co. (Pa.) 19170-632.

## d. Admissibility of Evidence.

64. Evidence of Bad Faith. In an action against defendant railroad by one claiming to have been arrested by the conductor, ejected from the train, and thrown into prison for drunkenness, when in fact perfectly sober, testimony that plaintiff's companions, who drank with him from the same bottle, were not disturbed by the conductor, is admissible as bearing on the good faith of the conductor in making the arrest. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.

65. Such testimony was admissible as part of the res gestae. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.

## e. Sufficiency of Evidence.

66. Evidence Sufficient. Evidence in an action for the death of a street-car passenger is held to be sufficient to sustain a verdict for the plaintiff. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

67. Evidence in an action for death of a passenger, who, suffering a stroke of apoplexy while on a street car, was carried thereon for five hours, held to warrant a finding of negligence of the conductor in assuming, and continuing to indulge in the assumption, that the passenger was drunk, and not in a critical condition and in need of immediate medical attention. Middleton v. Whitridge (N. Y.) 1916C-856.

(Annotated.)

68. In an acton against a steamship company for death of a passenger flung overboard through an unguarded space in the rail of the vessel, the evidence is held to be sufficient to support a finding that the accident was caused by a lurch of the ship, and not by deceased's volition or lack of

attention. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034.

. (Annotated.)

- 69. Liability for Injury to Passenger Falling Overboard. In an action against a steamship company for the conscious suffering of a passenger drowned upon going overboard through an unguarded place in the rail when the vessel lurched, the evidence is held to be sufficient to support a finding of due care on the part of deceased. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034.

  (Annotated.)
- 70. Person Riding Wrongfully by Permission of Employee. Where a boy nine years old attempted to board a moving trolley car on the invitation of the motorman, the act of the motorman in suddenly accelerating the speed of the car before the child reached a place of safety justified a finding of actionable negligence of the street railway company. Solomon v. Public Service R. Co. (N. J.) 1917C-356. (Annotated.)

## f. Questions for Jury.

- 71. Passenger Alighting from Street Car -Crossing Parallel Track Without Look-A person, passing behind a westbound street car from which she had just alighted and going upon the east-bound track without looking for an approaching car, was not guilty of contributory negligence as a matter of law, where her attention was directed towards another approaching west-bound car, and her view of the east-bound car, which struck her, was obscured by the standing car, as she had a right to presume that proper warning of the approaching car would be given, and that the car would be under proper control, and was not required to anticipate negligence on the part of those in charge of the car; and hence whether she was negligent is a question for the jury. Louisville R. Co. v. Kennedy (Ky.) (Annotated.) 1916E-996.
- 72. Boarding Car. In an action by one injured in attempting to board a moving street car, who claimed that the conductor negligently grabbed his arm, the questions of negligence and of plaintiff's contributory negligence held for the jury. Jonas v. South Covington, etc. St. R. Co. (Ky.) 1916E-965.
- 73. Contributory Negligence—Riding on Step. In a passenger's action against a street railroad for injuries while riding on the step of a car, the question of contributory negligence is held to be for the jury under the evidence. Kelly v. Santa Barbara Consol. R. Co. (Cal.) 1917C-67.

  (Annotated.)
- 74. One who rides on the step of a street car on account of its crowded condition may be guilty of contributory

- negligence in so doing the question being for the jury; so that, in an action for injury to such a passenger, a charge that, as matter of law, he was not guilty of such contributory negligence is erroneous. Kelly v. Santa Barbara Consol. R. Co. (Cal.) 1917C-67. (Annotated.)
- 75. Question of Recovery. On conflicting evidence, in an action for the death of a street car passenger, the question of recovery is for the jury, and must be submitted, although one of plaintiff's witnesses on cross-examination testified adversely to him on matters outside the direct examination. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.
- 76. Evidence in an action for death of a passenger, who suffered a stroke of apoplexy while on a street car, and was carried thereon for hours afterwards, held sufficient to go to the jury on the issue of the omission of the carrier's duty to him being the proximate cause of his death. Middleton v. Whitridge (N. Y.) 1916C-856. (Annotated.)
- 77. Whether a person in attempting to board a moving trolley car is negligent depends on the circumstances and may, accordingly, be either a question for the court or jury. Solomon v. Public Service R. Co. (N. J.) 1917C-356.
- 78. Evidence considered and held sufficient to warrant submitting to the jury the question whether it was negligence to operate a street car in the city of Winona without a conductor, and to justify the jury in finding that it was. Koeller v. Wisconsin R. etc. Co. (Minn.) 1917C-71. (Annotated.)
- 79. In such action, where the issue is whether the carrier announced the junction and the necessity for changing cars as claimed by it, an instruction, leaving it to the jury to determine whether the trainman exercised ordinary care to apprise plaintiff of the place she was to leave the train to take a train on a connecting road, is erroneous, as ignoring the real issue. St. Louis, etc. R. Co. v. Needham (Ark.) 1917D-486. (Annotated.)
- 80. In an action for damages from defendant's negligent failure to notify plaintiff of the necessity for changing cars at a junction, the evidence is held to make the defendant's announcement of the junction and the necessity for changing a question for the jury. St. Louis, etc. R. Co. v. Needham (Ark.) 1917D-486. (Annotated.)

## g. Instructions.

81. Injury to Passenger—Overcrowding of Car. In an action for injury to a passenger on a street car while standing on a step thereof, charges that every street

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railroad must furnish on the inside of its passenger cars sufficient room and accommodations for all passengers who pay or buy tickets, that a carrier of persons for reward shall not overcrowd or overload his vehicle, and must give reasonable accommodations, and that a carrier should not allow so many passengers upon its cars as to overcrowd them, and, if unable to prevent overcrowding, the carrier has a right to refuse to move its cars, but, if it does not adopt such course, and under-takes to transport all passengers, whether within the cars or on its platform it is under additional care, commensurate with the perils or dangers surrounding the passengers by reason of the overcrowded con-dition of the cars, declared with fairness the law governing the conduct of common carriers of passengers, as expressed by Cal. Civ. Code, §§ 483, 2102, 2184, 2185. Kelly v. Santa Barbara Consol. R. Co. (Cal.) 1917C-67.

82. Right of Passenger on Car Step. In an action for death of a street car passenger, an instruction that, if a passenger is injured without fault on his part while on the steps of a moving car, the burden is on the company to show absence of negligence, is not erroneous for declaring that a passenger has a right to be on the steps of a moving car, since that is his right in entering and preparatory to leaving the car. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

83. Insane Passenger. In an action for the death of a passenger who became insane while riding on the train, and attempted, to the knowledge of the porter and brakeman, to throw her baby from the car window, and after being prevented from so doing, and after apparently quieting down, threw herself from the window, instructions held to have correctly declared the law and the measure of the carrier's duty toward the passenger. Weirling v. St. Louis, etc. R. Co. (Ark.) 1916E-253. (Annotated.)

## 10. JITNEYS AND TAXIS.

84. Taxicab Company as Carrier. A taxicab company is a common carrier within the meaning of the act of Cong. of March 4, 1913 (37 Stat. at L. 938, c. 150) § 8, and hence subject to the jurisdiction of the Public Utilities Commission of the District of Columbia as a "public utility" in respect of its exercise of its exclusive right under lease from the Washington Terminal Company, the owner of the Washington Union Railway station, to solicit livery and taxicab business from persons passing to or from trains, and of its exclusive right under contracts with certain Washington hotels to solicit taxicab business from guests, but that part of its business which consists in furnishing automobiles from its central garage on individual orders, generally by telephone.

cannot be regarded as a public utility, and the rates charged for such service are therefore not open to inquiry by the Commission. Terminal Taxicab Co. v. Kutz (U. S.) 1916D-765. (Annotated.)

85. Jitney Bus as Common Carrier. A "jitney" is a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and, as a common carrier, conveying passengers at a five-cent or some small fare, between such termini and intermediate points, and so held out, advertised, or announced. Memphis v. State (Tenn.) 1917C-1056. (Annotated.)

86. Where, under an act of the legislature, municipalities are authorized to regulate by ordinance, subject to the statute, the operation of jitney buses as common carriers, and the city council fails to regulate, a street railway company can have the operation of jitneys enjoined, since the city council might fail to act at all under the statute, and thus the rights of the company be unlawfully invaded. Memphis St. R. Co. v. Rapid Transit Co. (Tenn.) 1917C-1045. (Annotated.)

87. Regulation of Jitney Buses—Effect of Noncompliance. Under Tenn. Acts 1915, c. 60, making jitneys common carriers, and requiring them, under ordinances of the cities or towns, to file bonds and perform the conditions of the statute and ordinances, a jitney company is altogether without right to do business on the streets of a city, where the city has passed no ordinance pursuant to the act, and the company has failed to procure any license or execute any bond under the act. Memphis St. R. Co. v. Rapid Transit Co. (Tenn.) 1917C-1045.

(Annotated.)

88. Tenn. Acts 1915, c. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitney buses and street railway cars, since the jitney runs upon no track, and is less substantial and more dangerous than the street car, thus presenting essential differences properly the subject of classification. Memphis v. State (Tenn.) 1917C-1056.

89. Separate Regulation of Jitney Buses. Tenn. Acts 1915, c. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitneys and privately owned automobiles, since the uses and character of operation of the two classes are distinct. Memphis v. State (Tenn.) 1917C-1056.

90. Tenn. Acts 1915, c. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classi-

fication between jitneys and taxicabs, since taxicabs are for hire at a fare proportioned to the length of the trips of the several passengers, without regard to route, while the jitney carries passengers upon a designated route, and the investments in the two classes of machines are widely different. Memphis v. State (Tenn.) 1917C-1056.

91. Jitney Bus as Common Carrier. The legislature, being endowed with police power to regulate the use of streets in public places, may prescribe the conditions with which jitneys, being common carriers, must comply in order to operate.

Memphis v. State (Tenn.) 1917C-1056.

(Annotated.)

#### Notes.

State or municipal regulation of jitney buses. 1917C-1051.

Taxicab proprietor as common carrier. 1916D-767.

Jitney bus proprietor as common carrier of passengers. 1917C-1060.

## CARRYING WEAPONS.

See Weapons.

## CARTAGE.

Right to lien for cartage, see Mechanics' Liens, 12, 13.

## CARTOON.

As libel, see Libel and Slander, 153.

#### CASHIER.

Authority of, see Banks and Banking, 19.

#### CASUAL EMPLOYEE.

As within Workmen's Compensation Act, see Master and Servant, 241, 276.

## CATS.

See Animals, 1, 2.

#### CAUSA MORTIS.

See Gifts, 11-17.

## CAVEAT.

On will contest, see Wills, 126.

## CAVEAT EMPTOR.

Application to guardian's sale, see Guardian and Ward, 13.

#### CEMETERIES.

Proceeding for exhumation, see Dead Body, 7-10.

1. Injunction Against Maintenance. While a cemetery is not a nuisance per

se, yet underdrainage of a cemetery, which would pollute a stream used by an adjoining landowner to water his stock, will be enjoined without requiring a prior judgment at law establishing the nature of the nuisance. Sutton v. Findlay Cemetery Assoc. (III.) 1917B-559.

(Annotated.)

2. A cemetery is not a nuisance per se, and its use cannot be enjoined because offensive to the esthetic sense of an adjacent proprietor. Sutton v. Findlay Cemetery Assoc. (Ill.) 1917B-559.

(Annotated.)

3. The maintenance of a cemetery on land adjacent to that of complainant will not be enjoined on the ground of nuisance, where it appeared that the surface waters promptly drained from the cemetery and would not pollute a stream flowing through complainant's lower lands. Sutton v. Findlay Cemetery Assoc. (Ill.) 1917B-559. (Annotated.)

#### Note.

Equitable relief against cemetery as nuisance, 1917B-563.

## CENSUS.

Meaning, see Municipal Corporations, 158.

#### CERTAINTY.

Requisite of charitable gift, see Charities, 15-17.

Of indictments, see Indictments and Informations, 10, 11.

Of instructions, see Instructions, 12-17.

As essential to remedy, see Specific Performance, 2.

As statute requisite, see Statutes, 15-17. Of trusts, see Trusts and Trustees, 3.

## CERTIFICATE OF DEPOSIT.

Construction, see Banks and Banking, 30.

#### CERTIFIED CHECKS.

See Checks, 8-11.

## CERTIFIED COPY.

Of record, as evidence, see Evidence, 86,

## CERTIORARI.

1. Scope and Purpose of Writ. Certiorari is a common-law writ, which issues in the sound judicial discretion of the court to an inferior court, not to take the place of a writ of error or an appeal, but to cause the entire record of the inferior court to be brought up by certified copy for inspection, in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not pro-

ceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law. Malone v. Quincy (Fla.) 1916D-208.

- 2. What Constitutes Part of Record. On certiorari to review the decision in an election contest, the opinion of the lower court, though not strictly a part of the record, is open to examination to discover the grounds of the court's action. Cramer's Election Case (Pa.) 1916E-914.
- 3. Scope of Review. An order of the trial court, made pending an action for libel, requiring defendant therein to produce its circulation books, is not reviewable by certiorari, since the court had jurisdiction of the parties and the subject-matter and had power to make the order, and certiorari is not to correct entering committed by the court but only errors committed by the court, but only to review cases where the court has exceeded its jurisdiction and the order is illegal. Dalton v. Calhoun County District Court (Iowa) 1916D-695.
- 4. Necessity of Notice of Hearing. Where a petition for certiorari does not ask for a stay of proceedings in the lower court, a notice of hearing served on the lower court is not a condition precedent to the issuance of the writ under Iowa Code, § 4157. Dalton v. Calhoun County District Court (Iowa) 1916D-695.

## CHALLENGING JURORS.

See Jury, 22-28.

## CHAMPERTY AND MAINTENANCE.

 Agreement to Collect on Commission. A good-faith agreement by a layman to collect, compromise, or settle a promissory note in consideration of a certain percentage of the amount collected or recovered, is not per se void on the ground of champerty or public policy. Rohan v. Johnson (N. Dak.) 1918A-794. (Annotated.)

#### Note.

Validity of agreement by person other than attorney to collect, settle or compromise claim for commission. 1918A-797.

## CHANGE OF BENEFICIARY.

In benefit contract, see Beneficial Associations, 27.

CHANGE OF GRADE. See Streets and Highways, 9-14.

#### CHANGE OF NAME.

Suit to change name, see Names, 5.

CHANGE OF TITLE. See Fire Insurance, 12-17.

## CHANGE OF VENUE.

See Venue, 3-9.

#### CHARACTER.

Of accused, evidence, see Criminal Law. 49, 50, 96, 97. Certificate of, on discharge, see Master and Servant, 8.

## CHARACTER AND REPUTATION.

Proof of, see Evidence, 42.

#### CHARACTER EVIDENCE.

On impeachment of witness, see Wit nesses, 109-111.

## CHARACTER OF SERVANT OR EM-PLOYEE.

Privileged communications to prospective employer, see Libel and Slander, 66-

#### CHARGE TO JURY.

See Instructions.

## CHARITIES.

- 1. What Institutions or Purposes are Charitable, 164.
  - a. In General, 164.
  - b. Education, 165.

  - c. Gift for Ben fit of Animals, 165. d. Home for Indigent Women, 165. e. Volunteer Fire Company, 165.

  - f. National or Patriotic Purpose, 165.
- 2. The Cy Pres Doctrine, 165.
  3. Terms and Validity of Gift, 165.
  a. In General, 165.
  b. Certainty, 166.

  - c. Rule Against Perpetuities, 166.
  - d. Inadequacy, 166.
  - e. Construction, 166.
- 4. Liability of Charitable Institution for Tort, 167.

Saving's bank as charity, see Banks and Banking, 76.

Rights of members of fire company on dissolution, see Corporations, 115.

Liability of fire patrol for negligence, see Master and Servant, 365.

City regulation of private charity, see Municipal Corporations, 85.

Statute against perpetuities inapplicable, see Perpetuitles, 5, 6, 10.

Exemption from taxation, see Taxation, 76, 77.

1. WHAT INSTITUTIONS OR PUR-POSES ARE CHARITABLE.

#### a. In General.

1. What Constitutes Charity. The word "charity" includes substantially any scheme to better the conditions of any considerable part of society, and includes any gift, not inconsistent with the law, which tends to promote science or the education, enlightenment, or the amelioration of the conditions of mankind, or which is for the public convenience. Wilson v. First National Bank (Iowa) 1916D-481.

- 2. What Constitutes Charitable Purpose. A "charitable trust" is a trust implying a public utility in its purpose, and if the purpose to be attained is personal, private, or selfish, it is not charitable; but when the purpose accomplished is that of public usefulness unstained by personal, private, or selfish consideration, its charitable character insures its validity. Matter of MacDowell (N. Y.) 1917E-853.
- 3. Scope of Term "Charity." A "charity" is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, and embraces the improvement and promotion of the happiness of man. Thorp v. Lund (Mass.) 1918B-1204.

#### Note.

Gift for establishment of home for persons of particular class as charitable gift. 1917E-857.

### b. Education.

- 4. Gifts to establish or endow schools for the mental or moral improvement of the people, especially of the poor, are lawful public charities. Wilson v. First National Bank (Iowa) 1916D-481.
  - c. Gift for Benefit of Animals.
- 5. Gift for Benefit of Animals. A devise in trust "for the protection and benefit of animals" is a valid charitable trust. In re Wedgwood (Eng.) 1917B-924.

(Annotated.)

## d. Home for Indigent Women.

6. Establishment of Home for Indigent Women as Charity. A testamentary provision giving property to be invested and the income to be used for hiring and maintaining a house to be used as a home for refined, educated, Protestant gentlewomen, whose means are small and whose home is made unhappy by having to live with relatives who think them in the way, with a preference to testatrix's sister and to her named cousins and their lineal descendants forever and to her named friends, all inmates of the home to pay board not to exceed \$7 per week toward paying the expenses of the home, is not rendered invalid as a charitable trust because of the preference given to testatrix's relatives and friends; though if the purpose had been to create a trust only for their benefit it would not have come without the designation of a "charitable trust." Matter of MacDowell (N. Y.) (Annotated.) 1917E-853.

## e. Volunteer Fire Company.

7. Charities—What is Charitable Corporation—Volunteer Fire Company. The volunteer fire company, incorporated by Ky. Act March 24, 1851 (Acts 1850-51, c. 728), and whose charter was amended by Act April 24, 1884 (Acts 1883-84, c. 1112), is not a public charity corporation, within Ky. St. § 323, as to disposition of a charity society's property on its dissolution, there not only being no gift to anybody, but no public purpose being imposed on the owners of the property, necessary under the definition of a public charity in section 317. Neptune Fire Engine, etc. Co. v. Board of Education (Ky.) 1917C-789. (Annotated.)

#### Note.

Fire company, insurance patrol or the like as charitable institution. 1917C-797.

## f. National or Patriotic Purpose.

8. What Constitutes Charity—National or Patriotic Purpose. A deed of trust providing that a fund should be appointed to a "national or philanthropic purpose in Norway associated with the name of my late husband, Ole Bull," must be held to create a charity when due consideration is given to the words "national" and "philanthropic," and to the fact that Ole Bull is regarded as a distinguished patriot and national hero whose name and example serve to inspire the youth of Norway. Thorp v. Lund (Mass.) 1918B-1204.

(Annotated.)

## 2. THE CY PRES DOCTRINE.

9. Inadequacy of Fund for Expressed Purpose. Under the cy pres doctrine, embodied in N. Y. Personal Property Law, \$12, each case must depend upon its own peculiar circumstance, and inadequacy of the trust fund to accomplish the purpose of the charity may justify a change in the scheme of the charity, and, if the supreme court cannot cause a testamentary trust to be carried out in the precise manner contemplated, it will apply the trust fund to other charities as nearly as possible like that specifically mentioned in the will. Matter of MacDowell (N. Y.) 1917E-853.

## 3. TERMS AND VALIDITY OF GIFT.

## a. In General.

- 10. Form of Creation—Use of Term "Charity." The employment of the word "charity" or "charitable" in a deed of trust is not essential to the creation of a valid charity. Thorp v. Lund (Mass.) 1918B—1204.
- 11. A testamentary gift of the income or property to maintain a home for refined, educated, Protestant gentlewomen

1916C-1918B.

whose means are small and whose home is made unhappy by having to live with relatives who think them in the way, ex-pressing a preference of benefits to the testatrix's sister, her named cousins and their lineal descendants forever, and to certain named friends, is a gift to a charitable use within N. Y. Personal Property Law, § 12, providing that no gift to charitable uses shall be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiaries, and that if it names a trustee the property shall vest in him, and that if no trustee is named it shall vest in the supreme court with power to control and administer it, as a public charity need have no special reference to the poor, and its character as such was not impaired by the fact that the inmates of the home were required to pay board, or by the inadequacy of the trust fund. Matter of MacDowell (N. Y.) 1917E-853.

(Annotated.)

- 12. Construction in Favor of Gift. A gift for charitable uses will be effected if it is consistent with the law, and for that purpose the most liberal rules permissible will be applied, and a charitable trust will often be sustained, where a private trust would fail. Wilson v. First National Bank (Iowa) 1916D-481.
- 13. Necessity for Institution. A gift for the foundation of a manual training school is not invalid on the ground that such a charity has been superseded by the adoption of manual training in the public schools; it not being open to the parties or to the court to inquire whether charity in that field of education has been rendered unnecessary in that manner. Wilson v. First National Bank (Iowa) 1916D-481.
- 14. Construction in Favor of Gift. All doubts will be resolved in favor of a charitable trust. Wilson v. First National Eank (Iowa) 1916D-481.

## b. Certainty.

- 15. Designation of Beneficiaries. A charitable trust is not invalid because of indefiniteness and is sufficient if the benefited class is designated in a general way, leaving the practical application of the gift to be made by the trustee. Wilson v. First National Bank (Iowa) 1916D-481.
- 16. Definiteness as to Object. A will recited testator's "desire to establish at I. an industrial training school for children and a library building to be used by the people of I.," and then named trustees who should administer the charity until a corporation could be organized to execute the trust, and also provided for the construction of a building for the school by the trustees, and that the school should be open to all persons fitted for the training

- offered, without regard to sex, race, color, etc. Held, that the trust was not invalid as a charitable trust on the ground of indefiniteness. Wilson v. First National Bank (Iowa) 1916D-481.
- 17. If the general nature and purpose of the charity is expressed by an instrument creating a charitable trust, or is reasonably ascertainable, the details of its practical administration may be left to the trustee, and need not be provided for in the instrument. Wilson v. First National Bank (Iowa) 1916D-481.

## c. Rule Against Perpetuities.

- 18. Charitable Gift Indefinite as to Time. The fact that a will, which devised funds in trust to establish a school, and provided that a corporation should be organized to take over the stock, did not limit the time in which the corporation must be organized cannot make the gift invalid under the statute against perpetuities, where testator bound the trustees by contract to organize the corporation within a year after his death, and the will reaffirmed such contract, since the trustees could be compelled to comply with such obligations. Wilson v. First National Bank (Iowa) 1916D-481.
- 19. Where, under a will giving a fund in trust for the establishment of a school, the fund was not available until the death of testator's brother and sister, the trustees or the corporation directed to be organized to take over the trust were not negligent in not attempting to establish the school before such means were available, so that it cannot be claimed that the fund would not vest in the corporation, under the statute against perpetuities, on the ground that there is no school in existence. Wilson v. First National Bank (Iowa) 1916D-481.

## d. Inadequacy.

20. A charitable gift is not invalid merely because it cannot take effect as fully as the donor intended, but will be effected so far as possible, and is not necessarily void because it contemplates contributions from others which may never be made, so that it cannot be said that the gift of \$30,000 for the founding of a manual training school and public library is so inadequate in amount as to render the gift invalid as a charitable trust. Wilson v. First National Bank (Iowa) 1916D-481. (Annotated.)

## Note.

Inadequacy of gift to accomplish purpose of charitable trust as affecting its validity. 1916D-487.

## e. Construction.

21. Power of Appointment—Propriety of Exercise—Beneficiary Designated Gen-

A trustee's proposed appointment to the Ole Bull fund committee of a fund appointed to a "national or philanthropic purpose in Norway, associated with the name of . . . Ole Bull" is valid, where it appears that such committee was established by royal charter in Norway to administer the surplus moneys collected for the Ole Bull monument and not needed for that purpose, and such augmentations as might come to it by gift or otherwise, the income to be applied to the distribution of donations to the younger musicians, actors, and actresses holding engagements with the National Stage of Bergen, which was founded by Ole Bull and is devoted to the fostering of a national and patriotic spirit. Thorp v. Lund (Mass.) 1918B-1204.

22. Such appointment of the fund was not to a public charity or for a "national or philanthropic purpose" within the terms of the deed of trust specifying that the fund should be devoted to such purpose. Thorp v. Lund (Mass.) 1918B-1204.

- 23. Nature of Purpose as Charitable—Circumstances Considered. In determining whether a deed of trust providing that a fund should be devoted to some national or philanthropic purposes associated with the name of the settlor's husband created a charitable trust, the circumstances of the parties and their relation to the subject matter should be considered. Thorp v. Lund (Mass.) 1918B—1204.
- 24. Construction in Favor of Charity. In view of Mass. Const. pt. 2, c. 5, § 2, making it the duty of magistrates to encourage public and private charity, a gift dictated by a benevolent purpose is to be liberally construed, and, if reasonably possible, upheld as a valid charity rather than declared void. Thorp v. Lund (Mass.) 1918B-1204.
- 25. Construction—"Or" Construed as "And." The rule in the construction of instruments establishing charities that the word "or" will be construed to mean "and" when this seems necessary to effectuate the meaning intended applies especially where one word expresses a charitable use and the other, if standing alone, might not indicate a strict charity, in which case the dominant word is taken to be the one pointing to a charity, and the indefinite word is narrowed by its context or used as a synonym with it. Thorp v. Lund (Mass.) 1918B-1204.

# 4. LIABILITY OF CHARITABLE INSTITUTION FOR TORT.

26. Liability for Acts of Employees. Though a hospital is a "charitable institution" and not within the rule respondent superior, it nevertheless is liable for injuries to patients resulting from its negligence in the selection of its agents and

servants. Hoke v. Glenn (N. Car.) 1916E-250. (Annotated.)

#### CHARTER.

See Corporations.
Construction of railroad charter, see Bailroads, 1.

## CHATTEL MORTGAGES.

- 1. Nature, Form, and Validity, 167.
- 2. Consideration, 167.
- 3. Filing or Recording, 168.
- 4. Lien, 168.
  - a. What is Embraced, 168.b. Waiver and Discharge, 169.
- 5. Default and Foreclosure, 170.
  - a. In General. 170.
- b. Rights of Junior Mortgagee, 170.
   6. Rights and Duties of Mortgagor and Mortgagee as to Third Parties, 170.

Holder not entitled to excess over debt, see Bankruptcy, 1, 2.

## 1. NATURE, FORM, AND VALIDITY.

- 1. Reservation to Mortagor of Right to Use. A mortgage on personalty not necessarily consumable in its use, where possession and right to use the property are reserved in the grantor, will not be held invalid, unless it appears from the instrument as a whole that the reservation is inconsistent with the purposes of the instrument and is for the general benefit and advantage of the grantor. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.
- 2. Mortgage on Stock of Merchandise. A mortgage on a stock of merchandise, with possession and right to continue business reserved to the mortgagor, is fraudulent upon its face and void. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.
- 3. Validity as to Creditors. A mortgage by a corporation of its real estate, plant, equipment, stock, bonds, leases, together with the issues and profits, reserving in the mortgagor the right of possession until default and possession taken by the mortgagee, does not indicate that the reservations are made for the benefit of the mortgagor and to cover up the property from other creditors, and is not invalid as to such creditors. Morgan v. Dayton, Coal, etc. Co. (Tenn.) 1917E-42.
- 4. Duress. Where the mortgagee, after two demands for payment of a running account, told the debtor that he was prepared to close him up unless he signed a mortgage, whereupon the debtor elected to do so, the mortgage was not invalid as having been executed under duress. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D—1224.

## 2. CONSIDERATION.

5. Pre-existing Debt. A pre-existing debt is a sufficient consideration for a

parol chattel mortgage. Brown v. Mitchell (N. Car.) 1917B-933.

(Annotated.)

## 3. FILING OR RECORDING.

- 6. Under Utah Comp. Laws 1907, §§ 150, 2473, postponing the rights of a chattel mortgagee to those of a creditor of the mortgagor who extended credit subsequently to the execution, but previous to the filing of the mortgage, where plaintiff, after filing, secured the assignment of a claim against the mortgagor which had accrued previous to the filing, plaintiff acquired all rights of such mortgagor therein, including the right to invalidate the mortgage. Volker Lumber Co. v. Utah, etc. Lumber Co. (Utah) 1917D-1158.
- (Annotated.)
  7. A chattel mortgage which is not filed as required is valid against all persons having claims against the mortgager which accrued previous to the execution and delivery of the mortgage, unless such persons acquire a lien by attachment or otherwise against the property before the mortgage is filed as provided; since a debtor may prefer his creditors. Volker Lumber Co. Utah, etc. Lumber Co. (Utah) 1917D—1158. (Annotated.)
- 8. Where a chattel mortgage is filed as provided, it becomes effective as against all persons extending credit to the mortgagor after such filing, unless such persons can invalidate it on the ground of fraud or other legal basis of attack. Volker Lumber Co. v. Utah, etc. Lumber Co. (Utah) 1917D-1158. (Annotated.)
- 9. Under Utah Comp. Laws 1907, § 150, providing that, unless the possession of personal property be given to, and retained by, the mortgagee, no mortgage thereof shall be valid as against the rights and interests of third persons, unless the mortgage or a copy thereof be filed in the office of the recorder of the county where the mortgagor resides, etc., and under section 2473, providing that retention of possession of goods by their vendor shall be conclusive evidence of fraud as against creditors, including all persons who shall be creditors of the vendor at any time while such goods shall remain under his control, a chattel mortgage is invalid as against all persons who without notice or knowledge of its existence give credit to the mortgagor at any time subsequent to execution and previous to filing. Volker Lumber Co. v. Utah, etc. Lumber Co. (Utah) 1917D-1158.
- (Annotated.)

  10. A bona fide purchaser of offspring after its natural separation from the mother is not bound by the registration of a mortgage upon the dam, but takes free of that incumbrance. McCarver v. Griffin (Ala.) 1917C-1172. (Annotated.)

- 11. Where a chattel mortgage was unenforceable at law because of the mortgagee's failure to take possession of the property or record his mortgage within five days, as required by R. I. Gen. Laws, 1909, c. 258, \$ 10, and the mortgager after the mortgage was recorded sold the property to complainant, who took with notice of the facts and the mortgagee's rights in the premises, complainant is in particeps criminis with the mortgagor in seeking by such sale to defeat the mortgage, and is therefore not entitled to a decree in equity restraining the mortgagee from taking possession of the property and from foreclosing or treating the mortgage as valid. Howard v. McPhail (R. I.) 1917A-186.
- (Annotated.)

  12. Where the owner of certain personal property executed a mortgage thereon, but the property was neither delivered to the mortgagee nor the mortgage recorded within five days, as required by R. I. Gen. Laws 1909, c. 258, § 10, a buyer of the mortgaged property from the mortgagor after the mortgage was recorded and with notice of the agreement of the seller to create a valid mortgage on the property will be regarded in equity as a trustee for the mortgagee to the extent of the latter's interest under the mortgage. Howard v. McPhail (R. I.) 1917A-186.
- (Annotated.)

  13. Failure to Record Within Statutory
  Time. A buyer of personal property subject to a mortgage which had not been recorded within the statutory period, who
  buys after the mortgage is recorded and
  with notice of the mortgage, cannot acquire title freed from the lien of the
  mortgage by estoppel. Howard v. McPhail (R. I.) 1917A-186. (Annotated.)
- 14. Failure to Record Effect as Between Parties. Under the express provisions of R. I. Gen. Laws 1909, c. 258, § 10, requiring that chattel mortgages shall be recorded within five days or possession of the property delivered to the mortgage, such a mortgage is valid as between the parties, though neither of such requirements is complied with. Howard v. Mc-Phail (R. I.) 1917A-186.

## Note.

Validity of chattel mortgage not recorded as required by statute as against person taking conveyance subsequent to actual recording. 1917A-196.

## 4. LIEN.

## a. What is Embraced.

15. Construction of Mortgage of Income. Under a mortgage by a going concern of its real estate, plant, and establishment, together with its income, issues, and profits, choses in action, etc., reserving a

right of user and enjoyment in the grantor until default, and giving the mortgagee the right to enter and take charge of the plant and operate it to discharge the mortgage debt, the income, issues, profits, etc., do not pass under the lien of the mortgage until default and possession thereunder by the trustee, and the lien then only attaches to such income, issues, etc., as arise after default and possession thus taken. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

- 16. Increase. As between mortgager and mortgagee, offspring, regardless of its age and development, continues subject to the mortgage incumbrance. McCarver v. Griffin (Ala.) 1917C-1172. (Annotated.)
- 17. The offspring of female animals when they come into visible existence and are endowed with independent life rest at birth under the same title or ownership as the dam, and are subject to any existing mortgage incumbrance upon her. McCarver v. Griffin (Ala.) 1917C-1172. (Annotated.)
- 18. In detinue by the mortgagee of a mare for a colt born during the life of the incumbrance, which plaintiff had bought from the mortgagor after separation from the mother, the evidence is held to charge defendant with knowledge that the colt was subject to the mortgage on the dam. McCarver v. Griffin (Ala.) 1917C-1172.

  (Annotated.)

19. Additions to Stock of Goods. As between the parties, a mortgage upon goods which authorizes the mortgagor to sell them, and with the proceeds of such sale to purchase other goods to take their place.

is valid. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D-1224. (Annotated.)

20. The intention of the parties as gathered from the language of all parts of the agreement, considered in relation to each other, and interpreted with reference to the situation of the parties, and their object, always prevails, unless some established principle of law or sound public policy would thereby be violated; and hence under a chattel mortgage providing that the mortgagor might sell in the or-dinary course of business, replacing the stock with new stock and keeping it to its present value, and that it covered all after-acquired property added to the business in any manner or during the existence of the mortgage, the mortgagee did not rely or intend to rely upon the agreement to sell from the stock and replace it with new stock, and, in view of what interested third parties might ascertain from inspection of the mortgage, he could take only such goods as he showed title to, which were in existence at the date of the mortgage or substituted for articles sold by purchase from the proceeds, as to hold otherwise would be a violation of an established principle of law and sound public policy. Williams v. Noyes, etc. Mfg. Co. (Me.), 1916D-1224. (Annotated.)

- 21. Additions to Stock of Goods. A printed provision of a chattel mortgage covering a stock of goods, which was written on an ordinary farm mortgage, that call increase from said stock of whatever kind or nature, the above-described stock being kept in my possession on .... Section No. .... Township No. .... Range No. ...," could not be construed to cover additions to or substitutions in the stock of goods. In re Thompson (Iowa) 1916D-1210. (Annotated.)
- 22. At common law a chattel mortgage only included property which was in existence and owned by the mortgagor when the mortgage was executed, unless he had a potential ownership therein at the time, as in case of crops, wool upon sheep, etc.; but, in absence of express provisions to that effect, a mortgage of a stock of goods would not cover and include other goods subsequently purchased from the trustees of the stock mortgaged, or otherwise. In re Thompson (Iowa) 1916D-1210.

(Annotated.)

23. While the increase of chattels mortgaged need not have a separate identity at the time the chattels and increase are mortgaged, in order to be covered by the mortgage, it must be at least the product or growth of property which at the time had a corporeal existence, and in which the mortgagor had a present interest. In re Thompson (Iowa) 1916D-1210.

(Annotated.)

24. Confusion of Goods. Where, after a stock of goods was mortgaged, the mortgager openly sold from the goods in the same town in which the mortgagee lived, and replaced them with other goods, so that the subsequently acquired goods were mingled with the mortgaged property, apparently with the mortgagee's consent, each party would be entitled to such proportionate share of the whole mass as the property to which he was entitled bore te the whole mass. In re Thompson (Iowa) 1916D-1210. (Annotated.)

#### Notes.

Chattel mortgage on stock of mercantile goods as covering additions thereto. 1916D-1215.

Right of chattel mortgagee or conditional vendor to accession to property mortgaged or sold. 1917C-1170.

Mortgage on animals as including increase. 1917C-1173.

## b. Waiver and Discharge.

25. Levy of Attachment. The levy of an attachment by a chattel mortgagee on the mortgaged property as the property of

the mortgager does not waive the title of the mortgagee, or estop him from maintaining an action of detinue to recover the mortgaged property, since, by the direct provisions of Ala. Code 1907, § 4091, a chattel mortgager has an equity in the mortgaged property subject to levy. Ex parte Logan (Ala.) 1916C-405.

(Annotated.)

#### Note.

Waiver of chattel mortgage lien by attachment. 1916C-408.

## 5. DEFAULT AND FORECLOSURE.

#### a. In General.

26. Remedies of Mortgagee. A chattel mortgagee has three several or concurrent remedies against the mortgagor: An action at law to recover the debt; an appropriate action to recover possession of the property; and a foreclosure of the mortgage, and sale of the property. Ex parte Logan (Ala.) 1916C-405.

27. Waiver of Fraud or Duress. Where the mortgagor for about three years thereafter carried on his business with the mortgage on his stock, he thereby waived any right to set up fraud or duress in the execution of the mortgage. Williams v. Noyes, etc. Mfg. Co. (Me.) 1916D-1224.

## b. Rights of Junior Mortgagee.

28. Price in Excess of Debt. Where personal property, subject to a mortgage to secure rent, was sold by a receiver under foreclosure and bid in by the lessor at the full amount of the mortgage, which exceeded the amount of the rent due, the lessor is liable to a subsequent chattel mortgagee for the overplus, and the sale will not, in an analogy to sales of real property, be set aside on the ground that the purchase price exceeded the value of the goods, for sales of personalty are not ordinarily subject to redemption. Northern Brewery Co. v. Princess Hotel (Ore.) 1917C-621.

## RIGHTS AND DUTIES OF MORT-GAGOR AND MORTGAGEE AS TO THIRD PARTIES.

29. Effect of Settlement With Mortgagor. Where by statute the mortgagor in possession of a horse may sue the railroad company whose train killed it and the company compromises with the mortgagor, it is not liable for a second payment for the value of the horse to the mortgagee, since the law contemplates but one settlement or satisfaction for the same injury. Chicago, etc. R. Co. v. Earl (Ark.) 1917D-552.

30. In such case where a mortgaged horse is killed by a railway company, the

mortgagor then in possession may maintain an action against the company for the killing of the horse, under Kirby's Ark. Dig. § 6776, providing that any person who has a special ownership in property killed by a train may sue the company for damages for such killing. Chicago, etc. R. Co. v. Earl (Ark.) 1917D-552. (Annotated.)

- 31. Right of Action Against Third Person. Although the possession by a mortgagor of personal property is permissive only, since Kirby's Ark. Dig. § 5410, entitles the mortgagee to possession, the mortgagor has such a special ownership and such duties in regard to the mortgaged property that he can maintain an action for negligent destruction or for conversion of the property. Chicago, etc. R. Co. v. Earl (Ark.) 1917D-552. (Annotated.)
- 32. Duty to Protect Property. Although Kirby's Ark. Dig. § 5396, makes the filing of a mortgage for record notice to all persons of its existence, and section 5410 provides that the mortgagee shall have the legal title thereto and the right of possession, the mortgagor in possession of mortgaged personal property has the special interest of a bailee, is under the duty of protecting the property, and is liable to the mortgagee if he fails to protect it. Chicago, etc. R. Co. v. Earl (Ark.) 1917D-552.

#### Note.

Right of action of chattel mortgagor against third person for injury, etc., to chattels. 1917D-554.

#### CHATTELS.

Meaning, see Executors and Administrators, 2.

#### CHAUFFEURS.

Liability of owner for driver's acts, see Automobiles, 23-26.

#### CHEATS.

See False Pretenses.

#### CHECKS.

1. Nature and Effect of Instrument, 171.

2. Presentment for Payment, 171.

3. Revocation and Countermand of Payment, 171.

4. Certified Checks, 171.

Rights and Liabilities of Indorsers, 172.
 See Banks and Banking, 44.

Check as payment, see Escrow, 3, 7. Worthless check, indorser defrauded, see

False Pretenses, 3, 4.
Finding in suit to cancel as conclusive in action on check, see Judgments, 65.
Indorser's liability on pledged check, see

Pledge, 1.

## 1. NATURE AND EFFECT OF INSTRU-MENT.

1. Negotiability. A "check" is a negotiable instrument payable on demand or at sight without days of grace, and is not an "inland bill of exchange," or less a check because it is postdated. Merchants, etc. Bank v. New National Bank (Ark.) 1917A-944.

## 2. PRESENTMENT FOR PAYMENT.

- 2. Place of Presentment. Under the Negotiable Instruments Law (N. Y. Consol. Laws, c. 38), § 133, declaring that, where no place of payment is specified, presentment for payment is properly made at the place of business of the one to make payment, a check is properly presented for payment at the banking house of the institution on which it is drawn. Columbia-Knickerbocker Trust Co. v. Miller (N. Y.) 1917A-348.
- 3. Check not Promptly Presented. Rem. & Bal. Wash. Code, § 3444, provides that, where an instrument payable on demand is negotiated unreasonably long after issue, the holder is not a holder in due course. Section 3575 provides that a "check" is a bill of exchange drawn on a bank, payable on demand, and that, except as otherwise provided, the provisions of the Negotiable Instruments Act applicable to a bill of exchange payable on demand apply to a check. Section 3576 provides that a check must be presented for payment within a reasonable time after issue, or the drawer will be discharged to the extent of the loss caused by the delay. A check was given by the maker to the indorser as an advance payment for corporate stock sold by the indorser to the maker; the understanding being that the check should not be negotiated until delivery of the stock. The indorser five weeks thereafter pledged the check with plaintiff bank as security for a pre-existing debt and a further loan. It is held that the bank was not thereby precluded from being a holder in due course, since, by section 3576, the fact that the instrument was stale when taken discharged the maker from liability only to the extent of the loss caused by the delay, of which there had been none, while, assuming that the bank was chargeable with knowledge of all the facts existing at the time of taking the check, it was merely chargeable with knowledge that such check was given in connection with an executory contract for the purchase of stock to be delivered 60 days from the date of the check, which time had still 30 days to run before breach, by failure to deliver the stock, could occur, while knowledge by the indorsee of a negotiable instrument that it has been given in consideration of an executory contract or agreement will not deprive such indorsee of his

character as bona fide holder in due course, unless prior to the assignment he had notice of some breach of the executory contract. German-American Bank v. Wright (Wash.) 1917D-381.

- 4. Presentment Through Clearing House. Under N. Y. Negotiable Instruments Law, § 132, providing that presentment for payment must be made by some person authorized, a bank to whom a check was indorsed may present it to the drawee bank through clearing house. Columbia-Knickerbocker Trust Co. v. Miller (N. Y.) 1917A-
- 5. Delay in Presenting. The failure to present a check within a reasonable time does not exonerate the drawer unless there has been a loss to him thereby. Baldwin's Bank v. Smith (N. Y.) 1917A-500.
- 6. Failure to Present Pledged Check. Where a bank sues the maker and indorser of a check pledged to it by such indorser, evidence is properly rejected as to whether it was customary or in keeping with prudent banking to hold a check taken as collateral for 20 days before sending it through for collection; the material point, under Rem. & Bal. Wash. Code, § 3576, providing that a check must be presented within reasonable time after its issue, or the maker will be discharged to the extent of loss caused by the delay, being whether loss was caused by any de-lay. German-American Bank v. Wright (Wash.) 1917D-381.
- 7. Effect of Acceptance. The "acceptance" of a check contemplates a promise on the part of the drawee to pay same, and is essentially different from the payment thereof. Elyria Savings, etc. Co. v. Walker Bin Co. (Ohio) 1917D-1055.

(Annotated.)

#### AND 3. REVOCATION COUNTER-

MAND OF PAYMENT.

8. Right to Stop Payment of Certified Check. After a bank has certified a check, thereby implying that it is drawn upon sufficient funds in its hands set apart for its satisfaction, and that they will be so applied when it is presented for payment, the drawer cannot stop payment on it, and the mere fact that he notifies the bank not to pay it does not release the bank from its liability thereon. Merchants, etc. Bank v. New National Bank (Ark.) 1917A-944. (Annotated.)

Note.

Right of drawer to stop payment of certified check. 1917A-947.

## 4. CERTIFIED CHECKS.

9. Effect of Certification. Where the drawer of a check, payable November 1st, on the 29th day of June causes the cashier of the drawee bank to note thereon "CerDIGEST. 1916C—1918B.

tified for \$2,000. 6/29/1911. B. C. Powell"—the certification becomes an acknowledgment by the bank that the drawer will have funds on deposit which it will pay to the holder on presentation after November 1st, the word "certify" meaning an absolute promise on the part of the bank to pay the check on presentation after November 1st. Merchants, etc. Bank v. New National Bank (Ark.) 1917A-944.

10. Rights of Bona Fide Holder. a bank certified a postdated check of a depositor, which was delivered to a third person, to be by him delivered to the payee after its date, on his compliance with the terms of a contract between himself and the maker, and it was delivered to the payee, although he had not complied with his part of the contract, a bank which credited him with the amount which he drew out before it had notice of any fraud in the transaction, or that the drawee bank had been enjoined from paying it, is a bona fide holder for value in the usual course of business without notice, and may enforce payment as against the drawee bank. Merchants, etc. Bank v. New National Bank (Ark.) 1917A-944.

11. Liability of Bank to Holder. By force of the provisions of Ohio General Code, § 8294, General Code, there is no liability on the part of a bank to the holder of a check unless and until it accepts or certifies the check. Elyria Savings, etc. Co. v. Walker Bin Co. (Ohio) 1917D-1055.

## 5. RIGHTS AND LIABILITIES OF INDORSERS.

12. Effect of Secret Agreement. Where defendant draws a check to the order of his codefendant without any indication on its face that it is not to be negotiated, it not even being postdated, the secret agreement between the parties being that it should not be negotiated until the payee delivers to the maker certain stock, such agreement will not defeat the recovery of a bank, with which the indorser pledges the check as collateral for a new loan and for an antecedent debt, since he who makes a loss possible should suffer the loss. German-American Bank v. Wright (Wash.) 1917D-381.

13. Clearing House Rules. The liability of an indorser cannot be affected by the fact that the check was sent through the clearing house; and, where the drawee refused payment, he cannot escape liability on the ground that, under the clearing house rules, the drawee was not privileged to do so. Columbia-Knickerbocker Trust Co. v. Miller (N. Y.) 1917A-348

(Annotated.)

14. Payment on Forged Instrument. Where a check is paid by a bank, which is the drawee thereof, on a forged indorse-

ment, and there is stamped upon the check "Paid," together with the date of the payment and the name of the bank, and the check is charged to the account of the drawer, this is not an acceptance of the check within the meaning of Ohio General Code, § 8294, and does not create a liability against the bank in favor of the true holder or payee. Elyria Savings, etc. Co. v. Walker Bin Co. (Ohio) 1917D-1055. (Annotated.)

#### Note.

Liability of bank to true holder or payee of check paid on forged indorsement. 1917D-1058.

#### CHEWING TOBACCO.

Liability of manufacturer for injury to consumer, see Negligence, 2.

## CHILD.

"Child" does not include bastard, see Executions, 4.

#### CHILDREN.

See Adoption of Children; Infants; Parent and Child.

As including posthumous child, see Wills,

#### CHINESE.

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## CHIROPRACTIC.

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#### CHIROPRACTOR.

See Physicians and Surgeons, 1, 2.

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## CHRISTIAN NAME.

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#### CHURCHES.

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## CIRCUMSTANTIAL EVIDENCE.

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## CITIES.

See Municipal Corporations.

## CITIZEN.

Not including corporation, see Corporations, 2.

#### CITIZENSHIP.

Expatriation by marriage, see Aliens, 15, 16.

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## CITY CHARTER.

See Municipal Corporations, 1-17.

## CITY WARRANTS.

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## CIVIL ACTION.

See Actions and Proceedings.

## CIVIL CONSPIRACY.

See Conspiracy, 13-20.

## CIVIL DAMAGE ACTS.

Participation of officers as defense to liability for mob violence, see Mobs, 1.

- 1. Liability for Death from Intoxication. In an action against a liquor dealer for a death caused by intoxication, evidence considered and held to warrant finding that defendant sold liquors to decedent while the latter was intoxicated. White v. State (Ind.) 1917B-527. (Annotated.)
- 2. In an action against a liquor dealer for a death caused by intoxication, evidence considered and held to justify finding that decedent's intoxication was the cause of his physical disability and death. White v. State (Ind.) 1917B-527.

(Annotated.)

- 3. Instructions Sustained. In an action against saloon keepers and their surety for injuries inflicted by a drunken father on his daughter, instructions submitting to the jury four essentials of defendants' liability, that plaintiff was assaulted and injured, that the father was intoxicated, that such intoxication was caused by the defendants, and that the father was in the habit of using liquor, are proper, although on some of such elements the plaintiff's evidence was undisputed, since the credibility of witnesses is for the jury, who may disregard any testimony. Yonkus v. McKay (Mich.) 1917E-458.
- 4. Evidence. In an action against saloon keepers and their surety for injuries inflicted by a drunken father on his daughter, evidence that on the day of the assault such father had no money with which to purchase liquor is properly admitted as bearing on the issue whether at the time of the assault he was in fact intoxicated. Yonkus v. McKay (Mich.) 1917E-458.
- 5. Complaint Sufficient. Where, in an action against a liquor dealer for a death

caused by intoxication, the complaint alleged that the intoxication incapacitated the decedent to manage his horses properly, that because of such incapacity they became unmanageable, and that, while decedent was intoxicated and the team in such state, he leaned out over the dashboard, and one of the horses, irritated by his acts, kicked him on the head and face, inflicting injuries from which he died, such complaint sufficiently avers connection between decedent's intoxication and his injury. White v. State (Ind.) 1917B-527.

6. Civil Damage Act—Evidence Admissible—Possession of Money by Alleged Drunkard. In an action against saloon keepers and their surety to recover for injuries inflicted upon plaintiff by her father when drunk, testimony tending to show that, on the day of the assault, such father had no money to buy liquor is admissible to impeach the father's testimony that he had money, such matter being material to the issues. Yonkus v. McKay (Mich.) 1917E-458.

#### Note.

Damages for death by intoxication. 1917B-530.

#### CIVIL RIGHTS.

1. Who is "Colored" Person. In view of S. Car. Const. art. 3, § 33, declaring void the marriage of a white person with a negro or mulatto having one-eighth or more negro blood, the child of a union of a white person and one having less than one-eighth negro blood is entitled to exercise all the legal rights of a white man, except those arising from a proper classification, when equal accommodations are afforded. Tucker v. Blease (S. Car.) 1916C-796.

#### CIVIL SERVICE.

1. Application to Policemen. The civil service provisions of section 1238 of the Kan. Gen. Stat. of 1909, relating to commission government in cities of the first class, must be restricted to the employment of subordinates and employees, and cannot apply to officers within the contemplation of section 2, of art. 15, of the Kan. state Constitution. Haney v. Cofran (Kan.) 1917B-660.

## CIVIL WAR VETERANS.

See Pensions.

## CLAIM AND DELIVERY.

See Replevin.

## CLAIM OF LIEN.

Notice, filing, service, see Mechanics' Liens, 18-28.

## CLASSIFICATION.

Of cities, see Municipal Corporations, 8,9.

#### CLASS LEGISLATION.

See Constitutional Law, 63-70, 87.

## CLERICAL ERRORS.

Disregard, in statute, see Statutes, 97.

#### CLOUD ON TITLE.

Injunction to prevent, see Injunctions, 6. Sale of curtesy interest as effecting, see Judicial Sales, 5.

#### CLUBS.

See Societies and Clubs.

## COAL

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#### COAL HOLE.

Injury to pedestrian, see Negligence, 29-

### COAL MINES.

See Mines and Minerals.

#### COASTING IN STREET.

Contributory negligence of child, see Negligence, 87.

## CODES.

Codification, effect on titles of statutes, see Statutes, 4.

Codification, effect on construction, see Statutes, 81.

Revival of will by, see Wills, 111, 112. Construction of codicils, see Wills, 169,

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## COLLATERAL ATTACK.

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On judgment, see Quieting Title, 12. On order of Railroad Commission, see Railroads, 36.

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Agreement for commission not champer, tous, see Champerty and Maintenance.

## COLLEGES AND UNIVERSITIES.

County bonds to aid state university, see Countles, 18.

#### COLLISION.

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Of ship with bridge, liability, see Bridges, 1-4.

Presumption of negligence from accident, see Carriers of Passengers, 62.

## COLLOQUIUM.

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#### COLORED PERSONS.

Who are, see Civil Rights, 1.

Race discrimination, see Constitutional

Law, 64, 111, 125. Validity of law requiring white signers to license application, see Intoxicating Liquors, 44.

Charge of placing negro over white girls, see Libel and Slander, 17.

Ordinances segregating races, see Municipal Corporations, 59-71. Separation of races, see Schools, 39.

## Note.

Separation of white and colored pupils, for purposes of education. 1916C-806.

### COLOR OF TITLE.

See Adverse Possession, 19, 20.

COMBINATIONS IN RESTRAINT OF TRADE. See Monopolies.

## COMITY.

See Courts; Extradition; Foreign Laws; Judgments.

Adoption proceedings of sister state, see Adoption of Children, 2, 4.

## COMMENT ON PUBLIC MATTERS.

Privileged communications, see Libel and Slander, 63-65,

## COMMERCE.

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#### COMMERCIAL PAPER.

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#### COMMISSION FORM OF GOVERN-MENT.

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## COMMISSION MERCHANTS.

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#### COMMISSIONS.

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Of executors and administrators, see Executors and Administrators, 62-64.
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## COMMON LAW.

1. In General.

2. To What Extent in Force.

3. In Relation to Crimes.

Right of action how abolished, see Actions and Proceedings, 3.

Liability of bastard's father for support, see Bastardy, 9.

Application of eminent domain, see Eminent Domain, 5.

Presumption as to common law of sister state, see Evidence, 143-145.

Common law indictment concluding against statute, see Indictments and Informations, 4.

Common law survivorship, see Joint Tenants, 1.

Defense of privilege, see Libel and Slander, 75.

Declaration for defamation, see Libel and Slander, 88.

Conspiracy to raise prices indictable, see Monopolies. 8.

Effect on duties of sheriff, see Sheriffs and Constables, 1.

As inapplicable to attestation of wills, see Wills, 20.

Applicability to revocation of will, see Wills, 104.

#### 1. IN GENERAL.

1. Nature and Scope. The common law consists of those principles and rules of action which have been from time to time adopted and acted on by the courts when administering justice, in cases not governed by any written law arising out of private disputes of individuals. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880.

#### Note.

What the "common law" includes. 1918A-968.

## 2. TO WHAT EXTENT IN FORCE.

2. Extent of Adoption. The common law is in force in this state, except where it has been modified by competent govern-

mental authority. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971.

(Annotated.)

3. What is Included. Burns' Ind. Ann. St. 1914, § 236, adopting all rules of the common law of England in force in the year 1607, does not bind the court to follow an English decision within the period named if such decision is unreasonable and unsuitable to American institutions, as the theory of the adopted system is that the law consists, not in the actual rules enforced by the decisions of the courts, but only in the principles from which these rules flow. Ketelsen v. Stilz (Ind.) 1918A-965. (Annotated.)

## Note.

Extent of adoption of common law. 1918A-981.

## 3. IN RELATION TO CRIMES.

- 4. Crimes. Mont. Rev. Codes, § 8275, denouncing as criminal contempt false or grossly inaccurate reports of the proceedings of a court, when construed in the light of the constitutional guaranty of freedom of speech, does not denounce as a crime every false or grossly inaccurate report concerning causes finally determined, when no public interest can suffer as a consequence of the publication, although such a report constituted a contempt at common law, and where the due administration of the law is not impeded, and a publication to the effect that the relator's first case was thrown out of court on a technicality, and his second case, by which he sought to oust a county commissioner from office for misappropriation of public funds, was thrown out, and characterized by the court as a "dirty mess," and that if a man steals cattle he goes to the penitentiary, while if the county com-missioners take county money that is simply "a dirty mess," did not constitute contempt within the statute. State v. District Court (Mont.) 1918A-985.
- (Annotated.)

  5. Extent ef Adoption. The common law, as far as applicable, is in force by virtue of Mont. Rev. Codes, § 3552, declaring that the common law, so far as not repugnant to or inconsistent with the federal or state Constitution or laws of the state, is the rule of decision in all the courts of the state, and the law of contempt as understood in England at the time of the Revolution is not in force in the state, since before the organization of the territory the law in England had been modified by various acts of Parliament, by decisions of the courts, and by disuse. State v. District Court (Mont.) 1918A-

Note.

Adoption of common law in relation to crimes. 1918A-990.

COMMON LAW LIABILITY.

Assumption of, see Carriers of Goods, 3.

COMMON LAW MARRIAGE. See Marriage, 6-10.

COMMON NUISANCE.

Statutory definition, see Nuisances, 7.

COMMON STOCK.

See Corporations, 59.

COMMONWEALTH ATTORNEYS.

See Prosecuting Attorneys.

COMMUNICATION.

As including acts, see Witnesses, 19.

COMMUNISTIC SOCIETY.

See Religious Societies, 1-4.

COMMUTATION OF AWARD.

Under Workmen's Compensation Act, see Master and Servant, 280.

#### COMMUTE.

As used in Workmen's Compensation Act, see Master and Servant, 280.

## COMPANIES.

See Corporations; Partnerships.

#### COMPANY.

Defined, see Trademarks and Trade-names, 6.

COMPARISON OF TYPEWRITING. See Forgery, 3.

## COMPENSATION.

Of attorneys, see Attorneys, 17-35.

Of brokers, see Brokers, 3.

Of corporate officers, see Corporations, 54, 55.

For property taken for public use, see Eminent Domain, 29-55.

Of executors and administrators, see Executors and Administrators, 62-64.

Of guardian, see Guardian and Ward, 29, 30.

Of judges, see Judges, 3-8.

Of servants, see Master and Servant, 6-7. Under Workmen's Compensation Act, see Master and Servant, 270-283.

Of city officers, see Municipal Corporations, 135, 136.

Of city firemen, see Municipal Corporations, 161-163.

Of sheriffs, see Sheriffs and Constables, 12, 13.

Of abutting owner for closing street, see Streets and Highways, 4.

Of cotenant for selling the common property, see Tenants in Common, 10.

## COMPETENCY OF WITNESSES.

See Witnesses, 1-46.

## COMPETITION.

See Monopolies; Trademarks and Tradenames.

Right of partner to compete with firm, see Partnership, 16, 17.

#### COMPETITIVE BIDDING.

On school building, see Schools, 10.

#### COMPLAINT.

See Pleading, 4-6.
To magistrate, when privileged, see Libel and Slander, 43-44.

## COMPLETED.

Meaning, see Taxation, 78, 79.

## COMPOSITION OF CREDITORS.

See Accord and Satisfaction; Assignments for Benefit of Creditors; Bankruptcy; Compromise and Settlement.

#### COMPOUND INTEREST.

Accounting by trustee, see Interest, 5.

## COMPROMISE AND SETTLEMENT.

Authority of attorney, see Attorneys, 9. Right of client to settle his case, see Attorneys, 16.

Effect on attorney's lien, see Attorneys, 43.

1. Agreement Held to be Compromise, Complainant obtained an oil and gas lease on Indian land from the father and mother of the deceased allottee, claiming to be his sole heirs. Before the lease was re-corded the lessors sold the land, and the purchaser executed a lease, afterward acquired by defendant, which went into possession, claiming priority, because its lessors obtained title before the recording and without knowledge of complainant's lease. One M. obtained a conveyance of the land from other relatives of the deceased allottee, and claimed adversely to both lessees. Complainant brought suit against all adverse claimants and obtained a receiver. Both complainant and defendant made offers to M., who leased to defendant for a royalty and an agreement to carry on the litigation and conditionally to pay a bonus. The court determined

that the father was the sole heir, but that defendant's lease from his grantee was prior because of complainant's failure to record. Thereupon M. filed an ancillary bill to recover the royalty on oil sold by the receiver. Held, that the lease and contract were in effect a compromise and settlement between two of the three adverse claimants, that they were the consideration for the surrender by M. of his claim to the oil rights, and that he was entitled to his share of the fund in the hands of the receiver in accordance with their terms. Kiefer Oil, etc. Co. v. McDougal (Fed.) 1916D-343.

2. Annulment of Compromise. An agreement of compromise and settlement is not invalidated because of a mistake of law by one of the parties. Kiefer Oil, etc. Co. v. McDougal (Fed.) 1916D-343.

(Annotated.)

#### Note.

Mistake of law as ground for annulment of compromise. 1916D-347.

COMPUTATION OF TIME.
See Time.

CONCEALED WEAPONS. See Weapons.

CONCEALING ASSETS.

See Bankrutcy, 30-36.

## CONCEALMENT OF ASSETS.

Liability of corporation, see Corporations, 24.

CONCLUSIONS OF LAW.
To be avoided, see Pleading, 3.

CONDEMNATION.

Meaning, see Eminent Domain, 3.

CONDITIONAL PARDON. See Pardons, 4.

CONDITIONAL SALES.

See Sales, 61-65.

CONDITIONS.

Defined, see New Trial, 37.

## CONDITIONS PRECEDENT.

To exercise of police power, see Constitutional Law, 20.

To discovery, see Discovery, 1. To issue of mandamus, see Mandamus, 23. To suit for reformation, see Rescission, Cancellation and Reformation, 4.

To suit for cancellation, see Rescission, Cancellation and Reformation, 21-26. Enforcement of contract, see Specific Performance, 7.

Compliance with mandatory law, see Statutes, 19.

#### CONDONATION.

See Divorce, 15-18, 32, 44-47.

#### CONFESSIONS.

- 1. Admissibility.
  - a. In General.
  - b. Determination of Question.
  - c. Effect of Improper Admission.
- 2. Weight and Corroboration.

## 1. ADMISSIBILITY.

## a. In General.

- 1. Procurement by Fraud. That a confession has been procured by deceptive practices does not render it inadmissible in evidence. People v. Buffom (N. Y.) 1916D-962. (Annotated.)
- 2. Effect of Intoxication. Intoxication, less than mania, does not exclude a confession made during its continuance, but is a fact for the jury tending to discredit such confession. Lindsey v. State (Fla.) 1916C-1167. (Annotated.)

## Notes.

Intoxication as effecting admissibility of confession. 1916C-1168.

Admissibility of confessions obtained by fraud or trick. 1916D-966.

#### b. Determination of Question.

- 3. Question for Jury. In a trial for murder held on the evidence that whether defendant's confessions were voluntary was for the jury. People v. Roach (N. Y.) 1917A-410.
  - c. Effect of Improper Admission.
- 4. In a prosecution of a wife for the murder of her husband, who died of arsenical poisoning, the erroneous admission of evidence of the illness and death of defendant's daughter, presumedly of poisoning, long after the death of the husband, requires a reversal when considered in connection with the admission of a confession procured from defendant by deception. People v. Buffom (N. Y.) 1916D-962.

## 2. WEIGHT AND CORROBORATION.

5. Corroboration of Confession. Under N. Y. Code Cr. Proc., § 395, providing that the confession of the accused is not suffi-

cient to warrant his conviction without additional proof that the crime charged has been committed, there must be, in addition to the confession, proof of the corpus delicti, and where the corpus delicti is established by independent evidence, a conviction based upon defendant's voluntary confession is warranted. People v. Roach (N. Y.) 1917A-410.

6. Where the voluntary nature of confessions was submitted to the jury under proper instructions, a verdict against the defendant is conclusive on the issue. Peo-

ple v. Roach (N. Y.) 1917A-410.

7. Confession as Sufficient Corroboration of Accomplice. Kirby's Ark. Dig., § 2384, provides that a conviction for a felony cannot be had on the testimony of an ac-complice, unless corroborated by other evidence tending to connect defendant with the commission of the offense, and that the corroboration is not sufficient if it merely shows the offense was committed and the circumstances thereof. Section 2385 declares that the defendant's confession, unless made in open court, will not warrant a conviction, unless accompanied by other proofs that the offense has been committed. Held that, where defendant's daughter testified that defendant had had intercourse with her, with her consent, defendant's voluntary confession of the same fact to officers after his arrest for incest constituted sufficient corroboration to sustain a conviction. Knowles v. State (Ark.) 1916C-568. (Annotated.)

#### Note.

Confession of defendant as sufficient corroboration of accomplice. 1916C-570.

## CONFISCATION.

Of liquor unlawfully kept, see Intoxicating Liquors, 17, 22.

## CONFLICT OF LAWS.

See Bigamy, 2; Limitation of Actions, 5.
Law governing benefit certificate, see
Beneficial Associations, 8.

Jurisdiction of civil and military courts, see Courts, 19.

Descent of corporate stock, see Descent and Distribution, 4.

Operation of Workmen's Compensation Act outside of state, see Master and Servant, 179-183.

Measure of damages for tort committed outside state, see Master and Servant, 370.

Treaties in conflict with state laws, see Treaties, 7.

1. Sale of Intoxicants. A contract for the purchase of intoxicating liquors for a quantity in excess of that authorized by law, between a citizen of this state and a citizen of some other state, cannot be enforced in the courts of our state, although the laws of the other state in question may authorize such contract. Klein v. Keller (Okla.) 1916D-1070.

- 2. Where two parties reside in different states, both of which authorize the sale of intoxicating liquors, and a retail dealer in one of such states contracts with a wholesale dealer in the other of such states for a quantity of liquors, such contract being made with no intention to violate the laws of either state, and being valid in either of such states, and being such a contract as affects neither the statutes nor the policy of this state, it may be enforced in the courts of this state. Klein v. Keller (Okla.) 1916D-1070.
- 3. Validity of Contract. The question whether a contract is legal or illegal is judged by the law on the subject in the state or country in which the contract is made; the general rule being that "a contract good where made is good everywhere, and a contract invalid where made is invalid everywhere." The exceptions to the general rule are: "(1) Where the contract in question is contrary to good morals; (2) where the state of the forum or its citizens would be injured through the enforcement by its courts of contracts of the kind in question; (3) where the contract violates the positive legislation of the state of the forum, that is, is contrary to its Constitution or statutes; (4) where the contract violates the public policy of the state of the forum. Klein v. Keller (Okla.) 1916D-1070.
- 4. The prosecution of transitory actions in a state or country other than that in which the cause of action arose is based on the principle of enforcing a foreign right by comity, so that, if under the lex loci no right of action exists, none can be enforced in the jurisdiction of suit. Osborne v. Grand Trunk R. Co. (Vt.) 1916C-74.
- 5. Liability of Wife for Household Expenses. The law of New York governs a wife's liability for the purchase price of provisions furnished to, and consumed by, the family in that state. Mettler v. Snow (Conn.) 1917C-578.
- 6. Personal Status. Under Civ. Code Cal. 1872, § 1387, legitimatizing the issue of marriages null in law, children of a bigamous marriage born in California are entitled to their father's share in the estate of his sister dying intestate domiciled in Connecticut, since the personal status as to legitimacy established by another state should be recognized in Connecticut unless violating some positive law of the state, contravening its established public policy, or offending against good morals; while, had the mother of the children been a decessed sister of the

intestate, instead of their father a brother, their right to share would have been complete under Connecticut law. Moore v. Saxton (Conn.) 1917C-534.

(Annotated.)

- 7. Rights Under Benefit Certificate. In this action upon a certificate issued by a fraternal benefit society, organized under the statute of Illinois, we assume, for the purposes of this case, that the laws of that state govern the rights of the parties. Anderson v. Royal League (Minn.) 1917C-691.
- 8. Transfer of Corporate Stock. The laws of Kentucky must determine the rights of a judgment creditor of the transferor of corporate stock in West Virginia to attach the stock in a suit in Kentucky, where no common law or statute of West Virginia invalidating the transfer is pleaded or proved. Husband v. Linehan (Ky.) 1917D-954. (Annotated.)
- 9. Discharge of Surety. The effect of acts of the creditor to discharge a surety is to be determined by the law of the place where the contract of suretyship is made. Scandinavian Amer. Nat. Bank v. Kneeland (Manitoba) 1917B-1177.
- 10. Enforcing Foreign Contract. A contract, though valid under the law of the place where it was made, will not be enforced in a jurisdiction where to so enforce it would involve a disregard of the established public policy of that jurisdiction. Grosman v. Union Trust Co. (Fed.) 1917B-613.
- 11. Existence of Corporation. Whether a foreign corporation, doing business in the state and treated as a de facto going concern, has a legal existence, depends upon the laws of the state of its domicil. Dickey v. Southwestern Surety Ins. Co. (Ark.) 1917B-634.
- 12. Legality of Contract. Where a contract in a foreign state is sought to be enforced in another state, the lex loci contractus controls the question of the legality of the contract, unless otherwise provided in the contract, and the laws of the state where the contract was made will be observed, in determining the rights and obligations of the parties, and effect given thereto, unless such foreign laws are irreconcilable with the local laws, or in conflict with the established policy of the enforcing state, provided that such laws of the foreign state are pleaded and proved. Marx v. Hefner (Okla.) 1917B-656.
- 13. Construction of Foreign Contract. In enforcing a Missouri contract, the courts of Indiana are required to give full faith and credit to the statutes of Missouri, as construed by its courts. Travel-

ers' Protective Assoc. v. Smith (Ind.) 1917E-1088.

14. Construction of Contract of Sale. Where a letter offering to buy lumber was received by the seller at its place of business in Ohio where the letter of acceptance was mailed and from which the lumber was shipped to points outside Ohio, the contract is an Ohio contract, the construction of which is controlled by the laws of that state. W. G. Ward Lumber Co. v. American Lumber, etc. Co. (Pa.) 1918A-451.

#### Note.

Presumption as to knowledge of foreign law. 1916D-1072.

#### CONFUSION.

- 1. Confusion by Mistake or Accident, 179.
- Confusion by Consent of Owners, 180.
   Confusion by Wrongful Act, 180.

Rights of mortgagee, see Chattel Mortgages, 24.

## 1. CONFUSION BY MISTAKE OR ACCI-DENT.

- 1. Confusion by Inevitable Accident. Where a confusion of goods is the result of inevitable accident, the several owners are tenants in common in the whole mass in proportion to the amount of property contributed thereto by each. In re Thompson (Iowa) 1916D-1210.
- 2. Loss Falling on Person Causing Confusion. Since the doctrine of confusion of goods is the protection of the innocent owner, the resulting loss falls upon the person causing the confusion, in case he is unable to distinguish his property. In re Thompson (Iowa) 1916D-1210.

(Annotated.)

#### Note.

Confusion of goods resulting from mistake or accident. 1918A-746.

- 3. Apportionment of Proceeds. In an action to recover the proportionate share of property or goods confused by another, it is not necessary to identify exact property, and where the goods confused could have been separated by the holder, but were not, he is liable to the owner for the average price received at the sale of such goods. Hobbs v. Monarch Refrigerating Co. (Ill.) 1918A-743.
- 4. Effect of Accidental Confusion. Where poultry in a warehouse becomes mixed by inevitable accident, the original owners become tenants in common of the mass, bearing proportionately any loss, and being in equity entitled to their just proportion of the poultry. Hobbs v. Monarch Refrigerating Co. (Ill.) 1918A-743.

(Annotated.)

#### 2. CONFUSION ΒŶ CONSENT OF OWNERS.

5. Confusion by Consent. Where there is a confusion of goods by consent of the parties, their rights in the goods would rest upon the contract involved in such consent, with a presumption that they were tenants in common therein. In re Thompson (Iowa) 1916D-1210.

## 3. CONFUSION BY WRONGFUL ACT.

- 6. Wrongful Confusion. Where goods are wrongfully mixed, the party whose wrong causes the confusion must bear the loss, unless the property consists of parts of equal value, and the value of each part with reference to the value of the whole is ascertainable, when the parties will be tenants in common and each entitled to his proportion thereof. In re Thompson (Iowa) 1916D-1210.
- 7. Confusion by Negligence. Where a confusion of goods is caused through mistake or negligence without actual fraud, the person causing the confusion must bear the loss, unless he can designate his own property. In re Thompson (Iowa) 1916D-1210.
- 8. Fraudulent confusion of a debtor's property with that of another in one fund converts the claim of the injured creditor into a priority of right on the commingled fund. Gurney v. Tenney (Mass.) 1918A-(Annotated.) 739.
- 9. Fraudulent Confusion. There being a fraudulent confusion of property, and plaintiff tracing that of his debtor into the common mass, defendant has the burden of proof as to separation. Gurney v. Tenney (Mass.) 1918A-739.

(Annotated.)

Note.

Tortious or wrongful confusion of goods. 1918A-740.

CONNECTING CARRIERS. See Carriers of Goods, 24-31.

## CONNIVANCE.

See Divorce, 19-22. No defense, see Adultery, 4.

## CONSENT.

Confusion by, effect, see Confusion, 5. As defense to crime, see Criminal Law, 9. Of landowner to improvement as essential

to lien, see Mechanics' Liens, 17.

Absence of consent, specific performance denied, see Specific Performance, 1.

## CONSENT JUDGMENTS.

See Judgments, 43-45.

CONSERVATOR AND WARD. See Guardian and Ward.

## CONSERVATORS OF THE PEACE.

Notary as conservator, see Breach of Peace, 9.

#### CONSERVATORY WRITS.

No action on dissolution, see Malicious Prosecution, 3.

#### CONSIDERATION.

See Bills and Notes, 6, 12-16; Deeds, 23. Written contract, parol proof of consideration, see Evidence, 122, 129.

Statement of in memorandum, see Frauds, Statute of, 18.

Partial failure of in antenuptial contract, effect, see Husband and Wife, 22.

mortgage debt, see Mortgages and Deeds of Trust, 19, 20.

For warranty, see Sales, 12.

Furnishing consideration by third party as raising trust, see Trusts and Trustees, 16, 17.

#### CONSORTIUM.

Husband's action for loss of, see Husband and Wife, 35.

## CONSPIRACY.

- 1. Criminal Conspiracy, 180.
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  - b. Indictment, 180.
    - c. Evidence, 181.
- 2. Civil Liability, 181. a. Character of Act and Nature of Liability, 181.
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## CRIMINAL CONSPIRACY.

- a. Right to Prosecute One of Several Conspirators.
- 1. Effect of Acquittal of One Defendant. Upon the indictment of two persons alone for criminal conspiracy, the acquit-tal of one is an acquittal of the other. Gordon v. McLearn (Ark.) 1918A-482.

#### b. Indictment.

2. Variance Immaterial. The variance between an indictment alleging that defendants wrongfully agreed to raise the price of milk to 13 cents and the proof

that after the agreement they sold milk at  $12\frac{1}{2}$  cents is immaterial, for the gist of the offense was the unlawful combination to raise the price, sustained by proof of agreement so to do, and that in consequence thereof defendants did raise the price. State v. Craft (N. Car.) 1917B-1013.

3. Defenses — Inducement for Purpose of Prosecution. An indictment charged a conspiracy to pervert the due administration of the laws. The proof was of an agreement by defendants with a detective in the employ of the state's law officers to detect defendants in corrupt conduct, by which the detective was to pay them money for their votes as members of a city council. Held that, as the indictment charged but one conspiracy, to which the detective was proper to be a necessary party, and as his object was to expose corruption, and prevent injury to the public, there was a failure to prove a conspiracy to pervert the due administration of the laws. State v. Dougherty (N. J.) 1917D-950. (Annotated.)

## c. Evidence.

- 4. Proof by Circumstances. It is not necessary to prove a conspiracy by positive evidence; but its existence may be inferred from circumstances attendant upon the doing of the act, and from the subsequent conduct of the parties. Brindley v. State (Ala.) 1916E-177.
- 5. Where, on the trial of C., a political leader, for selling a nomination to W. for a public office there was evidence sufficient to make a question of the existence of a conspiracy between C., W. and a third person to bring about the nomination of W., the testimony of a witness as to what W. said to him after W. and C. and the third person had conferred about the nomination, and later at the time he procured a loan for W. on a note, and before the money was paid over to him, is admissible. People v. Cassidy (N. Y.) 1916C-1009.
- 6. Acts and Declarations of Co-conspirators Admissible. Where evidence of a conspiracy has been given to make the question of its existence one for the jury, any evidence of the acts and declarations of the conspirators in furtherance of the common purpose is competent, and it is unnecessary that the conspiracy should be charged in the indictment to make the proof competent. People v. Cassidy (N. Y.) 1916C-1009.
- 7. Relationship of Parties. In determining whether accused and his wife were co-conspirators in killing deceased, the fact of their relationship may be considered. State v. Inlow (Utah) 1917A-741.
- 8. Circumstantial Evidence. While a conspiracy cannot be established by the

- acts and declarations of only one of the alleged co-conspirators so as to render such acts and declarations admissible against accused, yet a conspiracy may be established by circumstantial evidence, and in such case the acts of one co-conspirator are admissible against the other. State v. Inlow (Utah) 1917A-741.
- 9. Sufficiency of Evidence. In a prosecution for conspiracy, the question whether the defendants were actuated by lawful or unlawful motives is held to be a question of fact on which the jury's finding is not reviewable. Hummelshime v. State (Md.) 1917E-1072.
- 10. Investigation by Detective. In a prosecution for conspiring to demand money to corrupt a city council, testimony of a detective, engaged to entrap defendants, and the person from whom the money was demanded, as to whether he had investigated other members of the city council, and as to whether it was necessary to investigate other persons in connection with the water system, is properly excluded. Hummelshime v. State (Md.) 1917E-1072.
- 11. In prosecution for conspiracy, where citizens had engaged a detective to ascertain if there was corruption in a city council, the refusal of the court to require an attorney, who had been engaged to engage such detective, to divulge the names of his clients, is not improper, where an opportunity was offered by the court and accepted by the defense to ask any witness if he were one of the attorney's clients. Hummelshime v. State (Md.) 1917E-1072.
- 12. Mailing of Letter. In a prosecution for conspiring to demand money to corrupt a city council, where the person from whom defendants were charged to have demanded the money was a detective engaged to entrap them, testimony by the detective that the mail chute in an office building in which he placed a letter to a defendant was connected with the mail box below is admissible. Hummelshime v. State (Md.) 1917E-1072. (Annotated.)

#### 2. CIVIL LIABILITY.

- a. Character of Act and Nature of Liability.
- 13. Petition to Revoke License. Defendants' motive being the public good, and they being not actuated by malice or intent to injure plaintiff, their action in signing and presenting such petition was not a conspiracy, since a "civil conspiracy" is a combination between two or more persons to accomplish by concert of action an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means; the damage being the gist of any action. McKee v. Hughes (Tenn.) 1918A-459.

1916C-1918B.

- 14. Gist of Civil Action. In a husband's action against the relatives of his wife for conspiring to alienate her affections, a recovery may be had against two or more of the defendants if the charge of conspiracy is sustained, and against any one or more for individual responsibility if no conspiracy is proved, since the damage to the plaintiff and not the conspiracy, is the gist of the right of action. Ratcliffe v. Walker (Va.) 1917E-1022.
- 15. Gist of Civil Action for Conspiracy. The gist of the action of conspiracy is damage, and where no damage is proved the action cannot be maintained. mans v. Hanna (N. Dak.) 1917E-263.

(Annotated.) 16. Acts Lawful if Done by Individual. Except where the members engaged make what would otherwise be a lawful and innocent act a nuisance and harmful, what one may do singly a number may do to-gether. The mere fact that a number of gether. The mere fact that a number or persons join together in making a purchase of banking stock upon terms and conditions which would have been perfectly lawful for one to do by himself does not render such transaction unlawful. Youmans v. Hanna (N. Dak.) 1917E-263.

## b. Pleading.

17. Failure of Proof. Under Va. Code 1904, § 3384, providing that, if at the trial of any action there is a variance between proof and pleadings, the court, if substantial justice will be promoted, and the opposite party will not be prejudiced, may allow amendment of the pleadings to conform with proof, in a husband's action against the relatives of his wife for alienation of her affections, a charge that, unless the plaintiff prove conspiracy by all the defendants, there could be no recovery, is properly refused; since any variance between the parties alleged to be liable and those shown by proof to be so can be cured by amendment under the statute. Ratcliffe v. Walker (Va.) 1917E-1022.

#### c. Evidence.

- 18. Evidence of Conspiring. In an action by a husband against the relatives of his wife, who had left him, for conspiring to procure a separation, plaintiff need not prove that the defendants came together and actually agreed in terms to bring about the separation and to pursue the end by common means; it being sufficient if it was shown that the defendants pursued the same object by their acts with a view to its attainment. Ratcliffe v. Walker (Va.) 1917E-1022.
- 19. Declarations of Co-conspirators-Proof of Conspiracy as Prerequisite to Admission. In order that the declarations and conduct of third persons may be ad-

missible against defendant, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful, and the element of illegality may be shown by the declara-tions themselves. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.

20. Where H. was engaged in an effort to organize the coal miners of a particular district as the representative of a voluntary association of which defendants were active members, and in the execution of a purpose to which they had given consent, and in which some of them were actively co-operating, his declarations and conduct while so doing are evidence against defendants. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.

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#### 1. NATURE AND OPERATION CONSTITUTION.

- 1. Rights Protected by Constitution. The provisions of the Constitution, Nev. state or federal, do not cover rights, privileges, and obligations not specified and not existing or understood at the time of its adoption, or not in force by long acquiescence, or by continued official or public approval. Worthington v. District Court (Nev.) 1916E-1097.
- 2. Constitution as "Law." A statute and a Constitution though of unequal dignity, are both "laws," and each rests upon the will of the people. State v. Brantley (Miss.) 1917E-723.
- 3. The spirit of the Federal Constitution does not oppose but favors congressional action which makes for the promotion of obedience to the laws of the several states. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.

# 2. DISTRIBUTION OF POWERS OF GOVERNMENT.

#### a. In General.

- 4. Powers of Federal Government. Under Const. U. S. Amend. 10 (9 Fed. St. Ann. 356), declaring that the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people, the government of the United States is one of enumerated powers, and can claim no powers not granted to it by the Constitution, and the powers actually granted must be such as are given expressly or by necessary implication. People v. Brady (Ill.) 1917C-1093.
- 5. Respective Powers of State and Federal Government. The power to regulate property within the limits of the state, the modes of acquiring and transferring it, and the rules of descent and distribution dealt with by trustees, executors, etc., are subjects belonging exclusively to the jurisdiction of the state, not subject to federal control. People v. Brady (III.) 1917C-1093.

## b. Legislative.

- 6. Legislative Power to Regulate. The constitution of Ohio vests the judicial power of this state in the courts and specifically defines and limits both the original and the appellate jurisdiction of the courts of appeals. The general assembly of the state cannot enlarge or restrict this jurisdiction in matters judicial, but may provide by law for the exercise of that jurisdiction. Thompson v. Redington (Ohio) 1918A-1161.
- 7. Scope of Legislative Power. Under Me. Const. art. 4, pt. 3, § 1, giving the legislature full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of the state not repugnant to the Constitution, the powers of the legislature are absolute, except as limited by the Constitution. Laughlin v. Portland (Me.) 1916C-734.
- 8. Regulation of Public Utilities. There is nothing in the constitution that prohibits the legislature from enacting laws to regulate and control public utility corporations. Idaho Power, etc. Co. v. Bloomquist (Idaho) 1916E-282.
- 9. After the adoption of section 14, art. 1, of the Idaho constitution, it only remained for the legislature to provide the procedure to carry into effect the provisions of said section. The legislature, however, may add to the public uses enumerated in said section, but it cannot annul or repeal any of the uses therein specified. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.

## c. Judicial.

- 10. Formulation of Public Policy. A supreme court can announce no public policy of its own, but merely what it believes to be the public policy of the people of the commonwealth by which it is created. It has no power to create or command but merely to construe; and where the people have spoken, either in the form of a constitutional enactment or a valid and constitutional statute, it must be controlled by their decisions and conclusions. Northern Pacific R. Co. v. Richland County (N. Dak.) 1916E-574.
- 11. Province of Courts. In the division of powers, it is the function of the legislative department to make the laws, and the function of the judicial department to enforce them; and the courts are no more responsible for what a law may contain, so long as it is a valid enactment, than is the legislature responsible for the manner in which the courts may enforce the law. The responsibilities of the two departments are as separate as their functions. Van Winkle v. State (Del.) 1916D-104.
- 12. Validity of Statute. Coroner's Act (Hurd's III. Rev. St. 1913, c. 31), § 14, making it the duty of coroners' juries to inquire how, in what manner, and by whom or what dead bodies came to their death, and of all other facts of and concerning the same, together with all material circumstances in any wise related to or connected with the death, and to make up and sign a verdict and deliver it to the coroner, is not unconstitutional as investing the coroner's jury with judicial power in violation of Const. art. 6, § 1, by which all judicial powers are vested in the courts, as "judicial power" is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws, and this power involves, not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate and determine the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal or property rights in controversy in such proceedings, and the power to hear without the power to adjudicate and determine the rights of the parties is not judicial power, as that term is used in the constitution. Devine v. Brunswick-Balke-Collender Co. (Ill.) 1917B-887.
- 13. Delegation of Judicial Power. It does not follow from pronouncements that judicial power may not be delegated, that none but duly constituted constitutional courts may exercise judicial power, and it may be delegated to and exercised by special tribunals or officers exercising quasi judicial functions and by purely adminis-

trative bodies upon whom such functions have been conferred. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

#### 3. POLICE POWER.

#### a. In General.

14. The "police power" of the state is an attribute of sovereignty, and when exercised within its scope is supreme, to the exclusion of the power of the general government. It is the power of government inherent in every sovereignty—that is, the power to govern men and things—and, when exercised by a state sovereignty, extends to such restraints and regulations as are reasonable and proper to protect the lives and property of its citizens and to promote the order and welfare of society. Van Winkle v. State (Del.) 1916D-104.

- 15. A rightful exercise of the police power is not a violation of the Fourteenth Amendment, U. S. Const., even though property interests are affected. People v. Weiner (III.) 1917C-1065.
- 16. Whether a statute based on the police power is reasonable depends on whether in its attempted regulation it makes efficient constitutional guaranties and conserves rights, or is destructive of inherent rights. People v. Weiner (III.) 1917C-1065.
- 17. To come within the police power, a statute or ordinance must tend in some degree toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare, and it must be apparent that such end is the one actually intended, and there must be some connection between the provisions of the law and such purpose. People v. Weiner (Ill.) 1917C-1065.
- 18. While the police power cannot excuse the enactment of unreasonable, oppressive, or unjust laws, it may be legitimately exercised to preserve the public health, safety, morals, and general welfare. State v. Bunting (Oregon) 1916C-1003.
- 19. The "police power" is the inherent sovereign power under which the state must act by enacting statutes for the benefit of society and the protection of morals, health, and order. Chicago, etc. R. Co. v. Anderson (Ind.) 1917A-182.
- 20. Prerequisites to Exercise. The state may exercise the police power whenever the public interests demand it, but, to justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means

are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals. Barrett v. State (N. Y.) 1917D-807.

- 21. Reasonableness of Police Regulation. The consideration and determination of the reasonableness of regulations under the police power rests with the legislative departments, and court will not examine the question de novo and overrule such judgment by substituting its own, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power, or are unmistakably in excess of the legislative power or arbitrary beyond possible justice, bringing the case within the rare class in which such legislation is declared void. State v. McKay (Tenn.) 1917E-158.
- 22. A statute enacted within the police power will not be adjudged invalid merely because omitted cases might have been properly included in the statute. People v. Charles Schweinler Press (N. Y.) 1916D-1059.

## b. Scope of Power.

- 23. Nature and Scope of Police Power. The legislature has power to pass laws for the preservation of good order, or to promote public welfare and safety, or prevent fraud, deceit, cheating, and imposition, as the police power was in the state prior to the adoption of the Federal Constitution, and remained with the state under the constitution, and has not been taken away by any of the amendments thereto. People v. Weiner (Ill.) 1917C-1065.
- 24. Where the legislature has jurisdiction, in view of the facts, to exercise its police power, the selection of the method and extent of its action is largely within its discretion, and will not be adjudged invalid by the courts unless clearly so. People v. Charles Schweinler Press (N. Y.) 1916D-1059.
- 25. The police power of the state is coextensive with self-protection, and is not inaptly termed "the law of overruling necessity." State v. Starkey (Me.) 1917A-196.
- 26. Nature and Scope of Police Power. The "police power" in effect sums up the whole power of government, and all other powers are only incidental and ancillary to the execution of the police power; it is that full, final power involved in the administration of law as the means to the administration of practical justice. Wessell v. Timberlake (Ohio) 1918B-402.
- 27. The "police power" is that inherent and plenary power in the state which enables it to prohibit all things hurtful to

the comfort, safety, and welfare of society. People v. Weiner (Ill.) 1917C-1065

- 28. Rights of property may not be invaded under the guise of police regulation. People v. Weiner (Ill.) 1917C-1065.
- 29. An act passed under the police power of the state must have some relation and be adapted to the ends sought to be accomplished. People v. Weiner (III.) 1917C-1065.
- 30. Application of Fourteenth Amendment. The Fourteenth Amendment to the Federal Constitution [9 Fed. St. Ann. 384 et seq.] was not designed to interfere with the exercise of the police power of states. Durand v. Dyson (Ill.) 1917D-84.
- 31. The police power of the state includes the right to regulate, control, and prohibit occupations endangering the health, morals, and safety of the general public. Longmire v. State (Tex.) 1917A-726.
- 32. Nature and Scope. The right to impose restraints on the use and disposition of property, found by experience or on inspection to be injurious to the health, morals, or general welfare, is within the police power, and a statute, uniform and general and applicable to all persons in the same circumstances, does not deny to one the "equal protection of the law" within Ind. Const., art. 1, § 23, and Const. U. S. Amend. 14. Chicago, etc. R. Co. v. Anderson (Ind.) 1917A-182.
- 33. Extension by Modern Conditions. The advance of civilization and consequent extension of governmental activities has resulted in lessening the dominion of individuals over their property and strengthening the state's regulation thereof, until all private property is now held subject to the right of the state to impose on the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare. Harris v. Louisville (Ky.) 1917B-149.
- 34. The police power is not to be limited to guarding merely the physical interests of the citizen, and his moral, intellectual, and spiritual needs may also be considered, as in preserving wild animals. Barrett v. State (N. Y.) 1917D-807.
- 35. Regulating Use of Property. Every holder of property holds it under the implied liability that its use may be so regulated that it shall not encroach injuriously on the enjoyment of property by others or be injurious to the community. Pittsburgh, etc. R. Co. v. Chappell (Ind.) 1918A-627.

## c. Regulation of Business.

36. Power to Pass Inspection Laws. The right to pass inspection laws belongs

- to the police power of the government. State v. Starkey (Me.) 1917A-196:
- 37. Regulation of Commerce. The "liberty" guaranteed by La. Const., art. 2, providing that no person shall be deprived of life, liberty, or property without due process of law, includes the right to manufacture and offer for sale any article of commerce one pleases so long as the doing so does not come under the restrictive jurisdiction of the police power. New Orleans v. Toca (La.) 1918B-1032.
- 38. Agencies. The state, in the exercise of its police power, could, consistently with the Federal Constitution, enact so much of Mich. Pub. Acts 1913, act No. 301, as provides for the licensing of private employment agencies, and prescribes reasonable regulations in respect to them, to he enforced according to the legal discretion of a commissioner, including a provision making it a misdemeanor to send one seeking employment to an employer who has not applied for help. Brazee v. Michigan (U. S.) 1917C-522.

(Annotated.)

- 39. The term "police power" has a meaning coextensive with sovereign power or sovereignty. As understood in American constitutional law, the term denotes the power of the state to impose those restraints on private rights which are necessary for the general welfare of all, and is but the power to enforce the maxim, "Sic utere tuo ut alienum non laedas." It is the power to regulate the business of others, and not a power to go into business. Union Ice, etc. Co. v. Ruston (La.) 1916C-1274.
- 40. The police power of the state is sufficiently broad and comprehensive to enable the legislature to regulate by law public utilities, in order to promote the health, comfort, safety, and welfare of the people, and thus regulate the manner in which public utility corporations shall construct their systems and carry on their business within the state. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 41. Control of Public Utilities. All property devoted to public use is held subject to the power of the state to regulate or control its use in order to secure the general safety, health, and public welfare of the people, and when a corporation is clothed with rights, powers, and franchises to serve the public, it becomes in law subject to governmental regulation and control. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 42. Regulation of Petroleum Products. The state has full power to enact proper laws for the inspection of oils, gasoline, petroleum, ether, and like substances; and legislation relating to such inspection, if otherwise valid, is not void as an unlaw-

ful exercise of its police power. Castle v. Mason (Ohio) 1917A-164.

(Annotated.)

43. Commission Merchants—Validity of Regulation. The rights of liberty and property, guaranteed by Const. U. S. Amend. 14, and the corresponding provisions in the state constitution are not designed to interfere with the police power of the state for the protection of the health, safety, morals, and welfare; hence Rem. & Bal. Wash. Code, §§ 7024-7035, known as the Commission Merchants' Law, enacted to protect those consigning property to commission merchants, is a valid exercise of the police power, and does not interfere with the rights of liberty and property, which include the privilege of pursuing an ordinary calling without restriction. State v. Bowen & Co. (Wash.) 1917B-625.

(Annotated.)

State or municipal regulation of manufacture of bricks. 1917B-931.

- d. Conflict With Federal Constitution.
- 44. Conflict With Federal Constitution. Though the exercise of the police power is not to be interfered with where it is within the scope of legislative authority, and the means adopted reasonably tend to accomplish a lawful purpose, such power, broad as it is, cannot justify the passage of a law or ordinance running contrary to the limitations of the federal constitution. Buchanan v. Warley (U. S.) 1918A-1201.

## 4. DUE PROCESS OF LAW.

- 45. Application to States. The due process of law clause of the fifth amendment to the federal constitution applies only to Congress and does not affect state legislation. School Town of Windfall City v. Somerville (Ind.) 1916D-661.
- 46. Right of School Corporation to Demand Due Process. Acts 1903, c. 204 (Burns' Ind. Ann. St. 1908, § 6671), providing that real property owned by common school corporations shall be liable to special assessment for public improvements already constructed, and the corporation shall make payment, is not invalid under Const. U. S. Amend. 14, prohibiting the deprivation of property without due process of law for school corporations; being created by the legislature in accordance with Const. art. 4, § 1, the legislature has plenary power over them as well as over the roads and streets, and they cannot invoke the due process clause. School Town of Windfall City v. Somerville (Ind.) 1916D-661.
- 47. Section 22, art. 1, of the Constitution of North Dakota, which provides that "all courts shall be open, and any man for any injury done him in his lands, goods, or

reputation shall have remedy by due process of law, and right and justice administered without sale, denial, or delay," is aimed, not merely against bribery and the direct selling of justice by magistrates and officials, but against the imposition of unreasonable restraints upon and charges for the use of the courts. Malin v. Lamoure County (N. Dak.) 1916C-207.

(Annotated.)

- 48. What Constitutes "Property." Within Const. U. S. Amend. 14 (9 Fed. St. Ann. 416), protecting life, liberty, and property from invasion without due process of law, "property" is more than the mere thing which a person owns and includes the right to acquire, use, and dispose of it, and these essential attributes of property are protected by the Constitution. Buchanan v. Warley (U. S.) 1918A-1201.
- 49. Right to Public Trial. Notwithstanding Mont. Const. art. 3, \$16, guaranteeing to an accused person a right to a public trial, the trial court has the right to preserve decorum, and may exclude persons for disorderly conduct, or because they impede the due administration of the law. State v. Keeler (Mont.) 1917E-619. (Annotated.)
- 50. The right of an accused to a public trial guaranteed by Mont. Const. art. 3, § 16, is not infringed, because the courtroom is not large enough to include all persons, or because of an order closing the doors after the room is filled. State v. Keeler (Mont.) 1917E-619.

(Annotated.)

- 51. The right of an accused person to a public trial guaranteed by Mont. Const. art. 3, § 16, may be waived. State v. Keeler (Mont.) 1917E-619.
- (Annotated.)
  52. Rules as to Burden of Proof. The constitution is not violated by statutes which change burden of proof and take away defenses like assumption of risk, negligence of fellow servant, and contributory negligence. Rules as to burden of proof, and permitting such defenses, are made either by courts or by legislative action, and the legislature may change any rule made by the legislature, or one made by the court. The constitution gives no vested rights in mere rules of procedure and the like. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.
- (Annotated.)
  53. License Tax Regulations. Liberty to contract is not unconstitutionally infringed, contrary to the due process of law clause of U. S. Const. 14th. Amend. (9 Fed. St. Ann. 416), by Florida Laws 1913, c. 6421, § 35, making merchants offering with merchandise bargained or sold any coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, liable to pay an

additional license tax, which may be prohibitive, and, if the same are to be re-deemed by someone else than the merchant offering them, liable to pay a similar license fee for the one who is to redeem. Van Deman, etc. Co. (U. S.) 1917B-455. (Annotated.)

54. Nor is it invalid as unreasonable because requiring the giving of a surety bond for \$3,000 before license can be issued. State v. Bowen & Co. (Wash.) 1917B-625. (Annotated.)

- 55. Employment of Citizens Only on Public Works. Property is not taken without due process of law, nor is the equal protection of the laws denied, contrary to U. S. Const. 14th Amend. (9 Fed. St. Ann. 416, 538) by the provisions of N. Y. Consol. Laws, c. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference. Heim v. McCall (U. S.) 1917B-287.
- (Annotated.) 56. Effect of Coroner's Verdict. As no rights, property or otherwise, are fixed or established by a verdict of a coroner's jury, under Ill. Coroner's Act, § 14, that section is not void as depriving persons or property without due process of law. Devine v. Brunswick-Balke-Collender Co. (Ill.) 1917B-887.

57. Statute Establishing Presumption. A state may, consistently with the due process of law clause of U.S. Const. 14th Amend., establish by statute presumptions and rules respecting the burden of proof, provided that the statute be not unreasonable in itself, and not conclusive of the rights of a party. Hawkins v. Bleakly (U. S.) 1917D-637.

58. Criminal Law. Ga. Penal .Code (1910) § 204 is not violative of article 1, section 1, paragraph 3, of the state constitution, which declares that "no person shall be deprived of life, liberty, or property, except by due process of law." Griffin v. State (Ga.) 1916C-80.

59. The fifth amendment of the constitution of the United States is not a limitation upon the power of the states, but operates upon the national government Accordingly section 204 of the Ga. Penal Code, is not invalid as being violative of that amendment. Griffin v. State

(Ga.) 1916C-80. 60. What Constitutes. No process is "due process" which does not give notice. either actual or constructive, and no taking of property for debt is lawful unless the debt has been created with the knowledge and consent of the debtor. Anderson v. Great Northern R. Co. (Idaho) 1916C-191.

61. Coroner's Inquest. A coroner's inquest is within the spirit of Const. S. Car. art. 1, § 15, requiring all courts to be public. State v. Griffin (S. Car.) 1916D-392.

#### Note.

Validity of statute discriminating against aliens in employment of laborers. 1917B-287.

## 5. EQUAL PROTECTION OF LAWS. a. In General.

- 62. A statute, under which those included and those excepted are each at liberty to place themselves in the same position that the other is, is, if a discrimination at all, a purely academic one. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.
- 63. Classification must always rest upon some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed, though it need not always depend on scientific or marked differences in things or persons or relations, but it suffices if it is practical, and it is not reviewable unless palpably arbitrary. Hill v. Rae (Mont.) 1917E-
- 64. Race Discrimination. Colored persons are citizens of the United States, and have the right to purchase property and enjoy and use it without laws discriminating against them solely on account of color. Buchanan v. Warley (U. S.) 1918A-1201.
  - Judicial Review of Classification.
- 65. Class Legislation. Under Const. U. Amend. 14 (9 Fed. St. Ann. 538), prohibiting the denial to any person of the equal protection of the law, and Const. Tenn. art. 1, § 8, prohibiting the imprisonment or execution of any person, or depriving him of life, liberty, or property, except by judgment of his peers or the law of the land, and article 11, § 8, forbidding class legislation, the same rules will be applied to classifications therein as to the classifications made in legislative enactments, so that the basis for a classification must be natural, and not arbitrary or capricious, and must rest on some substantial difference; but the classification is not invalid merely because it does not depend on scientific or marked differences. Memphis v. State (Tenn.) 1917C-1056.
- 66. Under the provisions of the constitution prohibiting class legislation, it is not sufficient to invalidate a statute merely to show points of similarity in the thing classified, and the thing excluded from the classification; but it must be shown that the classification is unreasonable and impracticable. Memphis v. State (Tenn.) 1917C-1056.
- 67. Legislative classification is permissible because in the nature of things and in due appreciation of equality in the opera-

tion of the law it is necessary for purposes of revenue, or in the application of the police power, or in legislation designed to increase the industries of the state, develop its resources and prosperity, etc. Hill v. Rae (Mont.) 1917E-210.

68. The provision of the federal Constitution guaranteeing to all persons the "equal protection of the laws," does not mean broadly that all persons, however situated, shall have the same rights and be protected in doing the same things, but means that all persons in like situations shall have an equal protection of the law; the test in ascertaining whether equal protection of the laws is denied to any person, or to any class of persons, is whether the classification adopted is an arbitrary one, or is a reasonable one in view of the purposes and objects of the act. Van Winkle v. State (Del.) 1916D-104.

69. While legislative classification must have some reasonable basis upon which to rest, unless the courts are satisfied that there can be no basis in reason therefor, they will not overthrow the statute. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258. (Annotated.)

70. The wealth and prosperity of California or of any other state in the Union is of vital importance to the people of North Dakota. A statute, therefore, which discriminates in the matter of the amount of an inheritance tax between a citizen of Norway resident of Norway and a citizen of Norway residing in California or any other state of the Union, is not for that reason void on the ground of class legislation. Moody v. Hagen (N. Dak.) 1918A-933.

# 6. IMPAIRMENT OF OBLIGATION OF CONTRACTS.

71. Impairing Obligation of Contract. Rights and privileges arising from contracts with the state are subject to regulations for the protection of the public health, morals, and safety in the same sense as are rights arising from other contracts. Pittsburgh, etc. R. Co. v. Chappell (Ind.) 1918A-627.

72. Contract obligations are not unconstitutionally impaired by the imposition, under Florida Laws 1913, c. 6421, § 35, of an additional license fee upon merchants offering with merchandise bargained or sold coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, since the statute must be deemed to be prospective in its operation, and not to affect sales completed before its enactment. Rast v. Van Deman, etc. Co. (U. S.) 1917B-455.

(Annotated.)

## 7. PRIVILEGES AND IMMUNITIES.

73. A discrimination is not necessarily unlawful, but a privilege or a burden is

or is not a denial of the equal protection of the laws according to whether the discrimination relates to a matter upon which classification is legally permissible, and, if so, whether the classification is a reasonable one. Hill v. Rae (Mont.) 1917E-210.

74. Privileges and Discriminations. In the application of the Fourteenth Amendment to the federal constitution (9 Fed. St. Ann. 392) no distinction is to be observed between the effect of privileges conferred and of burdens imposed; a privilege conferred upon one class being a discrimination in favor of that class and against all others not similarly endowed, as a burden upon one class is a discrimination against it and in favor of all others not similarly burdened. Hill v. Rae (Mont.) 1917E-210.

75. Corporation as Citizen. A corporation may not invoke the protection of the privileges and immunities provisions of the federal constitution, because it is not a "citizen," within the meaning of that provision. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

76. Const. U. S. Amend. 14, and Const. Ind. art. 1, § 23, prohibiting the granting of privileges or immunities, do not forbid classification of persons for legislative purposes, and where the situation, conditions and circumstances of the person included within a class to which the law is made to apply so differ from those not so included as to indicate the propriety of making the law applicable only to those included within it, and the law applies to all whom the reason applies, and excludes all to whom the reason excludes, is not unconstitutional, and a classification having a reasonable basis will not be condemned merely because it is so framed as to include all within the reason of the classification and exclusion of others. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

77. Meaning of Prohibition. Const. U. S. Amend. 14, is a prohibition against the states, and requires that all burdens and liabilities imposed by law shall rest equally upon all persons under like circumstances and conditions, and Const. Ind. art 1, § 23, prohibiting the granting to any citizen, or class of citizens, privileges or immunities, forbids the granting of privileges or immunities which under like circumstances are not granted to all citizens; the one forbidding the curtailment of rights, and the other the enlargement of the rights of some in disparagement of the rights of others. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

78. The equality of rights and privileges with citizens of the United States with respect to security for persons and property which citizens of Italy are assured by the Italian treaty of February 26, 1871 (17

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Stat. at L. 845; 7 Fed. St. Ann. 656) is not infringed by the provisions of N. Y. Consol. Laws, c. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference. Heim v. McCall (U. S.) 1917B-287.

(Annotated.)

79. Abridgment of Privileges of Citizen -Scope of Federal Constitution. The Fourteenth Amendment (9 Fed. St. Ann. 392) draws a distinction between a citizen of the United States and a citizen of a state, and classifies the privileges of citizens into those which they have as citizens of the United States and those which they have as citizens of the state wherein they reside, and forbids the abridging of the privileges of a citizen of the United States, but does not forbid the state from abridging the privileges of its own citizens. Hopkins v. Richmond (Va.) 1917D-1114.

## 8. PERSONAL AND RELIGIOUS LIB-ERTY.

- 80. Mass. St. 1913, c. 678, § 2, prohibiting the carrying of red or black flags in parades, is not bad as unlawfully depriving persons of their liberty; the purpose of the enactment being to prevent parades which would provoke turbulence, which is a legitimate regulation of personal liberty. Commonwealth v. Karvonen (Mass.) 1916D-846. (Annotated.)
- 81. Liberty of Contract. Liberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare. Pittsburgh, etc. R. Co. v. Kinney (Ohio) 1918B-286.
- 82. Liberty of Speech and of Press. Under the right of freedom of speech and of the press, the public have a right to know and discuss all judicial proceedings, but this does not include the right to attempt, by wanton defamation and groundless charges of unfairness and partisanship, to degrade the tribunal and impair its efficiency. In re Hayes (Fla.) 1918B-936. (Annotated.)
- 83. Liberty of Speech and of Press. The thirteenth section of the declaration of rights of the constitution of Florida, which provides that "every person may fully speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press," etc., does not secure immunity from punishment to any citizen who falsely and with the purpose to defame, attacks in the newspapers the character of any other citizen, or impugns the integrity, honor and authority of the courts. In re Hayes (Fla.) 1918B-936.

(Annotated.)

84. The exercise of the right to "fully speak and write" one's sentiments on all subjects, a right secured by our constitution, is always subject to the preservation of the governmental authority of the state as conferred by law. In re Hales (Fla.) 1918B-936. (Annotated.)

85. An attorney cannot, under his constitutional right of free speech, slander or defame a court. In re Hilton (Utah) 1918A-271. (Annotated.)

## Note.

Validity of statute or ordinance regulating parades or processions, 1916D-847.

## GENERAL AND SPECIAL LAWS.

- 86. Effect of Slight Inequality. A statute is general and uniform, within the requirements of the constitution, if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because not made with exactness, or because in practice it may result in some inequality. Steele, etc. Co. v. Miller (Ohio) 1917C-926.
- 87. Classification. Reasonable classifications in a legislative act are not prohibited by the Constitution prohibiting the passage of local or special laws. Worthington v. District Court (Nev.) 1916E-1097.
- 88. Law Relating to Divorce. The Nev. Constitution, prohibiting any special laws granting divorce, renders void any special act granting divorce, as divorces granted by Parliament and state legislatures prior to the constitutional provision. Worthington v. District Court (Nev.) 1916E-1097.

## 10. DELEGATION OF LEGISLATIVE POWER.

89. Delegation to Courts of Nonjudicial Duty. In the absence of express constitutional provision therefor, the general assembly of Ohio cannot assign to the judicial branch of the government any duties other than those that are properly judicial, to be performed in a judicial man-Thompson v. Redington (Ohio) ner. 1918A-1161.

#### SELF-EXECUTING PROVISIONS.

90. The part of Const. Mo. art. 9, \$ 9, which provides that in any county which shall have adopted township organization the question of discontinuing the same may be submitted to a vote of the electors at a general election in the manner that shall be provided by law, is not selfexecuting, but the provision that, if a majority of the votes cast on the question

shall be against township organization, it shall cease in the county, and all laws in force in relation to counties not having township organization shall immediately take effect, is self-executing, and legislation is necessary to carry into effect the first part, while legislation as to the second must conform to it. State v. Duncan (Mo.) 1916D-1.

- 91. Prohibiting Intoxicants. The prohibition amendment to the Ariz. constitution, which in section 1 prohibits the manufacture in or introduction into the state of any intoxicating liquor and punishes any person who manufactures or sells or introduces into the state intoxicating liquor, and which declares in section 2 that the legislature shall, by appropriate legislation, provide for carrying into effect of the amendment, and which provides in section 3 that the amendment shall take effect on and be in force after January 1, 1915, is, when considered as a whole, self-executing, and section 2 merely imposes on the legislature the duty of enacting appropriate legislation for enforcement of prohibition; "appropriate" meaning suitable, fit, befitting, proper. Gherna v. State (Ariz.) 1916D-94.
- 92. Legislation in Aid of Self-executing Provision of Constitution. Const. Ariz. art. 2, \$21, requiring the legislature to effect all necessary laws to carry into effect the provisions of the constitution, grants no power to the legislature, and the duty it seeks to impose exists without the provision. Gherna v. State (Ariz.) 1916D-94.
- 93. As to School Taxes. Ark. Const. art. 5, § 28, declares that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, which shall not be longer than two Article 14, §§ 1-4, respectively, provide that common schools shall be maintained, that no school fund shall be used for any other purpose, that the general assembly shall provide by general laws for the support of common schools by taxes, that school districts may be allowed to levy special taxes, and that the supervision of public schools and the execution of laws relating thereto shall be vested in such officers as may be provided for by the general assembly. It is held that the provision of the constitution relating to school taxes is self-executing, except that the legislature may, every two years, deter-mine what percentage of the maximum school tax shall be levied, and no specific biennial appropriation by the legislature is necessary to authorize the payment of school funds for common school purposes. Dickinson v. Edmondson (Ark.) 1917C-
- 94. Classification of Cities. Section 1 of article 18 of the Ohio Constitution, relat-

- ing to the classification of municipal corporations, adopted September 3, 1912, is not self-executing. Murray v. State (Ohio) 1916D-864. (Annotated.)
- 95. Failure of Part. The fact that the costs cannot be collected, and that supplemental legislation is necessary, does not affect the provisions of the prohibition amendment to the Ariz. Constitution, which are clearly self-executing. Gherna v. State (Ariz.) 1916D-94.
- 96. Defined. Constitutional provisions are "self-executing" when they take immediate effect, and legislation is not necessary to the enjoyment of the right given or the enforcement of the duty imposed. State v. Duncan (Mo.) 1916D-1.
- 97. How Aided. A self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of constitutional right and make it more available. Gherna v. State (Ariz.) 1916D-94.
- 98. Constitutional Provision as Self-executing. To the exent of establishing the nature of the use for which privately owned property is necessary to the complete development of the material resources of the state, the provisions of said section 14 of the Idaho constitution are self-executing, and the courts of general jurisdiction are vested with the power to determine, upon judicial inquiry, whether or not any particular use for which land is sought to be appropriated is "necessary to the complete development of the material resources of the state." Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.
- 12. GENERAL PRINCIPLES GOVERN-ING DETERMINATION AS TO CONSTITUTIONALITY OF STAT-UTES.
  - a. In General.
- 99. Effect of Infringement of Constitution. Only the valid legislative intent becomes the law to be enforced by the courts. State v. Philips (Fla.) 1918A-138.
- 100. Declaring Statute Unconstitutional. Where a court passes on the constitutionality of a statute, in the validity of, which it has a direct pecuniary interest, such court should refuse to uphold the act, unless it is clear, by reason and authority, that the law is constitutional. McCoy v. Handlin (S. Dak.) 1917A-1046.
- 101. Power to Declare Statute Invalid. While the federal supreme court has the authority to make the final determination of the question of the constitutionality of an act of Congress, the state courts may, where the enforcement of a state statute

depends upon the constitutionality of a federal law, determine the question. State v. Sawyer (Me.) 1917D-650.

- 102. Statute Discussed. Certain constitutional limitations of the scope of section 580 of the Kan. Civil Code discussed. Wideman v. Faivre (Kan.) 1918B-1168.
- 103. Judicial or Political Question. Whether or not a state has violated the provision of U. S. Const. art. 4, § 4, guaranteeing to every state in the Union a republican form of government, is not a judicial question, but is a political one, which is solely for Congress to determine. Mountain Timber Co. v. Washington (U. S.) 1917D-642.
- 104. Criterion of Validity. The constitutionality of a law may be determined by its operative effect, though on its face it may be apparently valid. Castle v. Mason (Ohio) 1917A-164.
- 105. Evidence as to Constitutionality of Statute. The courts cannot hear evidence touching the constitutionality of a statute, but must determine its validity from the matters appearing on its face and matters of which the court can take judicial notice, though there may be some seeming exceptions to this rule. Barker v. State Fish Commission (Wash.) 1917D-810.
- 106. Test of Reasonableness of Order. There is no test of reasonableness that will fit all cases, but an order is unreasonable if contrary to federal or state constitution or laws, or if beyond the power of the commission, or if based on mistake of law, or if without evidence to support it, or if so arbitrary as to be beyond the exercise of reasonable discretion and judgment. State v. Great Northern R. Co. (Minn.) 1917B-1201.
- 107. Validity of Statute. Courts are not at liberty to declare a law void as in violation of public policy. Such policy is determined by the legislature, and the only limits upon the legislative power in such determination are those fixed in the state and federal constitutions. State v. Taylor (N. Dak.) 1918A-583.
- 108. Test of Validity of Statute. The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the express or implied restrictions of the state or federal constitutions. State v. Taylor (N. Dak.) 1918A-583.
- 109. Construction of Constitution. While the constitution is often applicable to conditions not existing when it was adopted, nothing may be read into the constitution merely because so doing will be helpful in dealing with conditions which exist now, but did not exist when the constitution was adopted. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

- b. Who may Raise Constitutional Question.
- 110. If there is any sphere within which a statute may validly operate, it should within that sphere be made effective. Therefore those not aggrieved may not complain of the unconstitutionality of a statute. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.
- 111. Validity of Ordinance. A colored man, who purchased a residence in the district of a municipality set apart by a prior ordinance to white people, cannot assail the ordinance as depriving him of liberty or property without due process of law. Hopkins v. Richmond (Va.) 1917D-1114.
- 112. Workmen's Compensation Act. The question of the constitutionality of the compulsory insurance provisions of the Iowa elective Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. c. 147), § 42, will not be considered by the federal supreme court at the instance of an appealing employer who has not accepted the act, where the highest state court construes such act as not compelling an employer to insure unless he has accepted and thus become subject to the act. Hawkins v. Bleakly (U. S.) 1917D-637.
- 113. Person not Injured. Persons not injured by portions of a statute cannot question its constitutionality. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.
- 114. Estoppel to Attack Statute. Mo. Laws 1905, p. 155, fixing fees of probate courts, and providing for the payment of a part of the fees into the county treasury for the benefit of the school fund of the county, and repealing all inconsistent acts and parts of acts, repeals Rev. St. 1899, § 3240, prescribing the fees of probate courts, and a judge of a probate court, elected after the Act of 1905 took effect, can only collect fees pursuant to the authority conferred thereby, and, when he collects fees, he is estopped from asserting the unconstitutionality of the provision for the payment of fees into the county treasury. Greene County v. Lydy (Mo.) 1917C-274. (Annotated.)
- 115. Estoppel to Attack Statute. A party may be estopped to assert the unconstitutionality of a statute in a suit on a bond given by him under it, from which he has received benefits. Greene County v. Lydy (Mo.) 19170-274.
- 116. Who may Assert Invalidity. A gas-distributing company cannot assert that constitutional rights of a gas-producing and transporting company furnishing gas to the former company upon the basis of a percentage of meter readings will be infringed by a municipal ordinance fixing the gas rates which the distributing com-

pany may charge. Newark Natural Gas, etc. Co. v. Newark (U. S.) 1917B-1025.

117. Persons not Affected. The defendant cannot attack the validity of the Wash. Commission Merchants' Law on constitutional grounds not applicable to their particular situation. State v. Bowen & Co. (Wash.) 1917B-625.

118. Where plaintiffs attacked the constitutionality of a statute authorizing a county to issue bonds for road purposes on the ground that the bonds cast a cloud on their property and that of other taxpayers, plaintiffs cannot urge the statute's invalidity as to persons who owned no property and paid only a poll tax, not falling within that class. Moose v. Board of Commissioners (N. Car.) 1917E-1183.

119. A court will not listen to an objection made to the constitutionality of an act by a party whose right it does not affect and who has therefore no interest in defeating it. State v. Philips (Fla.) 1918A-138.

120. A person who does not belong to a class alleged to be unlawfully discriminated against by a statute, cannot in judicial proceedings be heard to assail the constitutionality of the statute as it affects the class. State v. Philips (Fla.) 1918A-138.

121. One cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected thereby, or unless the unconstitutional feature renders the entire act void or renders the portion complained of inoperative. State v. Philips (Fla.) 1918A-138.

122. The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties. State v. Philips (Fla.) 1918A-138.

123. All constitutional inhibitions against the taking of private property without due process of law and all constitutional guaranties of equal rights and privileges, are for the benefit of those persons only whose rights are affected, and cannot be taken advantage of by any other persons. State v. Taylor (N. Dak.) 1918A-583.

124. One cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected by the statute, or unless the constitutional feature renders the entire act void. Gherna v. State (Ariz.) 1916D-94.

125. Persons Entitled to Attack Statute. Where specific performance of a contract for the sale of real estate to a colored person, which provided that he should not be required to accept a deed unless he had a right under the laws of the state and the city to occupy the property as a residence, was denied because of the existence of an ordinance making it unlawful for any white or colored person to move into and occupy as a residence any house upon any block upon which a greater number of houses were occupied by persons of the opposite color, the vendor, though a white man, is entitled to attack the constitutionality of such ordinance notwithstanding the rule that only persons whose rights are directly affected may attack the constitutionality of a law or ordinance, as his right to sell his property was directly involved and necessarily impaired. Buchanan v. Warley (U. S.) 1918A-1201.

### c. Avoidance of Determination.

126. Moot Questions. In an original proceeding in the supreme court, wherein a law is assailed as being unconstitutional, the court will not anticipate conditions which may never arise, or determine questions relating to the validity of minor provisions as to detail, but will consider only those questions which relate to the validity of the whole act. State v. Taylor (N. Dak.) 1918A-583.

127. Unnecessary Constitutional Questions. The rule that courts will not pass upon the validity of statutes unless it is necessary to a disposition of the appeal is one of comity, and may properly be departed from in an exceptional case. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

### d. Waiver of Objection.

128. Statute Long Acquiesced in. That a statute has for years been enforced by the courts, without its constitutionality being challenged, may be considered as a recognition of its constitutionality, and courts will seldom entertain questions of the constitutionality of a statute recognized as valid in the adjudication of rights, and when the invalidity of the statute would lead to serious consequences. Worthington v. District Court (Nev.) 1916E-1097.

129. Provisions of Statute not Involved in Case. The supreme court, where called to determine the validity of the provisions of Mo. Rev. St. 1909, \$ 10695, only so far as they relate to the disposition of a part of the fees collected by probate courts, will not consider the validity of the criminal provisions of the statute. Greene County v. Lydy (Mo.) 1917C-274.

### e. Construction in Favor of Validity.

130. The object expressed by the language of the statute in question being one

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that the legislature may lawfully accomplish under its police power, the statute will not be declared to be unconstitutional upon the ground that the purpose of the legislature was to exact from the public utilities a money tribute in violation of constitutional principles; first, because the purpose of the legislature is known to the courts only in so far as it appears in the object expressed by the language of its enactment, and, second, because in dealing with the language of an enactment the courts adopt, if possible, that construction which will sustain the statute as a valid act of legislation. State v. Sutton (N. J.) 1917C-91. (Annotated.)

131. When the constitutionality of a statute is questioned, it is the duty of the courts, and also a rule of construction, to adopt such construction as will make the statute constitutional if its language will permit. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

132. Unconstitutionality must be Clear. A statute will not be declared unconstitutional, unless clearly so, and not merely because doubts arise as to its validity. Greene County v. Lydy (Mo.) 1917C-274.

133. It is presumed that the legislature intended to enact a valid law, and, therefore, when a statute is susceptible of two constructions, one of which will render it valid and another which will render it unconstitutional and void, the former construction will be adopted. State v. Taylor (N. Dak.) 1918A-583.

134. Validity of Statutes Generally. All acts of the legislature are valid, unless they conflict with the state or federal Constitution. Board of Trustees v. Waugh (Miss.) 1916E-522.

135. Burden of Showing Discrimination. The burden is on one who complains that he has been denied the equal protection of the laws to sustain the complaint. State v. Philips (Fla.) 1918A-138.

### f. Presumption in Favor of Validity.

136. There is a strong presumption in favor of the validity and constitutionality of an act of the legislature. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

There is a presumption of validity in favor of a statute or ordinance; but such presumption, however strong, is not conclusive, though the legislative action will be sustained if possible under any reasonably supposable state of facts. New Orleans v. Toca (La.) 1918B-1032.

138. Unless an act is clearly and beyond all rational doubt in conflict with the constitution, it will not be so declared; all reasonable doubts will be resolved in

favor of its constitutionality. Laughlin v. Portland (Me.) 1916C-734.

139. The legislature is presumed to act within its powers, and its lawmaking discretion within its powers is not subject to review by the courts. State v. Philips (Fla.) 1918A-138.

140. It is presumed that the lawmaking power intended a valid, constitutional enactment. State v. Philips (Fla.) 1918A-138.

141. Any doubt in favor of the validity of a statute must be resolved in favor of validity. Hopkins v. Richmond (Va.) 1917B-1114.

142. The presumption of the constitutionality of a statute attaches to each separable provision thereof, and the invalidity of any provision must be made to appear beyond a reasonable doubt, before the court can declare any provision invalid. Greene County v. Lydy (Mo.) 19170-274.

In construing a statute authorizing the destruction of diseased cattle, it must be presumed that the legislature has carefully investigated and determined that the interests of the public require such legislation. Durand v. Dyson (Ill.) 1917D-84.

144. All reasonable doubts as to the question whether a statute authorizes taxation for a purpose not public should be resolved in favor of the constitutionality of the act. Perkins v. Board of County Commissioners (III.) 1917A-27.

145. All presumptions are in favor of the constitutionality of a statute. Perkins v. Board of County Commissioners (III.) 1917A-27.

146. All reasonable intendments will be made in favor of a law not obviously void on its face, and it will be presumed that the legislature has acted within constitutional limitations. State v. Bunting (Ore.) 1916C-1003.

147. An act of a state legislature will not be held unconstitutional unless its unconstitutionality appears practically beyond a reasonable doubt, since the state constitutions do not grant powers to the representatives of the people, but such representatives by virtue of the inherent sovereignty of the people have every power not withheld by the state constitution, or given to the federal government by the federal constitution. McCoy v. Handlin (S. Dak.) 1917A-1046.

148. All acts of the legislature are to be upheld by the court, unless it is plainly apparent that they conflict with the organic law, after solving all doubts in favor of their validity. Board of Trustees v. Waugh (Miss.) 1916E-522.

149. Every presumption is in favor of the validity of a statute, and, until the contrary is shown beyond a reasonable doubt, a statute enacted in the exercise of the police power will not be overturned. State v. Bowen & Co. (Wash.) 1917B-625.

150. An act of the legislature will not be declared unconstitutional unless its conflict with the constitution is clear and certain. Stout v. State (Okla.) 1916E-858.

151. Where a statute may be in violation of constitutional rights according to circumstances, the existence of circumstances necessary to support it will be presumed; hence it will be presumed in favor of Vt. Laws 1890, No. 179, empowering a paper company to float logs and timbers in a stream, that the stream was in fact navigable, for otherwise the act would be unconstitutional. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.

152. While it is only an honest exercise of the power that may do this, the courts presume that the legislature exercises this power in a legitimate way, and is not attempting thereby to evade the constitution. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

153. There is a legal présumption of the validity of a statute; if there is doubt as to its constitutionality the doubt shall be resolved in favor of its validity; the expediency or inexpediency of the statute is not for the courts; and the legislature's power to enact laws has no limitation except the express limitations of the state and federal constitutions. State v. Merchants' Exchange (Mo.) 1917E-871.

154. In determining the constitutionality of a statute, any doubt must be solved in favor of the legislative action, and the power to set aside a law is not to be resorted to unless the case be clear, decisive, and unavoidable. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

155. A statute solemnly enacted is not to be overthrown by anything short of a positive conviction of illegality. Hill v. Rae (Mont.) 1917E-210.

156. Where there is a reasonable doubt as to the meaning of a statute the court must adopt the meaning which will render it constitutional, for an act must be upheld by the court unless its repugnancy to the constitution clearly appears beyond reasonable doubt. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

### g. Wisdom of Statute.

157. Judicial Review of Statutes. It is the function of the legislative department to enact law, and of the judicial department to construe and apply it; and the courts cannot pass upon the wisdom or justice of statutes, but are simply to ascertain the intent of the lawmakers as expressed therein and to give effect thereto. Masses Pub. Co. v. Patten (U. S.) 1918B-999.

158. Policy of Statute. The wisdom of laws, etc., is a matter for the legislature, and it is the sole duty of the courts to say whether the act as passed is violative of the state or federal constitutions. State v. Senatobia Blank Book and Stationery Co. (Miss.) 1918B-953.

159. Expediency of Statute. The wisdom, necessity, or expediency of legislation are matters for legislative, and not judicial, consideration. State v. Taylor (N. Dak.) 1918A-583.

160. While the courts will not pass upon the wisdom of an act concerning the exercise of the police power, they will pass upon the question whether the act has a substantial relation to the police power. People v. Weiner (Ill.) 1917C-1065.

161. Policy of Statute. The court, in determining the validity of a statute, will not consider its policy, wisdom, or expediency, but will enforce it in accordance with the intention of the legislature, unless clearly in conflict with the constitution. Worthington v. District Court (Nev.) 1916E-1097.

162. Policy or Wisdom of Statute. Criticisms against the wisdom, policy, or applicability of a statute are subjects for legislative consideration, and not for the court in determining the constitutionality of the act. Perkins v. Board of County Commissioners (Ill.) 1917A-27.

163. Policy or Wisdom of Statute. Questions of the wisdom, necessity, and policy of law are solely for the legislature, and if the legislature proceeds regularly, violating no constitutional restriction, questions as to the necessity and policy of the law are conclusively determined in favor of the statute, if any state of facts could exist which would justify it. State v. Bowen & Co. (Wash.) 1917B-625.

164. Mandatory Nature of Constitution. Where constitutional provisions are clear, the courts should give effect to them, regardless of their wisdom. Moose v. Board of Commissioners (N. Car.) 1917E-1183.

165. The court, in determining the constitutionality of the legislative enactment, may not concern itself with the accuracy or wisdom of the legislative view. Hill v. Rae (Mont.) 1917E-210.

166. A statute enacted within the police power and appearing on its face to be reasonable and just and appropriate cannot be adjudged unconstitutional, though the court should doubt the wisdom of the statute; and, before it can adjudge the statute unconstitutional, it must be able to see either that there is no real substantial

evil of public interest to be guarded against or that there is no reasonable relation between the evil and the purported prevention offered by the statute. People v. Charles Schweinler Press (N. Y.) 1916D-1059.

167. Expediency of Statute. The court, in determining the validity of a statute, cannot consider its wisdom or policy or expediency. Gherna v. State (Ariz.) 1916D-94.

### h. Declaring Statute Unconstitutional.

168. Duty of Courts to Declare Nullity. It is not only within the power, but it is the duty, of the courts in proper cases to declare an act of the legislature unconstitutional, as the constitution is the supreme law which all judges are sworn to support, and the courts, in declaring what the law is, must, in case of a conflict between the constitution and a statute, sustain the constitution. State v. Knight (N. Car.) 1917D-517.

169. Courts should not declare acts of the legislature unconstitutional unless satisfied of their unconstitutionality beyond a reasonable doubt. Victor Chemical Works v. Industrial Board (III.) 1918B-627.

170. Invalidating Statute—Conflict With Constitution. It is the duty of the courts to enforce valid provisions of a statute; but a statutory provision that is clearly in conflict with organic law should not be enforced. State v. Philips (Fla.) 1918A—138.

171. Validity of Statute—In Harmony With Law Effectuating Constitutional Provision. No effect can be given to a legislative enactment, however broad its provisions, further than to harmonize it with existing law which is necessary to a constitutional requirement, and if a law be held to have been intended otherwise the court must declare it void for uncertainty or unconstitutionality. State v. Board of State Canvassers (Wis.) 1916D—159

172. Power to Annul Statute. If by judicial construction a legislative enactment embodies a purpose which is unconstitutional it must be condemned. State v. Board of State Canvassers (Wis.) 1916D-159.

173. Section 9205, Rev. Codes N. Dak. 1905, may be enforced and sustained even after eliminating therefrom the provision which relates to the fine. Even after the excision of such part of the statute, it can be presumed that the legislature would have passed the act, even though it had realized that the unconstitutional part would be eliminated therefrom. State v. Bickford (N. Dak.) 1916D-140.

(Annotated.)

174. One charged with selling liquor in violation of the prohibition amendment to the Ariz. constitution may not raise the question of the constitutionality of the provision prohibiting the introduction into the state of intoxicating liquor as an interference with interstate commerce, unless that provision, if invalid, renders the entire amendment invalid. Gherna v. State (Ariz.) 1916D-94. (Annotated.)

### 13. CONSTRUCTION OF CONSTITU-TION.

175. Constitutional Declaration of Purposes. In said section 14 of the Idaho constitution the people have declared the necessary use of lands to the complete development of the material resources of the state to be a public use, and the legislature has provided a procedure to subject such lands to such use. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.

176. By that provision of said section 14, Idaho Const., to wit, "or any other use necessary to the complete development of the material resources of the state... is hereby declared to be a public use," it was intended to and does include and cover every material resource of the state, and it is for the court to determine upon the facts of each case whether or not the case comes within the provisions of said section of the constitution. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.

177. That clause of said section 14, Idaho Const., to wit, "subject to the regulation and control of the state," refers to the machinery or procedure necessary to subject private lands to a public use. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.

178. Section 2 of article XIII of the Ohio constitution, as amended in September, 1912, contains a specific grant of power to the legislature to provide by law for the regulation of the sale and conveyance of personal property, and is a qualification to that extent of the guaranties contained in the Bill of Rights. Steele, etc. Co. v. Miller (Ohio) 1917C-926.

179. The Kan. constitution was not framed and adopted for the special protection of those who violate statutes, but for the good of the entire citizenship, and is to be construed with due regard for inevitable changes in social conditions and the advancement made in respect to the health, morals, and welfare of the people. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.

180. Words Taken in Ordinary Sense. In construing a state constitution the language thereof is to be taken in its general and ordinary sense, and when words

having both a restricted and general meaning are used, the general must prevail, unless the context clearly indicates that the limited sense was intended. Bronson v. Syverson (Wash.) 1917D-833.

181. Contemporaneous Construction. Where the language of the constitution and the intent of the people in adopting it are clear and free from doubt or uncertainty, the practice of the general assembly and officers of the government in making appropriations has no influence in determining their legality, since contemporaneous construction is of value only where there is doubt and uncertainty. Fergus v. Brady (III.) 1918B-220.

182. Citizens—State and Federal Citizenship. Under Const. Amend. 14 (9 Fed. St. Ann. 384), providing that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside, citizenship in the United States is paramount and dominant, instead of being subordinate to and derivative from state citizenship. Selective Draft Law Cases (U. S.) 1918B-857.

### 14. AMENDMENT OF CONSTITUTION.

### a. Adoption.

183. Number of Votes Cast. Under Const. Miss. 1890, § 273, providing that, if it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration, or amendment, that it shall be inserted by the next succeeding legislature as a part of this constitution, and not otherwise, amended returns of an election upon a constitutional amendment, showing the number of electors appearing at the polls and voting, legally or otherwise, which may or may not have been counted in ascertaining the result of the election, are of no value, since they do not show the number of qualified electors voting, for the reason that, though a qualified voter succeeds in getting his name on the poll list and a ballot in the box, he is not a voter voting unless his ballot is such as is prescribed by law and conforms to the general law regulating elections. State v. Brantley (Miss.) 1917E-723.

184. Proposal by Legislature—Entries. Under Const. Wash. art. 23, § 1, providing that constitutional amendments may be proposed in either branch of the legislature, and, if agreed to by two-thirds of the members of each branch, shall be entered on their journals with the ayes and noes thereon, and be submitted to the electors for their approval at the next general election, entries made on the journals, referring to a proposed amendment in the language of its title, that being sufficient as such, were sufficient without copying such proposed amendment in the journals.

nals in full. Gottstein v. Lister (Wash.) 1917D-1008.

185. Form of Amendment. Const. Wash. art. 23, § 1, provides that any amendment to the constitution may be proposed, provided that, if more than one amendment be submitted, they shall be submitted so that the people may vote for or against each amendment separately; article 2, § 1, vests the legislative power in a senate and house of representatives, to be called the legislature of the state; and the seventh amendment approved March 10, 1911 (Wash. Laws 1911, p. 136), purporting to directly amend article 2, § 1, substantially repeated its language, and qualified it by adding provisions therein for the exercise of legislative powers directly by the people through the initiative and referendum, and by withholding the veto power of the governor from "measures initiated by or referred to the people." is held, on objection, that the legislative proposal involved more than one amendment, and at least two separate subjects, that the amendment dealt with but one subject of legislative power, the participation of the people in legislation by direct vote, and that all else was incidental thereto, so that it was properly submitted as one proposition. Gottstein v. Lister (Wash.) 1917D-1008.

186. Number of Votes Required. Under Const. Wash. Amend. 7, approved March 10, 1911 (Laws 1911, p. 136), providing that initiative measures should become effective if approved by a majority of votes cast, if the votes cast equaled one-third of the total votes cast at such election, it is held that the term "votes cast at such election," meant the same as "number of voters voting at such election," and that since the court judicially knew that more than one-third of the voters voting on the amendment voted for its adoption, it was constitutionally adopted. Gottstein v. Lister (Wash.) 1917D-1008.

187. Judicial Power to Review Procedure. The courts have the power to declare void any attempted amendment to the constitution which is not adopted as prescribed by the constitution itself, and it is their duty to do so when the want of such prerequisites is of a substantial nature, and such that the court can judicially know that there has been a want thereof. Gottstein v. Lister (Wash.) 1917D-1008.

### b. Construction and Operation.

188. Construction of Constitution. The court, in construing a constitutional amendment, may transpose sentences and sections, to aid in arriving at the true construction thereof. Gherna v. State (Ariz.) 1916D-94.

### DIGEST. 1916C-1918B.

189. Harmonizing Parts. The court, in construing the prohibition amendment to the Ariz. constitution, must construe it as a whole and, if possible, give effect to the whole and to every section and clause; and, where different portions thereof seem to conflict, it must harmonize them, if practicable, and lean in favor of a construction which will render every provision operative. Gherna v. State (Ariz.) 1916D-94.

190. A constitutional amendment which aims to enlarge the power of the legislature or to remove doubts concerning its power should not be given too strict and literal an interpretation. Western Metal Supply Co. v. Pillsbury (Cal.) 1917E-390.

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#### 1. CLASSIFICATION OF CONTEMPTS.

1. The enumeration in Mont. Rev. Codes. § 7309, of acts constituting contempt is not exclusive, for section 8275 refers to other acts as constituting contempt. State v. District Court (Mont.) 1918A-985.

#### 2. CONDUCT CONSTITUTING CON-TEMPT.

- a. Obstructing Service of Process.
- 2. Evading Service of Process. A witness who, to evade service of subpoena to be issued, absconds and conceals himself at the request of a brother of one indicted for murder, is guilty of constructive con-

tempt of court. Aarons v. State (Miss.) 1916E-263. (Annotated.)

#### b. Criticism of Court.

3. Criticism Respecting Past Decision. The purpose to be subserved by investing courts with the power to punish contempt, as is recognized by Const. Mont. art. 8, § 3, authorizing writs of certiorari in proceedings for contempt in the district court. is to enable the courts to maintain order. and compel respect for their lawful orders, and enable them to investigate and determine causes before them without hindrance, and any publication tending to interrupt the due course of judicial administration may be punished as contempt, but criticism of a court after rendition of a decision, based on the decision, is not punishable as contempt, but is within the constitutional guaranty of freedom of speech, guaranteed by article 3, section 10. State v. District Court (Mont.) 1918A-985.

### c. Newspaper Comment.

- 4. Persons Liable for Newspaper Publication. Respondents, the publisher and managing editor of a newspaper published in a city where a federal court was in session, and circulated extensively in the city and throughout the state, permitted to be published therein an article containing statements relating to the defendant in a criminal case then on trial, such as that he was a paroled convict from the peniten-tiary of another state, was said to have committed other crimes described and other statements, not based on any evidence in the case nor admissible therein, but which were extremely prejudicial to the defendant. The article was read by some of the jurors in the case, and made it necessary to discharge the jury and continue the case. It is held that the court was within its power in imposing a fine for contempt on the publisher of the paper and also on the managing editor, although he did not personally see the article before its publication, on the ground that he failed in his duty to exercise proper editorial supervision. In re Independent Pub. Co. (Fed.) 1917C-1084.
- 5. Freedom of Press. The public press is not immune from the provisions of such statute authorizing punishment for contempts, but the freedom of the press guaranteed by the constitution is subordinate to the independence of the judiciary, and a newspaper article tending to interfere with the orderly procedure of the courts or to obstruct the administration of justice in accordance with legal standards is a contempt which is committed wherever the newspaper is intended to and does in fact circulate. In re Independent Pub. Co. (Fed.) 1917C-1084.

6. Newspaper Publication as Contempt. Publishers of newspapers have the right, but no higher right than others, to publish the conduct of the courts, but such right is limited by the obligation to observe respect for truth and fairness. In re Hayes (Fla.) 1918B-936.

### d. Defaming Legislature.

7. The implied power of the House of Representatives to deal directly by way of contempt, without criminal prosecution, with acts, the prevention of which is necessary to preserve and to carry out its legislative authority, does not embrace the punishment, as for a contempt, of the action of a federal district attorney in writing and publishing a letter addressed to the chairman of a subcommittee of the house, containing matter defamatory to the house or the committee, even conceding that the house was considering, and its committee contemplating, impeachment proceedings against that official. Marshall v. Gordon (U. S.) 1918B-371.

### (Annotated.)

### 3. POWER TO PUNISH.

- 8. Acts not in Presence of Court. Under the provision of Judicial Code, § 268 (Act March 3, 1911, c. 231, 36 Stat. 1163 [Fed. St. Ann. 1912 Supp. p. 243]), that the power of the federal courts to punish contempts "shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice" the physical nearness to the place where the court is in session of the actual commission of the act charged as a contempt is not important, but, as in the law of constructive presence in criminal cases, the misbehavior is committed where it takes effect. In re Independent Pub. Co. (Fed.) 1917C-1084. (Annotated.)
- 9. Power to Punish as Inherent. The power of a court of record to punish for contempt is inherent in the court. State v. District Court (Mont.) 1918A-985.
- 10. Power of Congress to Punish—Nature and Extent of Power. The distinction between legislative, executive, and judicial powers, recognized by the federal constitution, and the express limitations in such constitution, negative any implication of the possession of Congress of the commingled legislative-judicial authority as to contempts which is exerted in the English House of Commons. Marshall v. Gordon (U. S.) 1918B—371. (Annotated.)
- 11. Power to deal directly by way of contempt without criminal prosecution may be implied from the constitutional grant of legislative power to Congress in so far, and so far only, as such authority

is necessary to preserve and to carry out the legislative power granted. Marshall v. Gordon (U. S.) 1918B-371.

(Annotated.)

12. Punishment for contempt as punishment for the offense is not embraced in the authority to deal directly by way of contempt without criminal prosecution, implied from the constitutional grant of legislative power to Congress, since such power rests only upon the right of selfpreservation, i. e., the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty, or the refusal to do some-thing which there is an inherent legislative power to compel, in order that legislative functions may be performed. Marshall v. Gordon (U. S.) 1918B-371.

(Annotated.)

13. Congressional authority to deal directly by way of contempt without criminal prosecution with acts which interfere with the preservation of its legislative authority does not cease to exist merely because the act complained of may have been committed before the authority is exerted. Marshall v. Gordon (U. S.) 1918B-371.

(Annotated.)

14. Inherent Power to Punish. This court has the inherent power, independent of statutory authority, to punish as for a direct contempt any person who during the pendency of a cause before this court pub-lishes an article referring to such cause which reflects upon the efficiency and integrity of the court. In re Hayes (Fla.) 1918B-936.

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Power of legislature to punish person other than witness for contempt. 1918B-

### 4. PROCEEDINGS FOR PUNISHMENT.

#### a. Sufficiency of Evidence.

15. Removing Children from Jurisdic-Evidence in habeas corpus held sufficient, if it was the same as that in the contempt proceedings, to authorize a judgment that the applicant was in contempt for the violation of its injunction against removing his children from the jurisdic-tion of the court. Ex parte Ellerd (Tex.) 1916D-361.

#### 5. PUNISHMENT.

16. Matters Considered. It is within the discretion of the court, in imposing a fine for a criminal contempt which made it necessary to discharge the jury and grant a continuance in a criminal case then on trial, to take into consideration the increased costs thus incurred by the government. In re Independent Pub. Co. (Fed.) 1917C-1084.

17. Imprisonment only, and for a term not exceeding the session of the body in which the contempt occurred, is the limit of the authority to deal directly by way of contempt without criminal prosecution, implied from the constitutional grant of legislative power to Congress in so far as such authority is necessary to preserve and to carry out the legislative power granted. Marshall v. Gordon (U. S.) 1918B-371.

(Annotated.)

### 6. REVIEW OF PROCEEDINGS.

- 18. Violation of Injunction. Where no appeal was taken from a decree for a permanent injunction, rendered after due service on defendant, the sufficiency of the evidence to sustain that decree or the regularity of the proceedings cannot be reviewed on appeal from a sentence for contempt except in so far as to determine the jurisdiction of the court over the subject-matter. People v. Clark (Ill.) 1916D-
- 19. Sufficiency of Evidence. A decree entered on default, sentencing for contempt of court for disobedience to an injunction, cannot be reviewed on the ground of the insufficiency of the evidence; since the default admits the facts alleged. People v. Clark (Ill.) 1916D-785.

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Of married women, see Husband and Wife, 1-12.

Antenuptial contracts, see Husband and Wife, 15-25.

Liability of infants, see Infants, 1-17. Injunction to prevent breach, see Injunctions, 10-12.

Insurance policies, see Insurance, 9-23. Creation of joint tenancy by contract, see

Joint Tenants, 8. Contract to pay rent implied from occu-

pancy, see Landlord and Tenant, 32. Of employment, see Master and Servant, 1-8.

Contracts forming basis for mechanics' liens, see Mechanics' Liens, 3-8.

Enlistment as contract, see Militia, 14. Restraint on future occupation, see Monop-

olies, 5, 13.

Power of partner to bind firm, see Part-

nership, 27, 28.
Variance in date, see Pleading, 101.
Cancellation, see Rescission, Cancellation and Reformation, 13-15.

Contracts employing school teachers, see Schools, 29-30.

Set-off of breach of warranty in action for repairs, see Set-off and Counterclaim,

Sunday contracts, validity, see Sundays and Holidays, 1-6.

Taxation of contracts, see Taxation, 33.

For improvement under special assessment, see Taxation, 126.

Subscriber's contract for telephone service, see Telegraphs and Telephones, 37.

For use of railroad right of way, see Telegraphs and Telephones, 6, 7.

Breached contract to devise as creating trust, see Trusts and Trustees, 15. Effect of usury, see Usury, 3, 9-11.

Effect on renewal of contract, see Usury, 12-18.

War as excusing breach, see War, 18. Contracts to devise, see Wills, 5-7. Of legatees for division of personalty, see Wills, 254.

#### 1. ELEMENTS.

### a. Offer and Acceptance.

1. Effect of Acceptance—Consideration. Upon acceptance, the obligations became mutual, and the promise of one furnished a consideration for the promise of the other. Davis Laundry, etc. Co. v. Whitmore (Ohio) 1917C-988.

### b. Duress.

- 2. Who may Take Advantage of Duress. To be available as a defense in an action upon a contract, duress must have been exercised upon him or her who sets it up as a defense by him who claims the benefit of the contract or by some one acting in his behalf or with his knowledge. Travis v. Unkart (N. J.) 1917C-1031.
- 3. Definition of Duress. The definition of "duress" given in Ga. Civ. Code 1910, § 4116, providing that "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will," is sufficiently comprehensive to include any conduct which overpowers the will and coerces or restrains the performance of an act which otherwise would not have been performed. Dorsey v. Bryans (Ga.) 1917A-172.
- 4. What Constitutes—Threat to Prosecute Brother. Where a sister indersed a note executed by her mother to plaintiff when informed by him that her brother had committed a state's prison offense, and that plaintiff would send him to prison if his notes were not taken up, the sister's contract of indersement is void for legal duress. Travis v. Unkart (N. J.) 1917C-1031. (Annotated.)
- 5. What Constitutes—Threat of Abandonment by Spouse. While a threat by a husband to abandon his wife unless she signs a note may in some instances amount to duress which will relieve her of liability on the note to a holder with notice,

yet, where the circumstances show that the wire had no reasonable apprehension of the threat being carried into execution, the bare making of it will not be such duress as to render the note invalid. Dorsey v. Bryans (Ga.) 1917A-172.

(Annotated.)

#### Notes.

Validity and effect of contract induced by threats of criminal prosecution against friend, or relative other than parent, child or spouse. 1917C-1033.

Threat of abandonment by spouse as duress. 1917A-174.

Validity and effect of contract of parent or child induced by threats of criminal prosecution against other. 1917C-1026.

#### 2. EXECUTION.

6. What Constitutes Testamentary Act—Proxy to Vote Stock. Such contract is not an attempted testamentary disposition of property, and so is not void because it was not executed with the formalities required in wills. Thompson v. J. D. Thompson Carnation Co. (Ill.) 1917E-591.

#### Note.

Implied authority to fill in blanks so as to complete signed instrument, 1917E-518.

# 3. CONSTRUCTION AND INTERPRETATION.

### a. In General.

- 7. Effect of Express Provision. There can be no implied covenants in a contract in relation to any matter that is specifically covered by the written terms of the contract itself. Kachelmacher v. Laird (Ohio) 1917E-1117.
- 8. Time of Essence of Contract. While under section 876, St. Okla. 1890 (section 968, Rev. Laws 1910), no particular form of expression is necessary to make it so, time is never considered of the essence of a contract unless expressly so provided by the terms thereof. Wiebener v. Peoples (Okla.) 1916E-748.
- 9. Where the language of a contract is uncertain and the parties thereto, by their subsequent acts and conduct, have shown that they construed it alike and within the purview of the constructions permitted as possible by such language, the courts will ordinarily follow such adopted construction as the correct one. Wiebener v. Peoples (Okla.) 1916E-748.
- 10. What Constitutes Engaging in Business. An agreement by the seller of a retail grocery business and the good will thereof not to conduct the same kind of business in the same town for a specified period is not broken by loaning money te a new grocery firm, where he has no pecu-

niary interest in such firm, directly or indirectly, as member, manager, agent, or otherwise than as a creditor. Finch v. Michael (N. Car.) 1916E-382.

(Annotated.)

- 11. Presumption as to Place of Payment. Where a contract to pay money is silent as to the place of payment, the law, in the absence of any legitimate inference to the contrary, implies that payment shall be made at the creditor's residence, office, or place of business, if within the state. State v. Kenosha Home Tel. Co. (Wis.) 1916E-365.
- 12. Avoiding Oppression or Inequality. A contract will not be construed so as to render it oppressive or inequitable to either party thereto, or so as to place one of the parties at the mercy of the other, unless it is clear that such was the manifest intention. Little Cahaba Coal Co. v. Actna Life Ins. Co. (Ala.) 1917D-863.
- 13. Construction in Favor of Validity. The court will not, unless constrained to do so by the terms of the instrument in the light of the surrounding circumstances, give to corporate bonds and mortgage such an interpretation as would make them void. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.
- 14. Intent of Parties. A party writing a contract cannot reasonably contend that he did not intend to do all that the contract by its terms obliged him to do. Hyland v. Oregon Hassam Paving Co. (Ore.) 1916E-941.
- 15. Popular or Technical Meaning. While legal terms are ordinarily given their technical meaning, in the absence of anything indicating that they are used in a different sense, where, upon consideration of the whole of an instrument, it appears that they are employed in an entirely different sense, such meaning will be adopted, and they will not be given their strict technical meaning if this will defeat the manifest intention. Saulsberry v. Saulsberry (Ky.) 1916E-1223.
- 16. Time as Essence of Contract. The written offer not having stipulated the time when the stock should be delivered, time did not become the essence of the contract, but the seller had a reasonable time to procure the outstanding stock. Davis Laundry, etc. Co. v. Whitmore (Ohio) 1917C-988.
- 17. Intent of Parties Controls. Parties competent to contract and free to do so may, in the exercise of their judgment, make their own contracts; and when their intention is ascertained, it is ordinarily the duty of the courts to carry it out, if not in conflict with any rule of law, good morals, or public policy. Parker-Washington Co. v. Chicago (Ill.) 1916C-337.
- 18. Exchange of Property—Contract— Termination—Lapse of Reasonable Time

for Completion. Where a contract for an exchange of properties does not, in itself, provide a time for its termination, a reasonable time is implied. Littlefield v. Bowen (Wash.) 1918B-177.

### b. Particular Contracts.

- 19. Place of Support. When an obligation upon the part of the grantee to support the grantor is created by deed and there is no express direction where and how the support should be furnished, the grantor is entitled to require it to be furnished at any place he may select if it can be supplied there without needless or unnecessary expense. Soper v. Cisco (N. J.) 1918B-452.
- 20. Promise to Pay "All Debts." A promise to pay all the "debts and obligations" of another includes the promise to pay its obligation to account and pay to a cotenant the latter's share of the proceeds of ore which the grantor has extracted from the common property and sold. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571.
- 21. Furnishing Materials for Telephone Line. Where plaintiff contracted with defendant to stake out a telephone line and furnish the materials for sixteen sections, defendant to procure subscriptions for that number of sections, or take them himself, plaintiff's failure to deliver the materials to defendant was not a breach of the contract. Camp v. Barber (Vt.) 1917A-451.
- 22. Construction of Terms—"Assets" of Corporation. In determining the assets of the corporation in such case, a claim for demurrage apparently due the corporation was properly excluded, where it appeared that the corporation's agent had agreed to save the party apparently liable therefor harmless from any claims for demurrage. Miller v. Dilkes (Pa.) 1917D—555.

#### Note.

Amusement contracts. 1917C-391.

### 4. VALIDITY.

- a. Contracts in Violation of Statute or Ordinance.
- 23. Sale of Liquor—Knowledge of Purpose to Resell Illegally. Mere knowledge on the part of a seller of intoxicants that the buyer intends illegally to resell the liquors will not render the contract void, so as to bar the seller's action for the purchase price, though if the seller participates in or contributes to the purchaser's intention to sell illegally, or does any act to facilitate or further the design to transgress the law, or has an interest therein, the right to recover the price is lost. Paul Jones & Co. v. Wilkins (Tenn.) 1918B-977. (Annotated.)

- 24. Violation of Statute. Any agreement involving the doing of an act positively prohibited by common law or statute is illegal and void. Gordon v. Gordon's Administrator (Ky.) 1917D-886.
- 25. Where the seller of liquors knew through its local agent that the buyer was running a wide-open liquor saloon in violation of law, and made the shipment to a transfer company, not to the consignee, marked merely with his initials, so that the public could not know to whom it was to be delivered, such seller cannot recover the price, having aided the buyer's design to transgress the law and circumvented the legislature's object in passing acts (Tenn. Ex. Sess.) 1913, c. 1, requiring common carriers to cause all consignees of liquor to sign, before delivery, an affidavit setting out his name, etc. Paul Jones & Co. v. Wilkins (Tenn.) 1918B-977. (Annotated.)

### Note.

Validity of sale of liquors where seller knows same will be illegally resold. 1918B-978.

- b. Contracts Affecting Administration of Justice.
- 26. Validity of Contract to Procure Pardon or Parole. A contract whereby one agrees to use his personal influence with the pardoning authority to procure a pardon is void as against public policy, being in contravention of Ky. St. § 1370, denouncing as unlawful contracts to procure a pardon from the governor, only in cases in which the party whose pardon is sought to be obtained has been convicted of crime by a legally constituted tribunal having the constitutional right to try and punish him. Gordon v. Gordon's Administrator (Ky.) 1917D-886. (Annotated.)
- 27. Contract to Procure or Suppress Evidence. A contract with decedent to secure letters in the possession of a third person so that they may be suppressed, and not without being used in a criminal prosecution against decedent, made with knowledge of such purpose, is illegal; but, if the letters were to be secured merely to prevent the person in whose possession they were from sending them unlawfully to the writer's wife, then the contract is good. Josephs v. Briant (Ark.) 1916E-741.
- 28. A contract to procure evidence to win decedent's divorce case, or to secure the possession of letters to prevent their use against him in the divorce suit, was void for illegality; but, if the procurement of the letters by the claimant was the only service she was to perform, she being unaware of any illegal purpose on the part of decedent to suppress the letters, it is not invalid. Josephs v. Briant (Ark.) 1916E-741.

#### Note.

Validity of contract to procure pardon or parole. 1917D-890.

- c. Contracts Relating to Public Lands.
- 29. Withdrawal of Competing Proposal for Public Land. The state of Idaho, by Rev. Codes Idaho, §§ 1613-1634, accepted the provisions of the acts of Congress relating to the reclamation of desert lands (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [U. S. Comp. St. 1913, § 4685]; Act June 11, 1896, c. 420, § 1, 29 Stat. 413 [U. S. Comp. St. 1913, § 4686]; Act March 3, 1901, c. 853, § 3, 31 Stat. 1188 [U. S. Comp. St. 1913, § 4687]), established a complete system for carrying into effect their provisions, and vested in the state board of land commissioners the selection, management, and disposal of such lands, authorizing the board on due application to contract on behalf of the state for the construction of irrigation works, and giving it exclusive power to pass on any application. While competitive proposals filed by two applicants for the reclamation of certain land were pending, one applicant orally agreed with the other that he would withdraw his bid for a certain consideration. A written contract executed subsequently in Pennsylvania, instead of providing that the applicant should withdraw its proposal. stipulated that it should sell to the other applicant its maps, plans, surveys, and estimates and interest in its application for the sum orally agreed upon. In accordance with the oral agreement the proposal was withdrawn and an award made to the other applicant, who paid a part of such sum on account, the maps, etc., being duly delivered. It is held that the written contract, being void as against public policy and the real consideration therefor being illegal, could not be enforced for the amount remaining due under it. Kuhn v. Buhl (Pa.) 1917D-415.
- d. Contracts for Suppression of Bidding.
- 30. Agreement to Prevent Bidding at Judicial Sale. Plaintiff and three others were joint owners of certain corporate stock subject to a mortgage for the purchase price thereof. On foreclosure of the mortgage, plaintiff was preparing to bid on the stock, when he was told by two of the other owners that the mortgagee had agreed to bid in the stock for the amount of the debt and transfer it to the three owners on payment of the purchase price, thereby eliminating the interest of the fourth owner. Plaintiff thereupon ceased his efforts to raise the money with which to compete in the bidding, and, after the sale, discovered that the real agreement between the purchaser and the other two owners was, that the stock should be transferred to them, so that plaintiff was also

eliminated as an owner. It is held that the agreement between the purchaser, plaintiff, and the two owners to prevent competition in the bidding was a fraud upon the fourth owner, and therefore could not be specifically enforced in equity. Schmitt v. Franke (Wis.) 1917D-230.

(Annotated.)

#### Note.

Validity of contract to prevent bidding at judicial sale. 1917D-232.

- e. Enforcement of Illegal Contracts.
  - (1) Recovery on Quantum Meruit.
- 31. Where a contract, classifying the material to be removed by plaintiff in his grading and construction work, is void because made on Sunday, plaintiff is entitled to recover the reasonable value of the work, regardless of the classification. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.

### (2) Proof of Illegality.

32. Parol Evidence to Show Illegality. Evidence aliunde is admissible to show the illegality of the consideration of a contract attacked on the ground that it is violative of public policy; it being the court's duty in such case to inquire into the entire transaction unembarrassed by any technical rules as to the admissibility of evidence. Kuhn v. Buhl (Pa.) 1917D-415.

#### Note.

Admissibility of parol evidence to show illegality of contract. 1917D-426.

### f. Contracts Against Public Policy.

- 33. Effect of Infringing Public Policy. A contract prohibited by public policy will be declared illegal, though no actual injury may have resulted to the public in the particular instance; the test being the evil rendency of the contract, and not its actual result. Kuhn v. Buhl (Pa.) 1917D-415.
- 34. A contract whereby a paving company agreed to pay plaintiff 3 per cent of the contract price on all contracts for street improvement work entered into between it and a city, to be earned when the contract should have been duly signed by the company and the city, and providing that plaintiff should "at all times do everything in his power" to further the business of the company, under which plaintiff was to circulate petitions among property owners asking that streets be paved with . the company's product, and obtain signa-· tures of 20 per cent of the property owners, to present such petitions to the city council, to answer and fight remonstrances, and, by bringing property owners before the street committee and the council, to procure the passage of ordinances and resolutions authorizing the paving of streets, and assessing the expense on the adjacent

lots, in effect a selling or promoting proposition, in view of the fact that the compensation was contingent, and was broad enough to cover services of any kind, secret or open, honest or dishonest, and the exercise of personal and private influence upon the city council, and of the fact that such compensation was probably included in the company's contract price, is invalid, as against public policy. Hyland v. Oregon Hassam Paving Co. (Ore.) 1916E-941. (Annotated.)

- 35. Contract to Procure Legislation. Any person interested in any proposed legislation before any legislative body, including the common council or other lawmaking body of a municipal corporation, may legally employ an agent or an attorney to collect facts relating thereto, and to prepare a bill, and to explain the desired measure to the legislative body or any committee thereof fairly and openly, and have it introduced, and a contract to pay for such services, so rendered, is not a violation of law or of public policy. Hyland v. Oregon Hassam Paving Co. (Ore.) 1916E—941. (Annotated.)
- 36. Contract Against Public Policy. Many things which the law does not prohibit in the sense of attaching penalties to punish their commission cannot be admitted as the subject of a valid contract, as being so mischievous in their nature and tendency that to permit them to be the subject-matter of a contract would be violative of "public policy"; the principle declaring that no one can lawfully do that which has a tendency to be injurious to the public welfare. Gordan v. Gordan's Admr. (Ky.) 1917D-886.
- 37. A contract is against public policy if injurious to some established public interest, contravenes some public statute, is against good morals, or tends to interfere with the public welfare or safety. Gordon v. Gordon's Admr. (Ky.) 1917D-886.
- 38. Ky. St. § 3828 requires that the board of prison commissioners base its action in paroling a prisoner upon his record while confined, his record previous to confinement, and upon his securing, before parole, a contract for employment for six months. Section 1370 denounces the offense of assisting in procuring the granting or refusal of a pardon by the governor for fee or reward. It is held that a contract of a son with his father whereby the son agreed to prepare an application and to do what was necessary to secure the parole of his brother from prison in return for the father's promise to reimburse him for expenses incurred, necessary in view of the requirements of the paroling statute, was not void as in contravention of public policy, the case not coming within section 1370. Gordon v. Gordon's Admr. (Ky.) 1917D-886. (Annotated.)

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- 39. Contract to Control Governmental Action. All agreements for pecuniary considerations to control the business operations of the government are void as against public policy, without reference as to whether improper means are attempted or used in their execution. Kuhn v. Buhl (Pa.) 1917D-415.
- 40. Public Policy. A contract is not void as against public policy unless it is injurious to the public or contravenes some established interest of society; such policy being determined by the state constitution and statutes, and, where these are silent, by the decisions of the courts. Chreste v. Louisville R. Co. (Ky.) 1917C–867.

#### Notes.

Validity of contract for contingent compensation in procuring legislation. 1916E-948.

Validity of contract not to change will. 1916D-1160.

### g. Contracts Affecting Elections.

41. Influencing County Seat Election. That the principal purpose of a contract by one of two town-site companies to buy the other's land is to eliminate the latter's town as an aspirant for the county seat and secure influence and votes at a county seat election, will not invalidate the contract, though the election is pending, where there is no stipulation as to how the officers of the vendor shall vote or use their influence or any provision that the purchase money shall not be payable if the election is unfavorable to the purchaser. Lamro Townsite Co. v. Bank of Dallas (S. Dak.) 19170-346. (Annotated.)

### Note.

Validity of contract designed to influence public election. 1917C-350.

### h. Contracts Partially Illegal.

- 42. Effect of Partial Invalidity. Where the consideration is valid and several/separable promises are based upon it, some of which are legal and others illegal, while the illegal promises are void, the legal ones will be enforced. Stratton v. Wilson (Ky.) 1918B-917. (Annotated.)
- 43. Where the consideration of a contract is indivisible, and a part is illegal, it falls as a whole. Kuhn v. Buhl (Pa.) 1917D-415.

### 5. MODIFICATION OR MERGER.

44. Oral Extension of Time. A substantial performance of an oral agreement for an extension of time for the completion of a building contract reduced to writing makes the oral agreement a lawful alteration of the written contract. American-

Hawaiian Eng. etc. Co. v. Butler (Cal.) 1916C-44.

#### 6. PERFORMANCE OR BREACH.

#### a. Performance.

- 45. Necessity of Performance. Where a contract for services is special and entire, the price as fixed by it cannot be recovered unless the party has strictly performed it. McCurry v. Purgason (N. Car.) 1918A-907.
- 46. The seller of a retail grocery business and the good will thereof who agreed not to conduct the same kind of business in the same town, is not thereby required to see that the purchaser retained all the customers of the old business. Finch v. Michael (N. Car.) 1916E-382.

(Annotated.)

### b. Acts Constituting Breach.

- 47. The unconditional notice of cancellation, though not acquiesced in by plaintiff operated to relieve defendant from damages resulting from the acts done by plaintiff in performance of the contract subsequent to notice of cancellation, and relieved defendant from freight charges incurred by plaintiff after such notice of cancellation. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706. (Annotated.)
- 48. Anticipatory Breach. Before time fixed for delivery defendant gave notice of cancellation of his written and accepted order of plaintiff for a traction engine. Plaintiff refused to permit cancellation, insisting upon performance, with defendant repudiating the contract and declaring that he would not accept or pay for the machine. Plaintiff thereafter tendered it, and, upon defendant's refusal to accept it, left the engine at defendant's farm against his protests and without his consent. Plaintiff claims title passed as on a delivery, and sues for the purchase price, \$2,400, and sues for the purchase price, \$2,400, and freight \$104 additional. Held, the doctrine that there can be no anticipatory breach of an executory contract of purchase and sale, adopted in Stanford v. McGill, 6 N. D. 536, is overruled, and the overwhelming weight of authority, both English and American, followed. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.

(Annotated.)

### c. Excuses for Nonperformance.

49. Conditions Precedent. Plaintiff, entering into a contract with a contracting company for excavation work to be completed for a certain price and by a certain date, with a provision for liquidated damages, upon which the contractor gave a surety bond conditioned for the faithful performance of the contract, on the contractor's abandonment of the work, is un-

der no duty to complete it as a condition precedent to his recovery of damages. Comey v. United Surety Co. (N. Y.) 1917E-424.

- 50. Effect of Waiver of Stipulation as to Time. Where time of performance of a building contract, made of the essence, is once waived, another date for performance can only be fixed by definite notice, or by conduct equivalent thereto. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.
- 51. Time for Rescission. In a suit to recover payments under a contract for the sale of a house and lot under which the purchaser went into possession in November, 1911, but which he attempted to rescind in March, 1913, because of the inability of the vendor to give title to a narrow strip covered by the contract, evidence as to improvements made by the purchaser, the pendency of a suit involving the contract and its binding force, and negotiations for a settlement, held to make a question for the jury whether the rescission was attempted within a reasonable time. Brown v. Aitken (Vt.) 1916D-1152.
- 52. Delay during the time parties to a contract are negotiating for a settlement does not amount to a waiver of the right to rescind. Brown v. Aitken (Vt.) 1916D-1152.
- 53. Misrepresentation and Concealment. Misrepresentations by bank president soliciting a guaranty as to the business of its debtor, the guarantor's son, and concealment of the son's debt to the bank from stock gambling losses equaling the amount of the guaranty, are sufficient to avoid the contract. American National Bank v. Donnellan (Cal.) 1917C-744.

### Note.

Right of purchaser to rescind contract for sale for breach by vendor in tendering less land than quantity contracted for. 1916D-1154.

### 7. IMPLIED CONTRACTS.

54. Services by Member of Family. Where maintenance and services are rendered between relatives living together as one household there is a presumption that they were intended to be gratuitous. In order to recover therefor the plaintiff must overcome this presumption by proving affirmatively either an express contract for remuneration or circumstances showing a mutual understanding or expectation between the parties that there would be compensation. Holstein v. Benedict (Hawaii) 1918B-941.

### 8. ACTIONS.

### a. Remedies for Breach.

55. Stipulated Remedies for Breach as Exclusive. Where a contract provides cer-

tain specified remedies for its breach, other remedies are not excluded, in view of La. Rev. Civ. Code, art. 1962, providing that when a contract contains general obligations, and the parties in order to avoid a doubt whether a particular case comes within the scope of the agreement have made special provisions for such case, the general terms of the contract shall not be restricted to the single case provided for. Queensborough Land Co. v. Cazeau (La.) 1916D-1248.

### b. Pleading.

- 56. Plea by Defendant of Change in Contract. In an action on a contract, defendant was not required to plead evidence to establish the contract, but, having pleaded the instrument claimed by it to establish the contract, was entitled to show that such instrument was prepared and assented to, with the changes therein, after the contract relied on by plaintiff had been executed. Divide Canal, etc. Co. v. Tenney (Colo.) 1917D-346.
- 57. Recovery on Quantum Meruit. In an attorney's action on an express contract for compensation, plaintiff cannot recover on the quantum meruit without amending his pleadings. Egan v. Burnight (S. Dak.) 1917A-539.

#### c. Evidence.

- 53. Parol to Supplement Contract. Where a telephone rental contract is silent as to the place of payment of rentals, but provides that it cannot be varied, except in writing, signed by a contract agent or higher officer of the company, evidence of an oral agreement between plaintiff and defendant's service solicitor that rentals should be collected monthly by collectors at plaintiff's office is inadmissible. State v. Kenosha Home Tel. Co. (Wis.) 1916E-365. (Annotated.)
- 59. Sufficiency. That the telephone number, used by the seller of a retail grocery business in his store has been changed, and the old number transferred to a new grocery firm to whom he had loaned money, does not show a violation of his agreement not to conduct the same kind of business in the same town. Finch v. Michael (N. Car.) 1916E-382. (Annotated.)

### Note.

Admissibility of parol evidence to show place of payment under contract silent in that respect. 1916E-366.

### d. Questions for Jury.

60. Amusement Contract—Wrongful Discharge of Actor—Question for Jury. In an action on a written contract for the employment of a company of actors for wrongful discharge without two weeks' notice provided for, plaintiffs' right of recovery is held to be for the jury. Fergu-

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son v. Majestic Amusement Co. (N. Car.) 1917C-389. (Annotated.)

### e. Questions of Law and Fact.

- 61. Abandonment. As to whether a contract in suit was abandoned is a mixed question of law and fact; what constitutes an abandonment being a matter of law, and whether there has been an abandonment, a question of fact. McCurry v. Purgason (N. Car.) 1918A-907.
- 62. Validity as Question of Law. Whether a contract is against public policy is a question of law for the court to determine from all the circumstances in each case. Kuhn v. Buhl (Pa.) 1917D-415.

### f. Damages.

63. Penalty or Damages. A provision in a contract for the sale of electrical machinery to be manufactured that for each day of delay in the delivery thereof twenty-five dollars should be deducted from the purchase price "as liquidated damages and not as a forfeit" is a stipulation for liquidated damages and not for a penalty. Canadian General Elec. Co. v. Canadian Rubber Co. (Can.) 1916D-488.

(Annotated.)

- 64. Recovery of Liquidated Damages. In an action for the purchase price of machinery liquidated damages for delay in delivery, which by the contract are to be deducted from the price, may be so deducted without a cross-action. Canadian General Elec. Co. v. Canadian Rubber Co. (Can.) 1916D-488.
- 65. Necessity of Proving Actual Damage. To warrant a recovery under a fair and reasonable provision for liquidated damages for delay, no proof of actual damages is necessary. Canadian General Elec. Co. v. Canadian Rubber Co. (Can.) 1916D-488.
- 66. Contracts Liquidating Damages. Contracts by which parties, who are under no compulsion, agree beforehand upon the amount of damages which shall be allowed for a breach, are as lawful as any others, unless inhibited by some rule of law. Parker-Washington Co. v. Chicago (III.) 1916C-337.
- 67. Penalty or Liquidated Damages. Where the intention of the parties to a contract is in doubt, the courts are inclined to construe a sum stipulated for in case of breach as a penalty, since the general theory of the law is that compensation shall be the rule, and the application of that rule works justice between the parties. Parker-Washington Co. v. Chicago (III.) 1916C-337. (Annotated.)
- 68. In determining whether a stipulated sum to be paid for the breach of a contract was intended to be a penalty or liquidated damages, the language used and the sub-

- ject-matter of the contract will be considered to ascertain the intention of the parties, and generally the language used will control; but the use of the word "liquidated" is not always controlling. Parker-Washington Co. v. Chicago (Ill.) 1916C—337. (Annotated.)
- 69. If a provision in a contract fixing a stipulated sum in case of breach has reference to uncertain damages, and it appears that serious damage might have been incurred, and no fraud has been used in procuring the contract, the courts cannot interfere, and the stipulated sum furnishes the measure of damages. Parker-Washington Co. v. Chicago (Ill.) 1916C-337.

(Annotated.)

- 70. Where different acts to be performed under a contract are of unequal degrees of importance, some resulting in great damage, and others in trifling and inconsiderable loss, a stipulated sum in gross, to be paid for a failure to perform any one of the acts, will be construed as a penalty. Parker-Washington Co. v. Chicago (Ill.) 1916C-337. (Annotated.)
- 71. A stipulation in a contract with a city for the construction of a pumping station for pumping water to be distributed to certain parts of the city for the use of the inhabitants and for protection against fire, for the payment of \$50 for each day that completion was delayed beyond a time fixed, is a stipulation for liquidated damages, and not for a penalty, as the contract was made for the purpose of preserving the health and promoting the convenience and welfare of citizens, and protecting them and their property, and there can be no estimate of the damages, or compensation for the inconvenience to the public, especially where the contract recites that the damages from such delay cannot be calculated with any degree of certainty. Parker-Washington Co. v. Chicago (Ill.) 1916C-337. (Annotated.)
- 72. Liquidated Damages. Under a contract for the construction of a pumping station for a city, providing for the payment of \$50 for each day that the completion of the contract was delayed as liquidated damages, such damages are recoverable, though the pumping station was designed to bring water through a tunnel which was not completed until after the completion of the pumping station; the contracts for the construction of the tunnel having provided for its completion nine months before the time fixed for completion of the pumping station. Parker-Washington Co. v. Chicago (Ill.) 19160-337.
- 73. Special Damage. One seeking to recover special damages for breach of contract must show that such damages were within the contemplation of both parties to the contract; otherwise he can only recover such damages as in the usual course of

things flow from the breach. Missouri etc. R. Co. v. Foote (Okla.) 1917D-173.

(Annotated.)

- 74. Inference of Damage from Breach of Contract. Whenever there is a breach of a contract for the invasion of a legal right the law infers some damage. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726.
- 75. Liquidated Damages Distinguished from Penalty. Where plaintiff enters into a written contract with the defendant bank to tear down its old building and to erect a new two-story building, which should be completed by August 15, 1912, and to pay the owner \$10 per day as liquidated damages for delay in completion, and the bank's quarters on the lower floor are not completed and accepted until December 15th, and the upper floor later, during which delay the damages to the bank are indeterminate and difficult of ascertainment, though it is shown that the sum named bears a fair proportion to the damages discussed and manifestly contemplated by the parties in case of delay, and to the damages sustained, the stipulation is one for liquidated damages, and not for a penalty. Nevada County Bank v. Sullivan (Ark.) 1917D-736.
- (Annotated.)
  76. Duty to Minimize Damages. Though plaintiff could keep the contract alive and insist upon its performance up to the time for delivery, and could incur freight expense in so doing after notice of cancellation, its right to recover for it depends upon defendant's subsequent withdrawal of his repudiation and subsequent performance. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.
- 77. The incurring of the freight charge after notice of cancellation received is an enhancement by plaintiff of its own damages, and not recoverable, unless suit can be maintained for the purchase price. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.

#### Notes.

Recovery of profits as damages for breach of contract to sell on commission. 1917B-1194.

Measure of damages for breach of contract to make will. 1918A-854.

Whether stipulated forfeiture for breach of contract a penalty or liquidated damages. 1917D-739.

- 9. BUILDING OR WORKING CONTRACTS.
  - a. Construction of Provisions.
- 78. Right of Contractor to Instalment—Delay in Prosecuting Work. The provisions in a building contract, which authorize the owner to terminate the contract on the architect certifying that the delinquencies of the contractor justify such

action, and which authorize the owner, on terminating the contract, to enter on the premises and complete the work, and provide that, in case of discontinuance of the employment, the contractor shall not be entitled to receive any further payment until the work is finished, do not affect the right of the contractor, under the provision for partial payments as the work progresses, to receive moneys due him for work already done, unless there is an actual discontinuance of the employment, in which case he is not entitled to any further payment until the work has been completed by the owner, and the architect's certificate of delinquency, authorizing a termination of a contract, is conclusive for the purpose of authorizing a termination, and for the purpose, after termination, of authorizing the owner to refuse further payments, and where the architect merely certifies to the failure of the contractor to prosecute the work diligently, the contractor is entitled to the partial payment stipulated for during the month preceding the making of the certificate. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.

79. Practical Construction of Contract. In a contract for the construction of a building, where there is an exception in favor of the builder of "excavations and foundations complete to joist line," which are to be "completed" by the owner, from the obligations of the builder, the builder should supply an iron railing required by the contract to be placed above the joist line on an outer retaining wall of a light and air space outside the basement, but he is not required to allow the owner in deduction from the contract price of construction the cost of stairways leading to and from such basement and voluntarily supplied by the owner, where all the conduct of the parties during the work of construction shows that they construed the contract as requiring the owner to Wiebener v. Peoples supply the same. (Okla.) 1916E-748.

#### Note.

Construction of phrase "damage by elements" or similar phrase as used in contract. 1917B-296.

### b. Performance or Breach.

80. Recovery for Substantial Performance. A contractor and builder who has in good faith endeavored to perform all that is required of him by the terms of his contract for the construction of a building, and has in fact substantially performed the same, is ordinarily entitled to sue upon his contract and recover the contract price, less proper deductions therefrom on account of omissions, deviations, and defects chargeable to him, especially where the owner occupies and uses such

building. Wiebener v. Peoples (Okla.) 1916E-748.

- 81. Waiver of Defects. Mere occupancy and use of a building by the owner does not, as a matter of law, constitute an acceptance of the work of construction and a waiver of nonperformance by the builder of the stipulations in the contract and does not ordinarily justify inference of acceptance as a fact. Wiebener v. Peoples (Okla.) 1916E-748.
- 82. Mere part payment by the owner for the construction of a building, whether with or without knowledge of the builder's failure to perform the contract, does not, as a matter of law, constitute an acceptance of the work of construction and a waiver of such failure to perform, unless, perhaps, to the extent of such payment with such knowledge where such acceptance and waiver is consistent with all the pertinent facts in the case. Wiebener v. Peoples (Okla.) 1916E-748.
- 83. Waiver of Nonperformance. Where a contract for the construction of a building requires the same to be done to the satisfaction of the owner and reserves to him the right without the duty of supervision and direction, his acquiescence in or his failure to object, during the work of construction, to minor and slight omissions, deviations, and defects, of which he has knowledge, before the builder has abandoned the work to him as completed and he is occupying and using the same, will ordinarily and when not excused be regarded as a waiver of such nonperformance. Wiebener v. Peoples (Okla.) 1916E-748.

### c. Bond of Contractor.

- 84. Contractor's Bond Limitation of Time for Suit-Effect of Abandonment of Work. A surety bond to plaintiff on his contract with a contracting company for excavation work to be done by a certain day and for a certain price, with a provision that after a certain date damages were to be liquidated at \$10 a day, conditioned for the faithful performance of the contract, and providing that actions against it must be begun within six months after the completion of the work specified in the contract, assumes completion of the work, and will apply when the work has been done under the contract, but does not apply as against plaintiff's action for damages for the contractor's abandonment of and refusal to complete the work. Comey v. United Surety Co. (N. Y.) 1917E-424.
- 85. Building Contracts Liability on Contractor's Bond Waiver New Contract for Completion of Work. Plaintiff, who entered into a contract for excavation work, with a provision that for any delay after a fixed date damages should be liquidated at \$10 per day, and to whom

the contractor gave a surety bond conditioned for the faithful performance of the contract, and who after the contractor's abandonment of the work at once made demand on the surety and notified it of the contractor's default and that it would be held responsible for the damages, by entering into a new contract with the contractor, assented to by the surety, and providing that it should not be deemed to waive the original contract and under which the work was completed at an increased cost, does not extinguish his right of action against the surety for damages for breach of the first contract. Comey v. United Surety Co. (N. Y.) 1917E-424.

#### d. Architect's Certificate.

- 86. Conclusiveness of Architect's Certificate. A certificate of an architect that the contractor has failed to prosecute the work with diligence, made pursuant to a stipulation in the contract authorizing a termination of the contract on the architect certifying that the delinquencies of the contractor justify it, is at most only prima facie evidence in any collateral matter, and is not conclusive in an action by the contractor for the value of work done and material furnished. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.
- 87. Architect's Certificate Refused. Where it was the custom for a contractor, entitled to monthly payments on certificates of the architect, to present each month to the architect an estimate of the work done and material furnished the preceding month, and for the architect to examine the work and certify that it was done to his satisfaction, and when a monthly estimate was presented to the architect, the architect replied that he had been instructed by the owner not to give the certificate, and the owner de-clared that he would not make any more payments, and there was no claim that the work for the preceding month had not been properly done, or any suggestion that the want of the architect's certificate was the ground for refusing payment, and the work for the month was, in fact, well done, the payment for the work becomes due, though the architect did not approve and certify to the work. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.
- 88. Termination for Default of Contractor—Requisites of Notice. Where a building contract contains provisions authorizing the owner, on certificate of the architect, and after notice to the contractor, to provide labor and materials, or terminate the contract, the certificate of the architect must substantially comply with the contract, and the notice to the contractor, following the certificate, must fully advise the contractor of what the

owner demands. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.

- 89. Right of Owner to Complete Work. A building contract which provides that, on the architect certifying to the failure of the contractor to supply skilled workmen or proper material, or to prosecute the work with promptness, the owner may, after three days' notice, provide labor and materials and deduct the cost thereof from any money then or thereafter to become due the contractor, and that, if the architect shall certify that the failure is sufficient grounds for such action, the owner may terminate the employment, and enter on the premises, and employ persons to finish the work, and, in case of discontinuance of the employment of the contractor, he shall not receive any further payment until the work shall be finished, does not contemplate a termination of the employment of the contractor for only a part of the work, but as to any part of the work touching which, according to the architect's certificate, the contractor is delinquent, the owner may furnish the necessary labor and material to be used by and charged to the contractor, but may not oust the contractor from that part of the work and undertake to perform it independent of him, though, where the contractor has become so delinquent as to justify a termination, the owner, on the architect's certificate to that effect, may, after proper notice, terminate it. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.
- 90. Where an owner, employing a building contractor, fails to give lawful notice to the contractor of the termination of the contract, as authorized by the contract, on receiving a proper architect's certificate, the owner may not take charge of the work, or any part thereof, and the contractor may resist the attempt of the owner to do so. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.
- 91. Conclusiveness of Architect's Certificate. Where a building contract authorizes the architect to determine and certify the existence of a fact, material to a proceeding under the contract, the certificate of the architect, duly made, that the fact exists is conclusive on the parties as to the thing to be done to which the fact relates, or as to which, under the proceeding, it is to affect the rights of the parties, except for fraud or gross mistake amounting to fraud. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.
  - e. Actions.

### (1) Evidence.

92. Lack of Interest in Nominal Party—Burden of Proof. Where a party seeks to avoid an action on a contract by showing that the plaintiff is an agent, the bur-

- den of proving the fact of agency, as well as the fact that the principal was disclosed, rests upon the party seeking to relieve himself from liability. Camp v. Barber (Vt.) 1917A-451.
- 93. Time for Completion of Work—Waiver. Evidence held to sustain a finding that an owner, employing a contractor to construct a building, waived the time of performance specified in the contract, so that he could not recover damages for delay in completing the work. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.
- 94. Waiver of Invalidity. In an action to recover the balance upon a grading contract, evidence held to show that defendant did not require plaintiff to quit work, even if defendant had the right to do so. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.

### (2) Damages.

95. Measure of Damages for Defective Performance. Where a contractor and builder had breached his contract by minor and slight omissions, deviations, and defects in the construction of a building, when tested by the terms of the contract, the owner's measure of damages, under section 2620, St. Okla. 1890 (section 2852, Rev. Laws 1910), is such an amount as will compensate him for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom; but the form in which this measure is expressed or the rule by which it is made may be changed to adapt it to the facts in the case on trial, as illustrated in the body of the opinion; and, where the facts warrant it, it is not error to instruct that such measure is the difference between the value of parts not so constructed and the same parts if they had been constructed Wiebener v. as required by the contract. Peoples (Okla.) 1916E-748.

(Annotated.)

96. Measure of Damages for Breach, The basis of the action is to fasten a trust on the property of the testator in favor of the plaintiff, and to specifically enforce such a trust against the testator's executor and the devisee claiming under the will violating the testator's contract with the plaintiff, and in the alternative to recover damages, if specific performance is impossible. The damages are measured by the value of the property promised to be devised, and not the value of the plaintiff's services which furnished the consideration of the contract. Gordon v. Spellman (Ga.) 1918A-852. (Annotated.)

### (3) Judgment.

97. Provision for Paying Subcontractor. Where an owner, required to pay the

1916C-1918B.

building contractor monthly as the work progressed, refused to make a monthly payment on the ground that he had law-fully terminated the employment, and the owner, when sued by the contractor for the value of the work done, did not rely on the existence of a claim against the contractor, in favor of a subcontractor, as an excuse for the refusal to pay, the owner could not complain of a judgment for plaintiff with a direction that a subcontractor's claim should be paid out of the amount of the judgment. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44.

### f. Right to Terminate Contract for Nonpayment.

98. The rule that a rescission of a contract by one party thereto, without the consent of the adverse party, cannot be made except by one who is not in default applies where the obligations on which each party is in default are dependent and concurrent, or where the rescinding party's default is so related to the obli-gation in which the adverse party has failed that it, in some manner, affects performance, or the duty of the latter to perform, but does not apply to a building contractor whose sole default is that he has not been diligent in performance; and where the owner refuses to make a monthly payment due under the contract. the contractor may rescind. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44. (Annotated.)

99. Where an owner, required to make monthly payments to the contractor as the work progressed, wrongfully refused to make a monthly payment, it is a breach of contract, and the contractor can rescind and sue on a quantum meruit for the work done and materials furnished. American-Hawaiian Eng., etc. Co. v. Butler (Cal.) 1916C-44. (Annotated.)

#### Notes.

Right of building contractor to rescind contract for failure of owner to make pay-1916C-54.

Avoidance of building and loan contract on ground of fraud. 1917A-890.

### AVOIDANCE FOR FRAUD.

100. Rescission of Contract - Fraud. Where one dealing with an agent to take applications for home purchasing invest-ment contracts signed without reading an application, reciting that the applicant relied solely on the terms of the contract and the options set forth on the back of the application and made a part thereof, and retained the contracts without reading them, and the agent made no effort to prevent a reading of the application and of the contracts, nor made any mis-

representations as to the contents of the application, the applicant is not entitled to relief on the ground of fraud based on statements by the agent as to the contents of the contracts. Capital Securities Co. v. Gilmer (Ala.) 1917A-888.

(Annotated.)

### CONTRACT TO DEVISE.

When cause of action accrues, see Limitation of Actions.

### CONTRIBUTION.

Cost of party wall, see Adjoining Landowners, 4-5.

Necessary parties, see Parties to Actions,

Between partners, see Partnership, 21-24. By partner after dissolution, see Partnership, 44-46.

### CONTRIBUTORY NEGLIGENCE.

See Carriers of Passengers, 23, 51-54; Negligence, 41-57, 66-68, 72-78, 82, 118; Railroads, 69-77, 85-87. Of servant, see Master and Servant, 32-37.

In actions under Employers' Liability Act, see Master and Servant, 67, 68.

As affecting compensation under Workmen's Compensation Act, see Master

and Servant, 107, 187.

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### CONVERSION.

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When action of trover accrues, see Limitation of Actions, 20.

No set-off of contract claims not connected, see Set-off and Counterclaim,

#### 1. WHAT CONSTITUTES CONVER-SION.

1. Taking from Husband of Owner. Where plaintiff, with consent of his wife, had possession of a dog given to his wife by defendant, the act of defendant, in either taking the dog or refusing to deliver on demand under an assertion of title, was a conversion. Herries v. Bell (Mass.) 1917A-423.

2. Receiving Property from Tortfeasor. Merely receiving property from one who has converted it and returning it to him before notice of his want of title is not a conversion by the depositary. Holden v. Farmers, etc. Nat. Bank (N. H.) 1917E-23.

### 2. WHO MAY SUE.

- 3. Conversion of Dog. Where plaintiff, with consent of his wife, had possession of her dog, and defendant converted the dog to his own use, plaintiff was entitled as bailee to recover full damages. Herries v. Bell (Mass.) 1917A-423.
- 4. Where plaintiff, with consent of his wife, had possession of her dog, and defendant enticed the dog away and detained it under a claim of ownership, plaintiff could sue for conversion. Herries v. Bell (Mass.) 1917A-423.

# 3. ACTIONS.

### a. Pleading.

- 5. All that is required in a declaration for trover is that the property should be described with as much reasonable certainty as the nature of the case will permit, so that it may be identified, and so that defendant may be protected against another suit for the same cause of action. Williams v. Williams (Me.) 1916D-928.
- 6. Declaration. Trover may be maintained to recover money deposited by an agent with the consent of his principal and thereafter converted by the agent, although the identical money cannot be specified in the declaration or thereafter identified. Williams v. Williams (Me.) 1916D-928.

### b. Evidence.

7. Expression of Conclusion. In an action for the conversion of electrical machinery, sold to a contractor to be placed in an electric plant for defendant city, evidence by defendant's mayor and council as to whether they would have consented to the placing of the machinery in the plant, had they known that plaintiff reserved title, is admissible on whether the city had notice of the reserved title. Allis-Chalmers Co. v. Atlantic (Iowa) 1916D-910.

### c. Instructions.

8. Property Attached to Realty of Third Person. In an action for the conversion of electrical machinery sold to a contractor to be placed in an electric plant, in which defendant city disclaimed knowledge that title was reserved by plaintiff until full payment, instructions on plaintiff's estoppel to assert its claim against

defendant should have distinguished as to fixtures placed in the plant before notice to defendant of the conditions of plaintiff's contract of sale and those placed thereafter; the evidence raising the issue as to the time defendant received notice. Allis-Chalmers Co. v. Atlantic (Iowa) 1916D-910. (Annotated.)

### d. Measure of Damages.

- 9. Conversion of Corporate Stock. While the par value of stock is presumptively the measure of damages for its conversion, if it appears that the corporation has been in existence but a short time, that there have been no sales of stock, and that the assets are depleted, an instruction that the damages are to be determined by the amount which a person wishing to buy the stock would expect to pay is not error. Hawkins v. Mellis, Pirie & Co. (Minn.) 1916C-640. (Annotated.)
- 10. Loss of Article Having No Market Value. The measure of damages for loss by a carrier of an article which has no market value is the value of the article to the shipper; and, in ascertaining the value, inquiry may be made into the constituent elements of the article and the cost to the shipper of producing it. St. Louis, etc. R. Co. v. Dague (Ark.) 1917B-577. (Annotated.)
- 11. Value of Article Having No Market Value. A shipper suing a carrier for the loss of an article having no market value, and showing that he was a mechanic, and giving a detailed estimate of the materials going into the article and the reasonable cost of constructing the same, may recover the value of materials furnished and the work done by others, as shown by his uncontradicted testimony. St. Louis, etc. R. Co. v. Dague (Ark.) 1917B-577.

  (Annotated.)
- 12. Conversion of Articles for Personal Use. This general rule is subject to the exception that, where the property converted by the defendant to its use consists of articles for personal use, which have been used by the owner, and therefore have little or no market value, the measure of damages is the reasonable value to the owner at the same time of conversion. Erie R. Co. v. Steinberg (Ohio) 1917E-661.
- 13. Measure of Damages. In a suit for conversion, where the facts do not authorize the assessment of exemplary damages, the general rule for the measure of damages is the value of the property at the time of the conversion. Erie R. Co. v. Steinberg (Ohio) 1917E-661.

#### Notes.

Measure of damages for conversion of, or failure to deliver, household goods. 1917B-585.

Measure of damages for loss or destruction of property having no market value. 1917B-579.

Measure of damages for conversion of shares of stock, 1916C-641.

#### e. Defenses.

- 14. In a suit to recover the proceeds of shares of stock, which were deposited with brokers on a margin account, and were by their own employee converted, held, that the brokers were not guilty of bad faith in applying the proceeds of the transaction as directed by the employee. Carlisle v. Norris (N. Y.) 1917A-429.
- 15. Fraud of Owner's Employee. Plaintiff deposited with stockholders stock certificates to protect his margin account. An employee of the broker, who was also plaintiff's confidential agent, obtained possession of the stock, which had been rehypothecated, and converted it to his own use, collecting the proceeds through the brokers as agent. Held that, where the brokers, in crediting the proceeds according to the employee's direction, acted in good faith, they were not liable, though negligent. Carlisle v. Norris (N. Y.) 1917A-429.

### f. Waiver of Tort.

16. Where a trespass has been committed upon real estate, and property severed therefrom and sold by the defendant or converted to his own use, the owner may waive the trespass and sue for the value of the property, and the law will imply a promise to pay for it. Wilson v. Shrader (W. Va.) 1916D-886.

### CONVERSION AND RECONVERSION.

Power to sell land implied from direction to pay legacies, see Executors and Administrators, 44.

Purchase of land by members of firm, see Partnership, 11, 12.

- 1. Reconversion How Accomplished. The beneficial owner of real estate which has been equitably converted into personalty has the power by word or act to reconvert it into realty, but his words or acts to have such effect must be unequivocal, and clearly indicate the purpose to countermand the trust. Chambers v. Preston (Tenn.) 1918B-428.
- 2. There can be no reconversion except by unequivocal act or declaration of the owner of the entire beneficial interest, and persons under disability are incapable of making such election. Chambers v. Preston (Tenn.) 1918B-428.
- 3. Where testator by will converted realty to personalty, and one heir mortgaged his interest, which was also levied on by certain creditors, and court pro-

ceedings were had, and his interest was sold and bid in by the other legatees, and partition was had, there is no reconversion of the personalty into realty, especially where certain remaindermen in interest were not made parties to the partition suit. Chambers v. Preston (Tenn.) 1918B-428.

- 4. Condemnation of Land Subject to Remainder. Where, in such case, certain of testator's realty was condemned by the federal government during the widow's lifetime and prior to the death of one of the sons, damages paid therefor to the trustee are distributable as realty, not as personalty. Tatham's Estate (Pa.) 1917A-855.
- 5. Devise to Trustees With Power of Sale. For a testator to devise his land to trustees, with power to sell land and invest the proceeds in personalty, does not work an equitable conversion, though the sale and reinvestment has that effect. Porter v. Union Trust Co. (Ind.) 1917D-427
- 6. Effect on Owner's Right to Recover. Where title to property is changed from personalty to realty with the vendor's consent, the vendor's right of recovery to protect his rights in the property must be based upon its reasonable value, rather than upon the property itself. Allis-Chalmers Co. v. Atlantic (Iowa) 1916D—910.
- 7. Equitable Conversion—Testamentary Direction for Future Sale. A will devising the use of land as a loan to the testator's wife to be sold by the executors on her death or on the son's attaining majority, and the proceeds thereof to be distributed among the children, operates to convert the realty into personalty as of the date of the testator's death. Chambers v. Preston (Tenn.) 1918B—428.

(Annotated.)

### CONVEYANCE.

Defined, see Frauds, Statute of, 12.

# CONVEYANCES OF LAND.

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### CONVICTION.

Form of sentence for several counts, see Sentence and Punishment, 10.

## CONVICTS.

See Pardons.

Effect of imprisonment on homestead, see Homestead, 19.

Death sentence, effect of insanity, see Sentence and Punishment, 7, 12.

Place of imprisonment, see Sentence and Punishment. 20

Punishment, 20.
Impeachment of ex-convict witness, see Witnesses, 105.

- 1. Capacity to Contract. Under Okla. statutes a person convicted of a felony is not divested of all rights whatever and rendered absolutely civiliter mortuus, but may contract with an attorney or other person to obtain a parole, a pardon, or to sue for a writ of habeas corpus, and this in the absence of an express statute to the contrary, or some express provision for the management of his estate, necessarily carries with it the right to dispose of his property in order to employ counsel. Byers v. Sun Savings Bank (Okla.) 1916D-(Annotated.)
- 2. Service of Process. Va. Code 1904, § 2902, gives a right of action for wrongful death, though the act amounts to a felony. Section 4115 authorizes the appointment of a person to take charge of the estate of a convict. Section 4116 provides that such committee may sue or be sued in respect to debts due to or by the convict, "and any other of the convict's estate." Section 4120 provides that, if any person so appointed refuse to act or qualify, the court shall commit the estate to the sheriff of the county or sergeant of the corporation, who shall be the commit-tee. It is held that section 4116 authorizes actions against the committee on any cause of action existing against the convict, and, while at common law a convict might be sued, the statute covers the whole subject, and an action for wrongful death cannot be maintained against a convicted murderer, but must be brought against his committee. Merchant's Administrator v. Shry (Va.) 1916D-1203. (Annotated.)
- 3. Corporal Punishment. Laws N. Car. 1909, c. 281, § 6, applicable to Wake county, provides that convicts sentenced to hard labor shall be under the control of the county commissioners, who shall have power to enforce all needful regulations for the successful working of convicts on the highways, and may authorize the supervisors in custody to use such discipline only as may be necessary to carry out the regulations to the same extent as is allowed by law to the authorities of the penitentiary as to convicts employed in the state's prison. It is held that, since there is no law authorizing the authorities of the state's prison to enforce the discipline by flogging, supervisors in charge of a camp of convicts working on the roads in Wake county are not authorized by mere custom or otherwise to flog a convict under their charge, to enforce discipline and compel him to work. State v. Nipper (N. Car.) 1916C-126. (Annotated.)

### Notes.

Service of process on convict. 1916D-**12**07.

Right to inflict corporal punishment on convict. 1916C-130.

Contractual capacity of convict. 1916D-

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#### NATURE, CHARACTER AND STATUS.

- 1. "Citizen" as Including Corporation. An order of the railroad commission of Arkansas, based upon a petition signed by seventeen corporations and partnerships and one natural person, requiring one railroad to establish a connection with another is void, as not being signed by fifteen bona fide citizens residing within the territory affected, within the direct terms of Acts of Ark. 1907, p. 357, \$ 1, since "bona fide citizens," as there used, means permanent residents, as distinguished from mere sojourners, and refers to individuals, to the exclusion of corporations and copartnerships. St. Louis, etc. R. Co. v. State (Ark.) 1917C-873. (Annotated.)
- 2. It being presumed that the petition would not be signed without consideration of its proposed demands, the word "citizen" will not be construed to include corporations, in the absence of a provision in the act creating a means by which the assent of a corporation may be evidenced. St. Louis, etc. R. Co. v. State (Ark.) 1917C-873. (Annotated.)

3. A "citizen" ordinarily means only a natural person, and will not be construed to include a corporation, unless the general purpose and import of the statute in which the term is found seems to require it. St. Louis, etc. R. Co. v. State (Ark.) 1917C-873. (Annotated.)

3½. Whether a corporation is public or private is not to be decided from the number of persons engaged in the enterprise for their mutual advantage, but from the terms of its charter and the general law under which it is organized. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (Ill.) 1917B-495. (Annotated.)

#### Notes.

"Citizen" as including corporation, joint stock company or partnership. 1917C-875

Corporation not operated for profit as public utility. 1916D-899.

### 2. MATTERS RELATING TO COR-PORATE EXISTENCE.

a. Dissolution.

### (1) In General.

- 4. De Facto Dissolution. Where a corporation going out of business assigned its assets to stockholders for their assumption of its debts, no creditor complaining, the title of such stockholders to stock and bonds of another corporation, assigned them by the owner in part payment of his indebtedness to the dissolved corporation, was perfect against the assignee of the judgment creditor of the assigner of the securities, although no notice of dissolution of the corporation was filed with the secretary of state of the state of incorporation, as its statute required. Husband v. Linehan (Ky.) 1917D-954.
- 5. Judicial Power. The right to dissolve a corporation and wind up its affairs for any cause against its consent belongs to the sovereign state alone, and, in the absence of an express statute to that effect, the courts have no power to dissolve such corporation at the instance of an individual suitor. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.

### (2) Forfeiture of Charter.

6. Who may Assert Forfeiture. Oklahoma statutes requiring corporations to pay a license tax for doing business, and providing that a failure shall work a forfeiture, being chiefly revenue measures, individuals dealing with an Oklahoma corporation cannot question the validity of its existence on the ground that it had not paid its tax. Dickey v. Southwestern Surety Ins. Co. (Ark.) 1917B-634.

### (3) Effect of Dissolution.

7. Effect on Pending Penal Action. Kirby's Ark. Dig. §§ 957, 958, authorizing any corporation to surrender its charter, and conferring on the chancery court jurisdiction to pay the debts and distribute the assets among the stockholders, give the unqualified right to a corporation to dissolve at any time, and a voluntary dissolution pending action by the state for penalties for violation of the anti-trust statutes abates the action, in the absence of any provision for the enforcement of the claim against a dissolved corporation; for an action for a penalty is not an action for a diebt." State v. Arkansas Cotton Oil Co. (Ark.) 1917A-1178.

(Annotated.)

### Notes.

Dissolution of corporation as abating action against it to recover penalty or forfeiture. 1917A-1180.

Necessity of assent of all stockholders to consolidation of corporations. 1918A-165.

# 3. CONTROL BY LEGISLATURE AND COURTS.

8. Power to Dissolve. The power to wind up the affairs of a corporation and to dissolve it is not one which inheres in the courts, but exists only when conferred by statute. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.

#### 4. RIGHTS AND POWERS.

### a. Effect and Validity of By-laws.

9. Seat of Insolvent Member. A provision of the by-laws of a stock exchange, authorizing the sale of a member's seat on his insolvency and distribution of the proceeds to members in payment of their claims against him, before payment of anything therefor to him or those claiming through him, is valid. Gartner v. Pittsburgh Stock Exchange (Pa.) 1916E-878.

(Annotated.)

10. Restrictions on Transfer of Stock. Mass. St. 1903, c. 437, makes the first step in the organization of a corporation the signing by the proposed incorporators of a written agreement of association, and by section 8 (e) requires it to state the restrictions, if any, imposed upon the transfer of capital stock, and then requires a first meeting for the adoption of by-laws and the election of the directors and other officers, and articles of association containing a copy of the agreement of association; and section 28 regulates the transfer of stock as to its form. The agreement of association provided that none of the stock should be transferred without the consent of three-fourths of the capital

stock, and a by-law required any stock-holder before selling stock to file a writing giving the name of the proposed purchaser, the number of shares, and the purchase price, which sale should not be made unless approved by a meeting of the stockholders at which three-fourths of the stock shall vote to permit the sale. It is held that such restrictions were within the legislative intent, becoming a part of the corporate being and entering into each share of stock, and were not inherently unconscionable; and hence that defendants, claiming to hold offices as directors by virtue of shares of stock transferred in violation of such restrictions, were not qualified, and must surrender their offices. Longyear v. Hardman (Mass.) 1916D-1200.

(Annotated.)

11. That an assignee of an insolvent member was not given an opportunity to be heard by the arbitration committee appointed pursuant to such provision and the by-laws of the exchange did not entitle him to complain of a sale of the member's seat in accordance with the committee's action, or of the distribution of the proceeds of the sale pursuant to the by-laws, especially where he did not appeal from the action of the committee to the board of appeals, as provided by the by-laws, Gartner v. Pittsburgh Stock Exchange (Pa.) 1916E-878. (Annotated.)

### Notes.

Validity of corporate by-law regulating alienation of stock. 1916D-1202.

Validity of rule of stock exchange with respect to seat of insolvent or defaulting member. 1916E-879.

### b. Title to Property.

12. A corporation itself is a legal personalty holding the full title, legal and equitable, to all corporate property. Dawson v. National Life Ins. Co. (Iowa) 1918B-230.

#### c. Ultra Vires Acts.

13. Ultra Vires Contracts. "Ultra vires contracts" include not only those entirely without the scope and purpose of the charter privileges and objects, but also those beyond the limitation of the charter powers, though within the purposes contemplated by the articles of incorporation. American Southern Nat. Bank v. Smith (Ky.) 1918B-959.

### d. Implied Powers.

14. Incidental Powers. The term "incidental powers," within the rule that a corporation possesses only those powers which its charter confers upon it, either expressly or as incidental to its existence, means such powers as are directly and immediately appropriate to the execution of the

powers expressly granted and exist only to enable the corporation to carry out the purpose of its creation. State v. Missouri Athletic Club (Mo.) 1916D-931.

- 15. The "implied powers" of a corporation are such as are not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient, and suitable for that purpose, including as an incidental right a reasonable choice of the means to be employed in putting into practical effect this class of powers. State v. Missouri Athletic Club (Mo.) 1916D-931.
- 16. Powers essential to the exercise of the powers expressly granted are necessarily implied, and are as much granted as if expressed. Gregg v. Little Rock Chamber of Commerce (Ark.) 1917C-784.

### e. Power to Contract.

17. Chamber of Commerce—Power to Contract—Subsidy for Steamboat Line. The Little Rock Chamber of Commerce, incorporated under Kirby's Ark. Dig. §§ 937-943, providing that such corporations shall have, for carrying out their object, such powers as are possessed by other corporations, and which may be necessary to their management and purposes, and whose constitution declared its object to be the upbuilding of the city, the encouraging of its public improvements and educational advantages, and the development of its industries, and whose by-laws provided for an industrial committee to have exclusive control of the industrial fund and the power to grant aid or subsidies for public purposes, does not exceed its powers by granting a subsidy for the construction of boats and the navigation of the river from the city to Memphis, with a view to lowering prevailing freight rates. Gregg v. Little Rock Chamber of Commerce (Ark.) 1917C-784.

(Annotated.)

18. Restriction to Corporate Purpose. The power of a corporation to make and take contracts is restricted to the purposes for which it is created, and cannot legally be exercised by it for other purposes. Gregg v. Little Rock Chamber of Commerce (Ark.) 1917C-784.

#### Note.

Powers and liabilities of private corporation or association organized to promote business interests of community. 1917C-787.

### 5. DUTIES AND LIABILITIES.

#### a. In General.

19. Liability of Corporation. That the defendants were interlocking corporations controlled by the same stockholders and

directors, that the first company was created by the second company, and that the periodical formerly printed by the second company, in which the libel appeared, was transferred to the first, which had no visible property, is no ground for maintaining a bill in equity for the assessment of damages suffered, for, if the first company is merely the mouthpiece of the second, its corporate form does not prevent plaintiff from reaching the real offender, in an action at law. Finnish Temperance Soc. v. Riavooja Pub. Co. (Mass.) 1916D-1087.

20. Liability for Debt of Predecessor. A manufacturing corporation, without having issued any shares of its authorized capital stock, gave a mortgage on all of its property to secure an issue of bonds, with a provision that upon default in the payment of interest, the bondholders were authorized to take all the mortgaged property into their possession through the trustee, and operate and manage the business and property as a going concern, for the purpose of preserving it as security. The company defaulted on its payments, and at the request of a majority of the bondholders the trustee took possession of all the property and business, making one of the principal bondholders its agent, and the business was continued for more than two years by the bondholders in the name of the mortgagor. Thereafter, at the request of the bondholders the trustee foreclosed the mortgage, and the property was sold under the decree and purchased by the bondholders, who thereupon organized a new company as a holding company to take the title to the property, and the sheriff's deeds were made conveying all the property to the new company, none of the authorized capital stock of which was issued. No consideration was paid for the purchase of the property by the new com-pany, except the interest its incorporators owned as bondholders. In an action by plaintiff to recover for material and supplies furnished to the bondholders while in possession, and which were used for the purpose of preserving the property as security for the bonds, it is held that it would constitute a fraud on the rights of the plaintiff to permit the new company to acquire the title to the property freed from such obligations; that the circumstances surrounding the creation of the new corporation and its succession to the business and property of the old show that there was, in fact, no purchase, but merely a change in the capacity in which the business was conducted. The same persons who conducted the business as bondholders in possession as mortgagees, changed from partners or bondholders to incorporators of the new company, and therefore plaintiff was entitled to judgment against the new company. Spadra-Clarksville Coal Co. v. Nicholson (Kan.) (Annotated.) 1916D-652.

#### Note.

Liability of corporation for debts of predecessor. 1916D-658.

### b. Criminal Liability.

21. Criminal Prosecution. Under S. Dak. Pen. Code, § 15, providing that all persons who commit in whole or in part any crime within the state are liable to punishment, section 822 defining "person" as including corporations, S. Dak. Code Cr. Proc. § 183, empowering and requiring the grand jury to inquire into all public offenses and present them by presentment, indictment, or accusation in writing, and section 560 et seq. providing for a hearing before a magistrate upon a presentment against a corporation or the filing of a complaint or information against it, and providing that if the magistrate return a certificate that there is sufficient cause to believe the corporation guilty, the state's attorney shall file an information, or the grand jury may proceed as in the case of a natural person held to answer, a criminal proceeding against a corporation may originate by indictment by the grand jury in the first instance, by the return of a presentment by the grand jury and a hearing before a magistrate, or by an information filed before a magistrate and a preliminary examination. Štate v. Taylor (S. Dak.) 1916E-1285.

22. A corporation may be indicted and convicted under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1996 [Fed. St. Ann. 1909 Supp. p. 415]), for conspiracy to commit an offense against the United States by carrying liquors into Indian Territory or introducing liquors into Indian Territory or introducing liquors esction 335 of the Criminal Code (Fed. St. Ann. 1909 Supp. p. 495) the offense is a felony. Joplin Mercantile Co. v. United States (Fed.) 1916C-470. (Annotated.)

23. Under N. Car. Revisal 1905, § 2831, subd. 6, defining "person" as extending to bodies corporate, unless the context clearly shows the contrary, and section 3432 providing that, if any person shall by any false pretense obtain any money or other thing of value with intent to defraud, such person shall be guilty of a felony and imprisoned or fined, a corporation may be convicted of obtaining money by false pretenses, as a corporation may be convicted of a crime requiring an intent, and the fact that it cannot be imprisoned does not exempt it from criminal liability. State V. Salisbury Ice, etc. Co. (N. Car.) 1916C-456.

24. Criminal Liability. A bankrupt corporation is capable of committing the offense of knowingly and fraudulently concealing its property from its trustee in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912)

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Supp. p. 646). Kaufman v. United States (Fed.) 1916C-466. (Annotated.)

#### Note.

Criminal liability of corporation for act of misfeasance other than homicide. 1916C-459.

### c. Duty to Stockholders.

25. The relation of a corporation to its stockholders is that of a trustee of a direct trust, as to which limitations are inapplicable until there is a clear and unequivocal disavowal of the trust and notice brought to the cestui que trust. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

### d. Liability for Acts of Agents.

26. A corporation is as well liable for slander by an agent committed in the course of his employment as for a slander by an officer or manager of the corporation. Fensky v. Maryland Casualty Co. (Mo.) 1917D-963. (Annotated.)

27. Liability for Slander. A corporation is liable for a slander uttered by its agent while acting in the scope of his employment, and in the actual performance of the duties thereof touching the matter in question, though the corporation had no knowledge and did not ratify the act of the agent. Fensky v. Maryland Casualty Co. (Mo.) 1917D-963. (Annotated.)

### 6. PROMOTERS.

28. Right of Promoters to Subscribe. Promoters who complete subscription by subscribing for the balance of unsold shares, intending to sell such shares to others, are liable for the amount so subscribed. Heiskell v. Morris (Tenn.) 1918B-1134.

29. Liability on Contracts of Promoters. Where plaintiff, one of three partners engaged in selling interests in a tract of land on which they had an option and in organizing a corporation to take over such land, prepared the articles of incorporation without any promise that he would be paid therefor or without any assumption of liability therefor by the directors, which service was more than in the interests of the partnership than of the corporation, he must be assumed to have rendered such services in pursuance of a representation by his partners that the incorporation would be without expense to purchasers, so that he cannot recover therefor against the corporation; since, while a corporation may adopt the contracts of its promoters, especially those necessary to effect its creation, promoters cannot, in the absence of any adoption of their acts, bind the corporation by their contracts made before it was incorporated. Tanner v. Sinaloa Land, etc. Co. (Utah) 1916C-100.

(Annotated.)

Note.

Liability of corporation to third parties on contracts of its promoters. 1916C-105.

### 7. OFFICERS AND AGENTS.

a. Appointment, Election, and Qualification.

30. Eligibility of Officer-Stock Transferred to Permit Election. Defendant held a certificate for one share stock issued to him by a corporation upon the assignment to him of a share of stock by one who held as trustee for heirs under a will. The assignment was made under a provision of the will whereby the trustee was empowered to transfer stock to another person to enable him to act as director in the corporation. Defendant shortly after its issuance handed the stock certificate over to the trustee, with a memorandum wherein he acknowledged that he held the stock for the sole purpose of being qualified as a director, and declaring the beneficial ownership to be in the heirs under the trust. Held, that defendant was a stockholder within the statute requiring directors to be stockholders, since the transfer of the stock and issuance of the certificate to him in accordance with section 8 of the act under which the corporation was organized vested him, as to the corporation, with legal and equitable title. People v. Lihme (Ill.) 1916E-959. (Annotated.)

31. The fact that defendant surrendered his certificate to the trustee, together with the memorandum, does not affect his legal title, since he could be divested thereof only by transfer on the books of the company, in accordance with the express terms of Act Feb. 18, 1857 (Ill. Laws 1857, p. 163), § 8, under which the corporation was organized. People v. Lihme (Ill.) 1916E 959. (Annotated.)

32. The fact that defendant has no pecuniary interest in the success of the corporation does not disqualify him to act as director, since under the express terms of Act Feb. 18, 1857 (Laws Ill. 1857, p. 164), § 14, under which act the corporation was organized, providing for the voting of stock by fiduciaries, and under the general doctrine of the law, bare legal title in the absence of fraud qualifies the owner to act as director regardless of the trusts under which the stock may be held. People v. Lihme (Ill.) 1916E-959.

(Annotated.)

33. Necessity That Director Own Stock. A "director" in a corporation is a mere agent, and need not be a stockholder aside from statutory requirements. People v. Lihme (Ill.) 1916E-959.

34. Necessity for Acceptance. Evidence that one, claimed to be a director of a bank, had never performed the duties of

the office; was re-elected to it after his attempted resignation; that he was without the state for over five years and took no part in the conduct of the affairs of the bank, although at one time, while without the state, he assisted in the purchase of a farm for the bank, is insufficient to show that he was in fact a director, since, before becoming such, it was necessary for him to accept the office. Zimmerman v. Western, etc. Fire Ins. Co. (Ark.) 1917D—513. (Annotated.)

#### Notes.

Eligibility of officer of corporation to whom stock is transferred for purpose of enabling him to become officer. 1916E-963

Acceptance of office in private corporation. 1917D-516.

### b. Authority.

### (1) Ratification or Estoppel to Deny Authority.

35. Where the evidence in an action to enforce specific performance of a contract between the president of a membership corporation and a landowner, for the purchase of land, fails to show any meeting of the directors of the corporation after the making of the contract, or that they had ratified the contract as individuals, or that any of them had ever heard of the contract, it cannot be inferred from any subsequent acts of the president that the contract had been ratified by the directors. Catholic Foreign Mission Soc. v. Oussani (N. Y.) 1917A-479. (Annotated.)

36. Ratification or acquiescence results from an appropriation of the proceeds to the beneficial use of the corporation, or its failure for an unreasonable length of time, after knowledge of the unauthorized act, to restore the proceeds thereof to the source from which they were derived, or from a course of dealing on its behalf, without objection, so obvious and often repeated as reasonably to induce belief in corporate authorization for such purpose. Williams v. S. M. Smith Ins. Agency (W. Va.) 1917A-813.

### (2) Proof of Authority.

37. Authority of Officer to Contract. In an action for specific performance of a land sale contract evidence that plaintiff membership corporation had not contracted because it had not acted through its directors, but through its president, who exceeded his authority, is admissible under pleadings denying the contract. Catholic Foreign Mission Soc. v. Oussani (N. Y.) 1917A-479.

38. To aid in determining whether the directors of a membership corporation authorized the president to contract to purchase land, not only the formal resolutions

of the directors, but everything said and done at their meeting, may be shown. Catholic Foreign Mission Soc. v. Oussani (N. Y.) 1917A-479. (Annotated.)

- 39. Where a manager had no authority to execute a contract of guaranty for his bank, that fact is evidence that a contract signed by him as manager was intended only as his personal obligation. Griffin v. Union Savings, etc. Co. (Wash.) 1917B-267.
- 40. Manner of Signing. Where a contract was signed by one who described himself as manager of defendant bank, plaintiff has the burden of proving, there being nothing else to show that defendant was bound, that it was the intention of the signer to bind the bank. Griffin v. Union Savings, etc. Co. (Wash.) 1917B-267.

#### Note.

Authority of officer of corporation to enter into contract for purchase or sale of real estate. 1917A-482.

### c. Liability.

### (1) To Corporation.

41. Liability for Secret Profits. Where the directors of a corporation, on the unsubscribed for stock becoming greatly enhanced in value, appropriated it to themselves at a price below its selling value, of which the other stockholders had no notice, the profits accruing to them from the transaction constitute a trust fund belonging to stockholders of record at the time of the sale of such stock. Hechelman v. Geyer (Pa.) 1917A-236.

(Annotated.)

- 42. The directors of a corporation are under an inherent obligation not to use their position to advance their individual interests, as distinguished from those which they represent in a fiduciary capacity. Hechelman v. Geyer. (Pa.) 1917A-236.
- 43. Liability of Directors to Corporation. The directors of a corporation are "trustees" or quasi trustees of its capital and assets, and, as such, are liable for any breach of duty with respect thereto. Hechelman v. Geyer (Pa.) 1917A-236.

### Note.

Liability of corporate director to corporation or stockholder for secret profits. 1917A-238.

### (2) To Third Persons.

44. Liability of Director for Neglect. An action under Kirby's Ark. Dig. § 863, providing that any director of a bank or other corporation, intentionally neglecting or refusing to perform the duties of his office, shall be severally liable for debts

of the corporation during the period of his neglect or refusal to perform the duties, must be brought within three years from such refusal, and is thereafter barred. Zimmerman v. Western, etc. Fire Ins. Co. (Ark.) 1917D-513.

45. Persons Entitled to Enforce. Where officers of an insurance company and a bank conspire for the purchase of the insurance company's stock, and entries are made on the books of the bank so as to conceal that fact from the directors and stockholders, they cannot be liable severally to the depositor for any debt of the bank so accruing, since the insurance company cannot hold directors for any liability founded on the company's participation in a wrongful act. Zimmerman v. Western, etc. Fire Ins. Co. (Ark.) 1917D-513.

### (3) Relief to Stockholder.

46. Rights of Shareholder—Enjoining Illegal Act. An individual shareholder in a building and loan association may maintain an action to prevent its officers from doing some forbidden act, or from continuing a course of mismanagement of its affairs, or to require the association to obey the statute, or for the purpose of obtaining a judgment against the association. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.

47. Action for Fraud. Plaintiff, the holder of shares of stock in a life insurance company having a book value of about \$130 each, but which had sold as high as \$150, and who sold them for around \$200 a share to the vice-president and secretary of the company, acting with the president and others, owning a majority of its stock, in transferring or reinsuring its risks at a value giving them about \$1,000 a share, and certain payments and preferences for such service, and who had not been informed as to the true condition of the company or the value of its assets, may maintain an action against such officers for fraud, and recover the full value of his stock, without reference to the price agreed upon at the time Dawson v. National Life Ins. of the sale. Co. (Iowa) 1918B-230. (Annotated.)

### d. Particular Officers.

### (1) President.

48. Giving Note for Borrowed Money. A president has no inherent power to negotiate loans and issue notes therefor in the name of the corporate entity of which he is such officer. And, unless it ratifies such action on his part, or for an unreasonable length of time after knowledge thereof acquiesces therein, the notes so executed are not enforceable as liabilities against the corporation. Williams v. S. M. Smith Ins. Agency (W. Va.) 1917A-813.

49. Authority of President to Execute Contract. A contract pertaining to the business of a corporation, when formally executed in its name by its president, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation, and the presumption is not necessarily rebutted by mere failure of the directors' record to show affirmatively that such authority had been given. Omaha Wool, etc. Co. v. Chicago Great Western R. Co. (Neb.) 1917A-358.

(Annotated.)

50. Contract to Purchase Real Estate. Neither a resolution of the board of directors of a membership corporation that "the president and vice-president be empowered to take charge of the fiscal affairs until the by-laws are adopted," nor a resolution "that the president has authority to sign and execute all documents," standing alone and unexplained, gives the president that authority required by the N. Y. Membership Corporations Law (Consol. Laws, c. 35), § 13, providing that no purchase of realty shall be made by a membership corporation, unless ordered by the directors by a two-thirds vote, as a condition to his right to contract for the purchase of realty. Catholic Foreign Mission Soc. v. Oussani (N. Y.) 1917A-479.

51. Execution of Deed. A deed of "Big Hillabee Power Company," purporting on its face to be the deed of the company, and reciting that in witness the grantor had set its hand and seal and delivered it by its president, signed "L. W. Roberts, Pres't Big Hillabee Power Co.," was the deed of the company, since any defect in the signature is such as a court of equity will not permit to defeat the right of the grantee. Nolen v. Henry (Ala.) 1917B-792

### Note.

Presumption that contract executed by president of corporation is authorized by corporation. 1917A-360.

### (2) Directors.

52. Fiduciary Relation of Director and Stockholder — Purchase of Stock by Director. Any contract whereby corporate directors acquire profit to the shareholder's detriment, casts upon them the burden of affirmatively showing that the contract was fairly procured for value, or, if for less than value, upon full disclosure of all facts known to the director and unknown to the shareholder. Dawson v. National Life Ins. Co. (Iowa) 1918B-230. (Annotated.)

53. Relation to Stockholders. The officers and directors of a corporation are trustees of the stockholders in many respects, as in the transaction of the business and care of the property of the

corporation. Dawson v. National Life Ins. Co. (Iowa) 1918B-230.

#### Note.

Purchase of stock by director as affected by fiduciary relation to stockholder. 1918B-241.

### e. Compensation for Services.

- 54. Right to Compensation for Extra Services. Plaintiff, while drawing a salary of \$100 per month as general manager of a corporation which he with others had organized to take over land on which they had an option, is not entitled to compensation for his services in preparing or copying a contract for use by the corporation, since these services are such as a business manager is ordinarily expected to perform for his company. Tanner v. Sinaloa Land, etc. Co. (Utah) 1916C-100.
- 55. Allowed by Vote of Officer Benefited. Compensation voted to an officer of a corporation is illegal, if the resolution fixing it is carried by his vote, and such compensation may be recovered. Luthy v. Ream (III.) 1917B-368.

### 8. STOCK AND STOCKHOLDERS.

#### a. Issuance of Stock.

56. Issue of Stock and Bonds. Where the parties by their pleadings and stipulations have made a case where a corporation has purchased property necessary and proper for corporate use and issued therefor its capital stock and bonds, a prima facie case of valid payment for the stock and bonds is established. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

### b. Subscription to Stock.

### (1) In General.

57. Subscriptions of corporate stock by insolvent persons cannot be counted to hold other subscribers for the amount of their subscriptions; but, if such subscribers was apparently solvent at the time he made the subscription, no fraud is perpetrated upon other subscribers by the acceptance of his subscription in good faith, though he afterward proves to have been insolvent. Heiskell v. Morris (Tenn.) 1918B-1134. (Annotated.)

58. Contract for Sale of Stock. The Ideal Laundry Company was a corporation capitalized at 250 shares, of the par value of \$100 each, of which plaintiff owned 126 shares, the balance outstanding in the names of other parties.

The defendant laundry company, doing a kindred business and desiring to purchase all the shares, executed on January 11, 1910, to the plaintiff the following memorandum of agreement: "We agree to purchase 126 shares of Ideal Laundry

stock for \$5,500, and the balance of 124 shares at \$50 per share, from F. C. Whit-The Davis Laundry (Signed) Company, per E. W. Sloan. 1-11-10." This memorandum was not signed by Whitmore. No time was fixed for the delivery of these shares, and it was verbally agreed that delivery should be made at a local bank, and that the buyer should assist in obtaining the outstanding shares. On February 21, 1910, the seller had deposited in the bank his own 126 shares and had obtained 116 of those outstanding, at which time he notified the defendant of this fact, and that the re-maining 8 shares would be delivered in a very short time. On January 31, 1910, the buyer took possession of the plant and assets of the Ideal Laundry Company and operated the same for a period of two weeks. On February 28, 1910, the seller had secured the entire 250 shares and deposited them with the local bank for delivery, and so notified the buyer. On February 16, 1910, the buyer yielded posand repudiated the contract. session Held: The written memorandum was an offer to purchase the entire 250 shares of stock, and stipulated the price per share. Davis Laundry, etc. Co. v. Whitmore (Ohio) 1917C-988.

59. Common or Preferred Stock. Where a subscription agreement to form a corporation provides for the issuance of preferred and common stock, and that the subscriber is to designate the class of stock to which he subscribes, an undesignated subscription will be deemed a subscription to common stock, unless a preference is asked prior to the organization of the corporation, or is given by unanimous consent of the stockholders after such time. National Bank v. Amoss (Ga.) 1918A-74.

### (2) When Subscriber Becomes Stockholder.

60. A certificate of stock in a corporation is not the stock itself, and is not necessary to a subscriber's complete ownership of the stock, but is a mere muniment of title, evidencing the stockholder's right of ownership. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

(Annotated.)

61. Resolution Limiting Rights. Where stockholders of a corporation were composed of the holders of certain trust certificates representing an interest in certain town-site land, it being contemplated that the trust certificate should be exchanged for stock in the corporation, the rights of the holders of such certificates cannot be terminated by a resolution that such holders should not be entitled to draw dividends or vote at stockholders' meetings until they had surrendered their certificates and taken out renewed cer-

1916C-1918B.

tificates, notice of which is given only by publication in three newspapers in states other than that in which the corporation was organized. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

62. Where a subscriber to the capital stock of a corporation has paid his subscription or performed his obligation essential to entitle him to the issuance of his stock, he is a full stockholder and entitled to all the rights as such, regardless of whether a stock certificate was ever issued to him. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

(Annotated.)

63. The owners of a town site, in order to promote a sale thereof, conveyed the land to trustees to be disposed of for their benefit, the land being represented by 1,000 shares of joint stock, for which certificates were to be issued to purchasers for the benefit of the landowners. purchasers formed a joint-stock company, operated by the trustees, who thereafter conveyed the land to the directors of the joint-stock company, and, a corporation having been subsequently formed and the land conveyed to it, it was resolved by the stockholders of the joint-stock com-pany that the holders of the trust certificates should be required to file and register them, receiving in lieu thereof a certificate of stock in the corporation, and that such transfer should be necessary to enable the shareholders to receive dividends. The trustees continued to issue trust certificates after the organization of the corporation, and both such certificates and the certificates for the shares in the corporation were acceptable in payment for lots sold by the corporation. In 1856, forty shares of trust certificates being still outstanding, it was resolved that the holders should not be entitled to draw dividends or vote thereon until they were surrendered, and that notices of the resolution should be published in three newspapers in other states. The act of incorporation provided that "the stockholders in the Galveston City Company be and they are hereby incorporated under the same name and style." It is held that, the act of incorporation being for the benefit of the persons interested in the joint-stock company, it would be pre-sumed that it was accepted by them, and hence the holders of trust certificates became ipso facto stockholders in the corporation, and were entitled to all the rights of stockholders, regardless of whether they ever surrendered their certificates for shares in the company or not. Yeaman v. Galveston City Co. (Tex.) 1917E-191. (Annotated.) 1917E-191.

#### Note.

When subscriber to stock becomes stockholder. 1917E-209.

- (3) Withdrawal and Avoidance of Subscription.
- 64. Where subscribers for more than two years took no steps to repudiate subscriptions, but allowed their names to remain on the corporate books as shareholders, and paid one assessment, it is held that they could not defeat an action by receiver to recover unpaid subscriptions on the ground of fraud. Heiskell v. Morris (Tenn.) 1918B-1134.
- 65. Fraud on Subscriber Waiver by Delay. The shareholder, whose subscription is obtained through fraud, must be diligent in discovering the fraud and repudiating the contract, to avoid his subscription as against creditors of the corporation. Heiskell v. Morris (Tenn.) 1918B-1134.
- 66. Insolvency of One Subscriber. The insolvency of a subscriber, as relieving other subscribers from obligation to pay subscriptions, is a matter of defense, the burden of proving which is on those subscribers asserting it. Heiskell v. Morris (Tenn.) 1918B-1134. (Annotated.)
- 67. Effect on Other Subscriptions. The withdrawal of a subscription is reached does not vitiate the other subscriptions not so withdrawn. National Bank v. Amoss (Ga.) 1918A-74.
- 68. Where promoters enter into a secret and collateral agreement with a person to induce him to subscribe for stock of a corporation to be formed, the breach of such agreement will not release the subscriber from his liability to the corporation. National Bank v. Amoss (Ga.) 1918A-74.
- 69. Fraud of Promotor as Releasing Subscriber. Where a promoter solicited subscriptions to a corporation to formed, and presented to the prospective subscriber a subscription agreement containing a provision that the promoter undertook and agreed that a certain corporation would sell to the subscribers certain property for a stated sum, and no misrepresentation of fact was made, nor any trick or device practiced by the promoter to secure the subscription, in a suit by the corporation and its officers to wind up its affairs, adjust the liabilities of the holders of stock and subscribers to stock, and distribute the corporate assets, subscribers will not be released on the ground that their subscription was procured by alleged fraud of the promoter, who had largely overvalued the property in the subscription contract, and who was a large owner of stock in the corporation which owned the property. National Bank v. Amoss (Ga.) 1918A-74.
- 70. Release of Subscriber. A subscriber to stock in a corporation to be

formed "for the purpose of organizing the Sparta Cotton Mill," where the subscription agreement contained no reference to the scope, extent, or nature of the business beyond limiting the capital stock to a fixed sum, but did contain a provision that a named person would sell for a stated sum, to the subscribers, the property of the Sparta Oil Mill, is not released from his subscription because the charter subsequently granted empowers the corporation "to conduct such branch establishments and business as are found to be useful to the main enterprise"; the main enterprise, as stated in the charter, being the manufacture and sale of cotton goods, yarns, thread and cloth. National Bank v. Amoss (Ga.) 1918A-74.

(Annotated.)

### Notes.

Alteration in charter or change in corporate design as releasing subscriber to stock. 1918A-79.

Liability on stock subscription as dependent upon whole amount of stock having been subscribed. 1918B-1137.

### (4) Conditional Subscriptions.

71. Effect of Failure to Subscribe Entire Amount. Under a subscription contract, making all subscriptions contingent upon the whole amount being subscribed, no assessments can be enforced until the entire capital stock has been subscribed. Heiskell v. Morris (Tenn.) 1918B-1134.

(Annotated.)

72. A subscription contract, providing that all subscriptions are on condition that the promoters "procure" subscriptions to the full amount of the capital stock, is held not to require that all subscriptions be made by persons other than the promoters. Heiskell v. Morris (Tenn.) 1918B-1134. (Annotated.)

### (5) Preference in New Issue of Stock.

73. Preferential Rights of Stockholders. A corporation increasing its capital stock may offer the stock at par to its bona fide stockholders who appear to be such on the books of the corporation, and it need not accept the subscription of any other person. Schmidt v. Marconi Wireless Tel. Co. (N. J.) 1918B-131. (Annotated.)

### Note.

Right of stockholder to preference in subscribing for new stock. 1918B-132.

### c. Nature of Ownership.

74. Relation of Stockholders to Corporation. The stockholders of a corporation have no legal title to property, which is owned by the entity known as the cor-

poration, but their shares represent integral parts of the whole, and proportional shares of the dividends declared or to be declared, and of net assets upon dissolution. Dawson v. National Life Ins. Co. (Iowa) 1918B-230.

75. "Stock in a corporation" is not merely property, but creates a personal relation analogous, otherwise than technically, to a partnership. Longyear v. Hardman (Mass.) 1916D-1200.

### d. Lien of Preferred Stock.

76. The board of directors adopted a resolution to redeem the preferred stock, and at the same time adopted a resolution to set aside seventy-five per cent of the gross earnings from that time on for that purpose, to be known as a preferred stock fund, to be apportioned as often as twenty-five per cent of the amount of the preferred stock was accumulated. The resolutions were adopted only eight days before the receiver was appointed, and the board of directors had no opportunity to carry them out. Held, that resolutions must be construed together, and so considered they merely pledged the transfer of seventy-five per cent of future gross earnings to the preferred stock fund, to be apportioned as stated; the entire issue of preferred stock did not immediately become an absolute liability of the company; the preferred stockholders continued to be stockholders and not creditors until an apportionment of the preferred stock fund was made; and the preferred stockholders then became creditors only with respect to such apportionment. Inscho v. Mid-Continent Development Co. (Kan.) 1917B-546. (Annotated.)

77. Status as Stockholder or Creditor. The capital stock of the corporation consisted of \$100,000 common stock and \$50,000 preferred stock. The plaintiff purchased 500 shares of the preferred stock and received a certificate of stock which provided there should be paid on it from net earnings a fixed yearly dividend from date of issuance at the rate of seven per cent per annum, to be earned before dividends on common stock were declared; that the stock should not be entitled to further dividends and should have no voting power; that it should be preferred as to assets on winding up the affairs of the company; and that it should be redeemable at the option of the company after one year from date of issue, at par with accrued dividends. Held, the certificate was a certificate of stock and not a certificate of indebtedness, and the plaintiff was a stockholder of the corporation and not a creditor. Inscho v. Mid-Continent Development Co. (Kan.) 1917B-546.

(Annotated.)

### Note.

Preferred shareholder as creditor or stockholder of corporation. 1917B-558.

### e. Transfer of Stock.

- 78. Necessity of Transfer on Corporate Books. Transfer upon the corporate books was not necessary. Tender or offer to deliver the stock properly indorsed for transfer by the owner, either in blank or to the defendant, was sufficient. Davis Laundry, etc. Co. v. Whitmore (Ohio) 1917C-988.
- 79. Effect of Failure to Record. That the buyers in good faith of corporate stock from a judgment debtor did not cause the certificates, as required by provisions on their back, to be transferred on the books of the corporation, did not invalidate the transfer, since the provision requiring transfer on the books was for the benefit of the corporation. Husband v. Linehan (Ky.) 1917D-954.
- 80. The purpose of Revisal 1905, § 1168, providing that stock shall be transferable on the books of the corporation under regulations prescribed by by-laws, and, when any transfer is made for collateral, it shall be so expressed in the entry of the transfer, is to prevent fraudulent transfers and to protect the corporation, but a holder of stock as pledgee has priority over a subsequent attachment, though the transfer to the holder has not been entered on the corporate books. Bleakley v. Candler (N. Car.) 1917A-425. (Annotated.)
- 81. "Fly Power." A "fly power" is a written assignment in blank, whereby, on being attached to a stock certificate, the stock may be transferred. Carlisle v. Norris (N. Y.) 1917A-429.
- 82. What Law Governs. Where neither common law nor statute of the state wherein corporate stock was sold and transferred is pleaded or proved in a suit in Kentucky attacking such transfer, the law of this state determines the validity of the transfer. Husband v. Linehan (Ky.) 1917D-954. (Annotated.)
- 83. The method of transferring corporate stock is governed by the law of the state of incorporation, although the transfer is made in another state. Husband v. Linehan (Ky.) 1917D-954.

(Annotated.)

84. Sufficiency to Rebut Corporate Records. In proceedings to determine the legal directors of a corporation, the documentary evidence is held to be insufficient to overcome the showing of the corporate records that a party was the owner of certain stock. Dolbear v. Wülkinson (Cal.) 1917E-1001.

#### Notes.

Law governing transfer of corporate stock. 1917D-959.

Rights of unregistered transferee as against attachment or execution levied on stock. 1917A-428.

## f. Stockholders' Meetings.

### (1) Notice.

- 85. Effect of Failure to Give Notice. The correct rule is that, where required by statute, the absence of notice explicitly naming the day, time, and place of meeting invalidates the meeting, unless the stockholders are all present and consent, and, if a single stockholder refuses to consent, the proceedings will be void People v. Matthiessen (III.) 1916E-1035.
- 86. The action of the other stockholder in being present until after the assumption of business, but remaining mute and withdrawing upon the failure of the first stockholder's remonstrance, is not a participation in the meeting waiving the right to legal notice. People v. Matthiessen (Ill.) 1916E-1035. (Annotated.)
- 87. Waiver of Notice. The action of the stockholder in continuing to remonstrate after business had been taken up by the meeting is not a participation therein waiving the right to legal notice. People v. Matthiessen (Ill.) 1916E-1035. (Annotated.)
- 88. The facts that the stockholders for 20 years had held meetings by common consent without notice, and that the two stockholders being present at the meeting in question might have participated, and hence were not injured by want of notice, does not render the meeting valid, since the notice required by the act is indispensable, unless waived either expressly or by participation in the meeting. People v. Matthiessen (III.) 1916E-1035.
- 89. Necessity of Notice. On quo warranto to require a defendant to show by what right he acted as director in a corporation it appeared, that the by-laws of the corporations provided for an annual meeting of the stockholders to elect directors on December 18th; that ever since its organization the stockholders of the company by mutual consent met about 10 A. M. on that day without notice as required by Laws III. 1857, p. 162, \$6, under which act the corporation was organized; that at the meeting so held which elected defendant two stockholders appeared, one of whom protested against the meeting, the other saying nothing, and upon the failure of the protest both withdrew. Held, that defendant's election was void, since the meeting was illegal for want of notice as required by the act. People v. Matthiessen (Ill.) 1916E-1035.
- 90. Mailing of Notice. In proceedings to determine who were the legal directors of a corporation, the evidence is held to be sufficient to show mailing of notice of meeting to stockholders by the secretary. Dolbear v. Wilkinson (Cal.) 1917E-1001.
- 91. Part of stockholders of corporation, attending special meeting pursuant to

notice not advising them that the election of directors would be taken up, did not waive by attending the meeting, in which they did not participate, want of proper notice to them. Dolbear v. Wilkinson (Cal.) 1917E-1001. (Annotated.)

92. A special meeting of corporate stockholders, other than the annual meeting provided by the by-laws, which was held without notice that an election of directors was one of the purposes of the meeting, the notice stating that the purpose was "to transact such business as may come before the said meeting," is not authorized to elect directors, since stockholders are entitled to actual notice of the time, place, and business proposed to be transacted at a special meeting. Dolbear v. Wilkinson (Cal.) 1917E—1001. (Annotated.)

93. Contents of Notice. Cal. Civ. Code, § 314, provides that, if an election of corporate directors has not been held at the appointed time, it may be held at some other time ordered by the directors, or a meeting may be called by stockholders, as provided in section 310. Section 310 deals with the removal of directors, and provides that meetings of stockholders for the purpose may be called by stockholders holding at least one-half the votes, and that the calls must be in writing, addressed to the secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. It is held that section 314, in authorizing stockholders to call a meeting for the election of directors "as provided in section 310," incorporates, not only the provision prescribing the preliminary step of directing a call to the secretary, but also its required subsequent notice "of the time, place, and object of the meeting," and a special meeting for the election of directors, held upon request, signed by stockholders holding less than half the votes, and not stating the object of the meeting, did not result in a valid Dolbear v. Wilkinson (Cal.) election. 1917E-1001. (Annotated.)

### Notes.

Sufficiency as to contents of notice of special meeting of stockholders. 1917E-1004.

Waiver of notice of stockholders' meeting. 1916E-1038.

### (2) Right to Vote.

94. Voting Stock in Domestic Corporation. A bank domiciled in an enemy country, but having a local branch licensed by the local government to continue its business during a state of war, cannot through that branch vote stock in a local corporation. Robson v. Premier Oil, etc. Co. (Eng.) 1917C-227.

(Annotated.)

## (3) Voting Trusts.

95. Where a trust agreement provided that the trustee should have absolute power for ten years of voting corporate stock, parties to the agreement may repudiate it, and so may purchasers of stock with knowledge. Luthy v. Ream (Ill.) 1917B-368. (Annotated.)

### (4) Voting Agreements.

96. Stock Voting Agreement—Validity. A contract, by which the owners of a majority of the stock agree to vote for certain persons for directors or to secure to themselves the control and management of the corporation, is not against public policy so long as no fraud is committed or wrong done to the other stockholders. Thompson v. J. D. Thompson Carnation Co. (III.) 1917E-591. (Annotated.)

97. A stockholder may withdraw from a combination to control the majority of the stock of the corporation, though it is expressly stated therein that the agreement shall be irrevocable. Luthy v. Ream (Ill.) 1917B-368. (Annotated.)

98. It is legitimate for the owners of a majority of the stock of a corporation to combine for the purpose of controlling it. Luthy v. Ream (Ill.) 1917B-368.

(Annotated.)

(Annotated.)

### (5) Proxies.

99. As stockholders cannot divest themselves of their duty to participate in controlling the corporation, and as there is no such thing as an irrevocable proxy to vote stock not coupled with an interest, a trust agreement, whereby the owner of less than one per cent of the stock of a corporation had absolute power to vote a majority of the stock as he saw fit, which power was made irrevocable for ten years, is invalid and can be repudiated. Luthy v. Ream (III.) 1917B-368.

100. Irrevocable Proxy. The holders of the majority of the stock of a corporation entered into a contract to vote their shares of stock for each other for directors. The contract provided that, in case of the absence of a named stockholder, his daughter should have the power to vote the stock and should pay to his other two children their share in the stock. It was further provided that the contract could be changed only by the unanimous written consent of the parties, and that it was binding on their heirs, etc. It is held that as the title of the stock passed to the daughter on the stockholder's death, and as she had no power in his lifetime to vote it except in his absence, the contract was not void because an attempt to confer upon daughter an irrevocable proxy. Thompson v. J. D. Thompson Carnation Co. (Íll.) 1917E-591.

### g. Dividends.

101. Duty of Stockholder to Demand. A stockholder is under no obligation to draw or demand his dividends within any prescribed period; the declared dividend being in the nature of a debt on the part of the corporation to the stockholder, payable on demand. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

the time the resolutions referred to were adopted the board of directors adopted a resolution authorizing the secretary and treasurer to proceed with the payment of preferred dividends. At that time there were about \$2,900 in the treasury which were forthwith applied to the satisfaction of the claims of creditors. Held, the money was not net earnings, and the duty to pay creditors was superior to the duty to pay preferred stockholders. Inscho v. Mid-Continent Development Co. (Kan.) 1917B-546.

103. The defendant engaged in the business of prospecting for and producing gas and oil. It developed a valuable gas field near Muncie, left, it for other fields, and then returned to it after the proceeds of the sale of its stock had been spent. then borrowed \$11,000, which it used to build a pipe line to supply gas to consumers with whom it had contracts. By bringing in new wells and connecting them with the pipe line it brought its income up to an average of \$2,800 per month, and received for the sale of gas for the thirty days next preceding the appointment of the receiver the sum of \$3,000. It expended all earnings received after the pipe line was built in repaying the money borrowed to build the pipe line, in drilling new wells and connecting them with the pipe line, and for general expenses. When the suit was commenced it still owed about \$2,500 of indebtedness incurred for these purposes, which was due and payable. Held, there were no net earnings out of which to pay dividends on the preferred stock. Inscho v. Mid-Continent Development Co. (Kan.) 1917B-546.

### h. Right to Inspect Corporate Books.

104. Under Mass. St. 1903, c. 437, § 30, entitling a stockholder, on petition in equity, to an inspection of the books and records of the corporation, a petitioner, as incidental to such right, has the right to be represented by attorney and the right to make written memoranda or copies of the stock and transfer books. Powelson v. Tennessee Eastern Electric Co. (Mass.) 1917A-102. (Annotated.)

105. The fact that a stockholder and voting trustee of a corporation, by reason of prior litigation, desires to change its administration, and petitioned under Mass. St. 1903, c. 437, § 30, for an ex-

amination of its books and records with that object in view, is entirely consistent with an honest belief that a change in management and policy will advance the interests of the corporation and his own rights as a stockholder. Powelson v. Tennessee Eastern Electric Co. (Mass.) 1917A-102. (Annotated.)

106. Under the common law, the right of a stockholder to inspect the books of a corporation was a qualified and not an absolute right, but under Mass. St. 1903, c. 437, § 30, entitling a stockholder to inspect stock and transfer books and records, the right, though narrower in scope, is an absolute right. Powelson v. Tennessee Eastern Electric Co. (Mass.) 1917A-102. (Annotated.)

107. Under Mass. St. 1903, c. 437, § 30, requiring corporations to keep stock and transfer books in the commonwealth for the inspection of its stockholders, and giving the courts jurisdiction, on petition of a stockholder, to order books, etc., to be produced for his inspection, a holder of common stock of a corporation, whose demand for an inspection of its books was refused, and who became an intervening party to a petition for inspection by a voting trustee, is entitled to inspection. Powelson v. Tennessee Eastern Electric Co. (Mass.) 1917A-102. (Annotated.)

108. A stockholder is not entitled to inspect the books and papers of other corporations not shown to be in the possession of the corporation of which he is a stockholder. Klotz v. Pan-American Match Co. (Mass.) 1917D-895.

109. A stockholder's request to the corporation that he be permitted to inspect its books and records is too broad and indefinite, so far as it demands an inspection of all contracts of subscription and other instruments in writing with the various stockholders, the agreement containing the terms of the purchase of assets of a corporation other than those specified, any contracts for the sale of machinery to persons, corporations, and subsidiary companies other than those specified, all papers, records, and other instruments showing, referring to, or relating to commissions on sales of stock paid to certain persons, or relating to any other commissions to be paid for the sale of stock, and any and all other books, papers, and records referring or in any way relating to the affairs of the company. Klotz v. Pan-American Match Co. (Mass.) 1917D-895.

110. Scope of Examination by Stockholder. A stockholder, who is acting in good faith, will be permitted to inspect and make copies of the minutes of the corporation and of the directors, the stock ledger, the stock certificate books, the ledger showing the corporation's assets

and liabilities, a statement of an auditor or accountant showing a complete inventory and all expenditures and receipts, and the contracts for the purchase of the property and assets of another corporation. Klotz v. Pan-American Match Co. (Mass.) 1917D-895.

111. A by-law of a corporation, providing that the directors should determine whether, when, and under what conditions the accounts and books of the corporation, except such as might by statute be specifically open to inspection, should be open to the inspection of stockholders, was invalid, and did not deprive a stockholder of his common-law right to inspect the corporate books and records; there being no provision of the law of the state where the corporation was organized, or provision of its charter, authorizing it to bind the stockholders by such a by-law. Klotz v. Pan-American Match Co. (Mass.) (Annotated.)

112. The courts of this state will enforce the common-law right of a stockholder to examine the books of a foreign corporation, whose manufacturing plant, principal office, and books are in this state, and whose officers reside there; this involving no investigation of the internal affairs of the corporation or order affecting the management of its business. Klotz v. Pan-American Match Co. (Mass.) 1917D-895. (Annotated.)

113. A stockholder will be permitted to examine the books and accounts of the corporation, when he is seeking information as to its condition in good faith and for the purpose of protecting his own rights or advancing the interests of the corporation; but the rights of the corporation, especially in the protection of trade secrets and the interests of other stockholders, will not be disregarded. Klotz v. Pan-American Match Co. (Mass.) 1917D-895. (Annotated.)

114. A stockholder has a common-law right to inspect the books of a corporation at seasonable times and for proper purposes; but this is a qualified and not an absolute right, especially as the remedy in this commonwealth is by mandamus, which is a discretionary writ. Klotz v. Pan-American Match Co. (Mass.) 1917D-895. (Annotated.)

## Note.

Right of stockholder to inspect books of corporation as absolute or qualified. 1917D-898.

## i. Distribution of Corporate Assets.

115. An incorporated volunteer fire company not being a public charity, its property, on its dissolution, goes to its surviving members, and does not revert to its grantors or escheat. Neptune Fire En-

gine, etc. Co. v. Board of Education (Ky.)

116. Rights of Preferred Stockholders. Preferred stock, issued under charter authority and pursuant to proper corporate action, which provides that in case of liquidation or dissolution of the company, or distribution of its assets, it shall be entitled to be paid in full at par and accrued dividend charges, before any payment is made on the common stock, has a preference over common stock in the distribution of the assets of the corporation. National Bank v. Amoss (Ga.) 1918A-74.

# j. Liability of Stockholders.

# (1) In General.

Paid from 117. Dividends Capital. Where a solvent industrial corporation, which is engaged in the conduct of its business as a going concern, annually declares dividends through a number of years, and these dividends are paid out of the capital assets of the corporation, and the shareholders receive them in good faith and without notice that they are not paid from the net profits of the corporation, and afterward the corporation is adjudicated a bankrupt, an action by the trustees in bankruptcy will not lie against the shareholders to recover the amount of the dividends so received by them. Carlisle v. Ottley (Ga.) 1917A-573.

(Annotated.)

118. Change of Remedy. The legislature has the power to modify and change a remedy, provided no substantial right is thereby impaired; consequently a shareholder in a trust company cannot complain because the legislature changed the remedy by which the double liability previously imposed might be enforced. Johnson v. Libby (Me.) 1916C-681.

#### (2) Persons Liable.

119. Holder of Stock as Security. Evidence in an action to enforce a stockholder's constitutional liability against one who appeared upon an insolvent local corporation's stockbooks as a general owner of stock, held to sustain a finding that the failure of the corporation's records to show that the stock was issued to and held by defendant as collateral security for an advance made by a third person was not due to the negligence or fraud of the corporation but to his own negligence, wherefore he was estopped, as against creditors, to deny liability as a Way v. Barney (Minn.) stockholder. 1916C-565. (Annotated.)

120. Double Liability of Stockholders. A stockholder in a trust company who retained his stock after enactment of Me. P. L. 1905, c 19, amending Rev. St. c. 48, § 86, imposing a double liability on

shareholders in such corporation by providing a method of enforcing the liability, must be deemed to have accepted the effect of the amendment. Johnson v. Libby (Me.) 1916C-681.

121. The charter of the Waterville Trust Company (Priv. & Sp. Laws Me. 1889, c. 401, § 6) imposed a double liability on stockholders, and a similar liability was imposed by Rev. St., c. 48, § 86, as amended by Me. P. L. 1905, c. 19. Held, that one who voluntarily became a stockholder in such corporation assumed the double liability imposed by statute and charter. Johnson v. Libby (Me.) 1916C-681.

122. Liability After Transfer of Stock. A former stockholder in a Minnesota corporation cannot resist the recovery in an action brought by the receiver in another jurisdiction to enforce his liability under Minn. Rev. Laws 1905, §§ 3184-3190, for the corporate debts incurred prior to the transfer by him of his stock, because no separate and distinct assessment based upon the debts, antedating such transfer, was made by the Minnesota court when levying the assessment in conformity with the statute, but he must look to that court for the adjustment of such equities as he may have, the assessment order being a provisional one representing the best judgment of the court upon the evidence before it as to the amount of the assessment required, and directing that all moneys collected from the stockholders by the receiver shall be held until the further order of Selig v. Hamilton (U. S.) the court. 1917A-104. (Annotated.)

123. All stockholders, past or present, who may be actually liable for the corporate debts, are embraced by the order made in the proceedings under Minn. Rev. Laws 1905, §§ 3184-3190, to enforce the constitutional liability of stockholders for the corporate debts, where the receiver's petition, although setting forth as existing stockholders the persons alleged to be liable, and averring that some of them were the owners of the beneficial interest, having transferred their stock to avoid liability, manifestly invoked the jurisdiction of the court for the making of such assessment as it might consider necessary in order to enforce the stockholders' liability as it actually existed with respect to the corporate debts remaining unpaid, and the order of assessment by its terms purports to include "each and every share of the capital stock" and "the persons or parties liable as stockholders." Selig v. Hamilton (U. S.) 1917A-104. (Annotated.)

124. A nonresident former stockholder in a domestic corporation is not denied rights under the federal constitution by Minn. Rev. Laws 1905, §§ 3184-3190, enacted to make more effective the constitutional liability of stockholders for the cor-

porate debts, because under such statute he may be assessed for the corporate debts antedating the transfer, in proceedings in which he is represented by the corporation, and of which he is notified only by publication and mailing of notice. Selig v. Hamilton (U. S.) 1917A-104.

(Annotated.)

125. The authority of the Minnesota courts under Minn. Rev. Laws 1905, §§ 3184-3190, enacted to make more effective the constitutional liability of stockholders for the corporate debts, cannot be deemed to be confined to proceedings to assess existing stockholders, in view of the express terms of such law, making it applicable to cases of liability arising upon shares "at any time held or owned by such stockholders," and providing for the making of an assessment against "all parties liable as stockholders." Selig v. Hamilton (U. S.) 1917A-104. (Annotated.)

## Notes.

Validity and effect of statute making stockholder liable for corporate debts after bona fide transfer of stock. 1917A-109.

Liability for corporate debts or calls of person who holds stock as collateral security. 1916C-567.

### (3) Accrual of Cause of Action.

126. When Liability Accrues. The liability of a shareholder in a trust company which by statute is fixed at a sum equal to the par value of the shares, in addition to the amount invested therein, does not accrue as a claim against the shareholder's estate until assessed by a decree of court in liquidation. Johnson v. Libby (Me.) 19160-681.

# 4. Enforcement of Liability, Proceedings. .

127. Proceedings to Fix Liability. The determination of the court upon the evidence before it in the proceedings under Minn. Rev. Laws 1905, §§ 3184-3190, enacted to make more effective the constitutional liability of stockholders for the corporate debts, with respect to the amount of the assessment to be made upon former stockholders for the purpose of providing for the corporate debts incurred while they held the stock, is conclusive in a suit brought by the receiver in another jurisdiction to recover the amount of the assessment from a former stockholder notified of the original proceedings only by publication and mailing of notice. Selig v. Hamilton (U. S.) 1917A-104.

128. Competent evidence that there are corporate debts remaining unpaid which antedated the transfer of stock by a former stockholder was furnished in a suit against him to enforce in a foreign

jurisdiction his liability under Minn. Rev. Laws 1905, §§ 3184-3190, for the corporate debts incurred prior to such transfer, by decrees entered in the parent suit in Minnesota, which determined the amount of the outstanding claims and when they arose, and showed that there were debts in excess of the amount demanded of defendant, which arose before his shares were transferred. Selig v. Hamilton (U. S.) 1917A-104. (Annotated.)

129. Conclusiveness of Proceeding. A nonresident notified only by publication and mailing of notice of the proceedings under Minn. Rev. Laws 1905, §§ 3184-3190, enacted to make more effective the constitutional liability of stockholders for the corporate debts, is not concluded in an action brought against him in another jurisdiction by the receiver for the recovery of the amount assessed against him as a stockholder upon any issue as to the transfer of his stock or the good faith with which the transfer was made, but may litigate any matter which bears upon the extent or duration of his stockholding or any other personal defense. Selig v. Hamilton (U. S.) 1917A-104.

130. Enforcement Against Estate of Decedent. The double liability assumed by a purchaser of the stock of a trust company is contractual in its nature and does not abate at his death but survives and his estate is liable therefor. Johnson v. Libby (Me.) 1916C-681.

(Annotated.)

131. Where a shareholder in a trust company died during the liquidation of its affairs, an assessment against the shareholders on their double liability is valid against such shareholder's estate, without personal service on his representatives; the shareholder being represented in the proceeding against the corporation. Johnson v. Libby (Me.) 1916C-681.

132. Notice to Stockholders. In proceedings for the liquidation of the affairs of a trust company and the payment of its debts, the court may make an assessment against the shareholders upon their double liability without personal service upon them; the proceeding being against the corporation, which is presumed to represent them. Johnson v. Libby (Me.) 1916C-681.

133. Effect of Bankruptcy. Bankruptcy proceedings against a corporation do not stand in the way of a resort to the method prescribed by Minn. Rev. Laws 1905, §§ 3184-3190, of enforcing the constitutional liability of a stockholder for the corporate debts. Selig v. Hamilton (U.S.) 1917A-104.

134. Liability of Decedent's Estate. In view of Me. P. L. 1905, c. 19, authorizing the receivers of a banking or trust company to enforce the double liability of shareholders in an appropriate

action at law or in equity for the benefit of creditors, a decree of the court assessing the double liability of the shareholders and authorizing the receivers to institute all necessary proceedings in law or in equity to collect the same and enforce the decree is not limited in its scope solely to those persons who were shareholders at the time of the receivership but includes shareholders who have died subsequent to the receivership and authorizes an action against their estates. Johnson v. Libby (Me.) 1916C-681.

# 5. LIMITATION OF ACTIONS.

135. Me. Rev. St., c. 89, §§ 16, 17, 18, respectively, provide that, when an action on a contract or covenant does not accrue within the 18 months provided for the presentation of claims against an estate, the claimant may file his demand within that time in the probate office, and thereupon the judge shall direct that sufficient assets shall be retained by the administrator, and that, when such claim has not been filed in the probate office within said 18 months, the claimant may have a remedy against the heirs or devisees of the estate within one year after it becomes due and not against the executor or administrator. Held that, where the liability of a deceased shareholder in a trust company on account of an assessment against shareholders did not accrue until the decree of the court which was rendered more than 18 months after the time for the presentation of claims, an action to enforce such liability might within the year be maintained against her heirs. Johnson v. Libby (Me.) 1916C-681.

136. The three years' limitation prescribed by N. Y. Code Civ. Proc., § 394, for actions against a director or stockholder of a moneyed corporation or banking association to recover a penalty or forfeiture imposed, or to enforce a liability created by common law or by statute, does not govern a suit to enforce the liability of a stockholder in a foreign mercantile corporation. Selig v. Hamilton (U. S.) 1917A-104.

## k. Stockholders' Actions.

# (1) Right of Action.

137. Transfer of Stock on Books. Even against domestic corporations, mandamus is not a proper remedy to compel a transfer of shares. Travis v. Knox Terpezone Co. (N. Y.) 1917A-387.

### (2) Pleading and Practice.

138. Venue of Action. A suit in equity of the character just mentioned may be brought in the county of the residence of any one of the defendants. In such a case the jurisdiction will include also a defendant who resides in another county of this state. Carlisle v. Ottley (Ga.) 1917A-573.

139. Joinder of Defendants. Where an industrial corporation has been adjudged a bankrupt and trustees have been appointed, shareholders who received dividends from the corporation before the adjudication of bankruptcy, which were paid out of the capital assets of the corporation, may, under the Ga. Civil Code (1910), § 2251, be joined in one action instituted by the trustees to recover the amount of the dividends so paid. Carlisle v. Ottley (Ga.) 1917A-573.

# (3) Limitation of Actions.

140. Plaintiff's ancestor, as the holder of certain trust certificates, became a stockholder in defendant corporation in May, 1840, and on February 24, 1841. He died in 1853, leaving nothing to indicate his ownership of the stock, and the certificates originally issued to him had long been lost. The corporation, prior to July, 1909, had done nothing affirmatively adverse to such rights, and plaintiffs, who were the heirs of the original owner, had no knowledge until August, 1909, of his ownership, or that any certificates of any character had ever been issued as evidence of their ancestor's shares in the company. It is held that a suit instituted by them November 17, 1909, to enforce their rights under such certificates was not barred by limitations or laches. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

141. Action by Stockholder for Accounting. The four-year statute of limitations is applicable to a suit to enforce plaintiff's rights as a stockholder in a corporation and for an accounting. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

## 9. ACTIONS.

#### a. Process.

142. Mode of Acquiring Jurisdiction of Corporation. Under S. Dak. Code Cr. Proc. § 643, providing that the procedure, practice, and pleadings in criminal actions, or in matters of a criminal nature not specifically provided for in that Code, shall be in accordance with the procedure, practice, and pleadings of the common law, though there is no special statutory provision for process against a corporation upon an indictment either with or without preliminary examination, nor upon an information filed by the state's attorney, a summons issued by the trial court is a valid and appropriate process, and gives that court jurisdiction of the defendant, especially in view of section 561, providing for the issuance of a summons to require a corporation to answer a criminal charge upon a preliminary hearing before a magistrate. State v. Taylor (S. Dak.) 1916E-1285. (Annotated.)

143. Automobile Dealer as Agent of Manufacturer. Under a contract between

a toreign corporation manufacturing automobiles, and a local automobile sales partnership, by which the former sold cars and parts to the partnership, retaining title till payment, and requiring reports of sales, allotting certain territory, paying part of advertising expense, and agreeing to repurchase unsold goods on termination of the contract, the partnership to make all sales to consumers, the partnership is not an agent of the corporation, and service of process on a partner was of no force. Barnes v. Maxwell Motor Sales Corp. (Ky.) 1917E-578. (Annotated.)

## Note.

Method or process by which court may acquire jurisdiction on defendant corporation in criminal case. 1916E-1289.

## 10. INSOLVENCY AND RECEIVERS.

#### a. Preferences.

144. The Hay-Pauncefote Treaty (31 Stat. 1939; 7 Fed. St. Ann. 615), art. 2, providing that the citizens or subjects of each of the contracting parties have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise, does not affect the validity or application of Tenn. Acts 1877, c. 31, § 5, giving resident creditors of an insolvent foreign corporation a preference over nonresidents. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

145. Validity of Statute Preferring Residents. Tenn. Acts 1877, c. 31, \$5, providing that, on insolvency of a foreign corporation carrying on business in the state, resident creditors have a priority over simple contract creditors of any other country, is valid to the extent that corporations of another state will be deferred thereunder to resident creditors. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

# b. Distribution of Assets.

146. Rights of Creditors. Where all the assets of a corporation are turned over to another corporation without provision for payment of the debts of the former corporation, the creditors thereof may follow the assets into the hands of the latter corporation and charge its stockholders, who have received the stock in consideration of the transfer of their stock in the former corporation, as trustee for the creditors of the former corporation, because its assets are in equity a fund for the payment of debts. Barber v. Morgan (Conn.) 1916E-102.

'147. Recognition of Corporate Contracts. Where property is purchased by a recently formed corporation, which fails to become a going concern, and there is no fraud in the sale and purchase, and

the property is thereafter sold by order of the court in a pending proceeding to liquidate and distribute the corporate assets, the holders of the purchase money obligation will not be denied payments from the proceeds of this and other corporate property, solely on proof that the property was worth less than the agreed price. National Bank v. Amoss (Ga.) 1918A-74.

# c. Appointment of Receiver.

148. Grounds-Mismanagement. The majority of the stockholders of a corporation have the right to control the corporation, and the majority of the board of directors have the right to determine its policies and manage and direct its affairs so long as they act in good faith and within the limitations of the law. The appointment of a receiver for a solvent, going concern is a last resort remedy, and should not be employed to correct improper conduct when other adequate remedy is available. Bad judgment and ill success in previous ventures, completed or not being actively prosecuted, current transactions merely unwise and not so reckless or extravagant as to amount to breach of trust, irregularities and misconduct which are not so culpable as to jeopardize the interests of the corporation and the rights of stockholders, and dissensions among directors, so long as a majority of them control, do not warrant the appointment of a receiver. In no case should a court take the property and business of a solvent, going corporation out of the hands of the board of directors and into its own hands by the appointment of a receiver at the suit of a minority stockholder unless the right of the plaintiff be free from reasonable doubt and the danger of loss or injury be clearly proved. Inscho v. Mid-Continent Development Co. (Kan.) 1917B-546.

# 11. CORPORATE MORTGAGES AND BONDS.

149. Validity of Bonds. The bonds and mortgage of a corporation may be attacked on the grounds that they are invalid as conveying consumable property or reserving other benefits to the mortgagor, who is permitted to continue in possession, by subsequent creditors. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

150. Rights of Bona Fide Purchaser. Bonds of a corporation, payable to a certain bank or other registered holder for the time being, and providing in case of a registered transfer that the principal and interest will be paid without regard to any equity between the company and the original or any intermediate holder, whether technically negotiable or not, are free from equitable defenses in the hands of an innocent holder. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

- 151. Condemnation of Public Utility-Duty as to Lienholders. In a proceeding by a municipality to acquire a public utility under the public utilities statute (St. Wis. 1915, § 1797m1, subd. 5, and sections 1797m76 to 1797m85), it was the municipality's duty to see that the amount of bonds outstanding under a trust deed on the public utility of which the city had notice was applied to the claims of the bondholders, either by payment of the money into court for distribution, or by securing consent of the bondholders to pay it to the trustee, or, in the event that they would not consent to such payment, to wait until they asserted their rights in the fund, but it could not discharge its obligation in this respect by turning over the award to the public utility corporation itself, which was then insolvent. v. Kaukauna (Wis.) 1918A-247.
- 152. What Constitutes Default in Interest. Under a corporation's trust deed, authorizing the trustee to declare the principal of the bonds due for default in payment of interest, where the trustee advanced the money with which to pay the interest due, there is no default, authorizing it to declare the bonds due, although it advanced the interest to conceal from the bonds. Connell v. Kaukauna (Wis.) 1918A-247.
- 153. Reservations—Effect on Validity. Where the property described on the face of a corporate mortgage is not of such nature as to make it fraudulent and void, it cannot be attacked by subsequent creditors on the ground that the general conveying clause includes property not proper to be mortgaged, the possession and use of which is reserved to the mortgagor. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.
- 154. Receiving Payment for Bondholders. Under a corporation's trust deed, authorizing the trustee to declare the bonds due in certain contingencies, the trustee has no authority to receive payment for the bondholders merely because it is trustee, and before the bonds are due according to the trust deed, notwithstanding the bonds and interest coupons are made payable at the office of the trustee; and money deposited with the trustee for that purpose remains the property of the payor, and, if lost, the loss is that of the payor. Connell v. Kaukauna (Wis.) 1918A-247.
- 155. Power of Trustee for Bondholders. The authority of the trustee under a corporation's trust deed to act for the bondholders, as in accepting payment of bonds, is prescribed and limited by the terms of the trust deed. Connell v. Kaukauna (Wis.) 1918A-247.
- 156. Power to Act for Lienholder. Where the trustee under a corporation's trust deed represents certain bondholders

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as general agent for investment purposes, with power to accept payment on outstanding securities, to substitute one security for another, and generally to control the investment of the funds of such clients, it has authority to accept payment of the bonds of such clients under the trust deed, although such bonds are not due. Connell v. Kaukauna (Wis.) 1918A-247.

157. Consent of Stockholders. Notwithstanding Colo. Rev. St. 1908, § 865, providing that the directors of a manufacturing corporation shall have no power to mortgage the corporation's plant until the question shall have been submitted to the stockholders, and the majority of all the shares of stock shall have been voted in favor of the proposition, a mortgage given by the directors of a manufacturing corporation, without the consent of the stockholders, is not void but voidable only at the suit of the stockholders. Dillon v. Myers (Colo.) 1916C-1032. (Annotated.)

158. Effect of Failure to Obtain Consent of Stockholders. A subsequent judgment creditor of a manufacturing corporation cannot question the validity of a prior mortgage given by the directors of the corporation without the concurrence of the stockholders, where the stockholders, who could have questioned the mortgage, did not attack it; the transaction having been in good faith at least on the part of the mortgagee, and the corporation having received the proceeds of the loan. Dillon v. Myers (Colo.) 1916C-1032.

(Annotated.)

159. Ultra Vires Mortgage. A corporate mortgage, though ultra vires, will be enforced where the corporation received the proceeds, and the mortgagee entered into the contract which was fully executed, in good faith. Dillon v. Myers (Colo.) 1916C-1032.

# Note.

Right of creditor to object to mortgage of property of corporation made without required consent of stockholders. 1916C-1039.

### 12. FOREIGN CORPORATIONS.

- a Statutory Regulations.
- (1) Imposition of License Tax.

160. The taxes imposed by Cal. Pol. Code, § 409, requiring the secretary of state to charge and collect fees for filing articles of incorporation, graduated on the amount of the capital stock, and by Cal. St. 1905, p. 493, imposing an annual license tax on foreign corporations doing business in the state, are excise taxes, demanded as a privilege for the right to do a domestic business, and not taxes based on the capital stock but merely measured thereby, and the imposition of the taxes

on a foreign corporation selling its merchandise in the state, though manufactured elsewhere, is not an interference with interstate commerce. Albert Pick & Co. v. Jordan (Cal.) 1916C-1237.

(Annotated.)

### Note.

Imposition of license tax or fee on foreign corporation. 1916C-1248.

- (2) Statute Requiring Appointment of Representative to Accept Service of Process.
- 161. Designation of Agent. The permission granted by the state to a nonresident corporation to exercise its franchise in the state is a sufficient consideration for its agreement, pursuant to the requirements of Burns' Ind. Ann. St. 1908, §§ 4086, 4089, for service of process to be made on it by service on an agent. Meixell v. American Motor Car Sales Co. (Ind.) 1916D-375.

162. Construction of Statute. Burns' Ind. Ann. St. 1908, §§ 4086, 4089, relative to a foreign corporation's appointing an agency to receive service of process as a condition of doing business in the state, being a remedial statute, will be construed to include cases within the reason for its enactment, even though outside the letter of the statute. Meixell v. American Motor Car Sales Co. (Ind.) 1916D—375.

#### Note.

Liability to suit within state of foreign corporation which has revoked designation of agent for service of process and has ceased to do business within state. 1916D-378.

# (3) What Constitutes Doing Business.

163. A contract between a foreign corporation manufacturing Standard patterns, and a resident of the state, which recites that the corporation grants to the resident an agency for the sale of the patterns in a city for a specified term, and from year to year thereafter, until termination of the agreement, and which binds the corporation to sell and deliver, f. o. b. at points outside of the state, the patterns to the resident at a specified discount from retail prices and advertising matter at prices fixed, and to allow the resident to return semiannually discarded patterns on terms specified, does not contemplate the carrying on by the corporation of intrastate commerce, but the corporation, in performing its part of the contract, is engaged in interstate commerce, and may sue on the contract without complying with Mich. Pub. Acts 1901, No. 206, as amended by Pub. Acts 1903, No. 34, regulating the right of foreign corporations to carry on business in the state. Standard Fashion Co. v. Cummings (Mich.) 1916E-413.

(Annotated.)

(4) Effect of Noncompliance With Statutes.

164. Effect on Corporate Mortgage. That a foreign corporation was not authorized to do business in the state, not having filed its charter with the secretary of state as required by statute, does not render a mortgage and debentures of the corporation void. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

# b. Insolvency.

165. Authority of Court to Dissolve. The courts of the forum have no authority to dissolve or wind up a foreign corporation; their powers being limited to taking charge of the property within the jurisdiction of the court and enforcing the rights of creditors there. Dickey v. Southwestern Surety Ins. Co. (Ark.) 1917B-634.

(Annotated.)

# e. Actions by and Against Foreign Corporations.

# (1) Liability to be Sued.

166. Requisites of Jurisdiction. Three conditions are necessary to give a court jurisdiction in personam over a foreign corporation: First, it must appear that the corporation was carrying on business in the state; second, that the business was transacted by some agent of the corporation in the state; third, the existence of some local law making such corporation amenable to suit. W. J. Armstrong Co. v. New York Central, etc. R. Co. (Minn.) 1916E-335.

167. Refusal to Make Transfer-Remedies of Assignee of Stock. An assignee and holder of a certificate of stock of a foreign corporation, by its express terms transferable, when surrendered, upon the books of the corporation, on its surrender and on the refusal of its registered transfer agent and its other officers may sue in equity to compel such officers to make the transfer and to issue a new certificate, may sue the corporation for its value either in trover or assumpsit, may assert his ownership of the certificate and sue for the dividends declared upon it, or may sue to compel specific performance of the contract expressed therein. Travis Knox Terpezone Co. (N. Y.) 1917A-387.

168. Interference With Internal Affairs. The courts of this state will not annul the election of directors by the stockholders of a corporation chartered in another state. Travis v. Knox Terpezone Co. (N. Y.) 1917A-387. (Annotated.)

169. Compelling Transfer by Foreign Corporation. The courts of this state have jurisdiction to give relief against the transfer agent and other officers of a foreign corporation having their place of business in the state, who refuse to trans-

fer its certificate of stock on the corporate books, where no considerations of convenience, efficiency, or justice point to the courts of the corporate domicil as the appropriate tribunal, since the remedy merely enforces a contract between the corporation and its member, and his right to dividends, and protects his ownership of a certificate already issued, and does not interfere with the internal affairs of the corporation, nor amount to the exercise of any power of visitation, nor to the redress of any public wrong. Travis v. Knox Terpezone Co. (N. Y.) 1917A-387. (Annotated.)

# (2) Service of Process.

170. A foreign corporation keeping and maintaining agents in this state for procuring business for its benefit and profit may be required to answer in this state to a citizen thereof for a breach of contract or duty arising out of business so procured, and an agent engaged in procuring such business may be declared the representative of the corporation for the purpose of bringing it into court. W. J. Armstrong Co. v. New York Central, etc. R. Co. (Minn.) 1916E-335.

(Annotated.)

171. Service on Designated Agent. Under N. Y. General Corporation Law, § 15 (Consol. Laws, c. 23, McKinney's Consol. Laws, Book 22, p. 96), providing that a foreign corporation which has not obtained a certificate to do business from the secretary of state may not maintain an action in the courts of New York upon any contract made in the state, and section 16, providing the condition to obtaining such a certificate, that the corporation file a stipulation with the secretary of state, designating a person upon whom process may be served within the state, where the agent so designated by a Pennsylvania corporation was served with summons in an action against such corporation for breach of its contract to compensate plaintiff for injuries received in its employ in Pennsylvania, where the contract was made, such service is valid, since the designation of an agent within the state by a foreign corporation for service of process constitutes a contract by the corporation with the state, made in return for the extension of the privilege to sue in the court, and the designated agent is such to accept service, though the cause of action is without relation to the business transacted in the state. Bagdon v. Philadelphia, etc. Coal, etc. Co. (N. Y.) (Annotated.)

172. Agent of Associated Corporations. Summons was served on a foreign railroad corporation by leaving a copy with a soliciting freight agent employed by defendant and other corporations operating connecting lines and associated under the

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name of New York Central Fast Freight Lines. Under that name defendant and its connecting lines solicit freight systematically throughout the state of Minnesota for transportation out of the state. They transport freight solicited under a single through tariff. They maintain offices in the state for the purpose of such solicitation. This cause of action arose out of a shipment of freight from a point in Minnesota to New York City which was solicited in this manner. The statutes of the state authorize service of a summons on a foreign corporation by service upon an agent in the state for the solicitation of freight traffic over its lines outside the state. It is held that the soliciting agent of the associated corporation was the agent of each of them. W. J. Armstrong Co. v. New York Central, etc. R. Co. (Minn.) 1916E-335.

173. Without invoking this principle, the state may designate the agent upon whom service of summons may be made, but the agent must be one sustaining such relation to the corporation that such service constitutes due process of law. W. J. Armstrong Co. v. New York Central, etc. R. Co. (Minn.) 1916E-335. (Annotated.)

174. Service of Process on Agent. The rule that process may be served on a special agent of a foreign corporation taking orders within the state and sending them to the company for approval, though the business is entirely interstate, does not apply where the salesman is an independent contractor. Barnes v. Maxwell Motor Sales Corp. (Ky.) 1917E-578.

175. Revocation of Agent's Authority. Where a foreign corporation, on commencing business within the state, appoints an agency to receive service of process, in compliance with Burns' Ind. Ann. St. 1908, §§ 4086, 4089, it cannot, by filing an attempted revocation with the Secretary of State, revoke such agency upon discontinuing business in, and removing its property from, the state, so as to invalidate subsequent service upon its agent during his temporary presence in the state after removal therefrom, though such agent is neither an officer nor a stockholder of the corporation and has no connection therewith, where the cause of action is one arising out of a contract made in the state with the corporation, while it was engaged in the exercise of its franchise and the transaction of business in the state; the corporation's agreement with the state as to an agency for service of process being a power coupled with an interest and irrevocable so long as an interest in the subject of the power continues. Meixell v. American Motor Car Sales Co. (Ind.) 1916D-375. (Annotated.)

176. Service on Corporate Officer—Officer not at Domicil. The president of a foreign

corporation may be in the state, without bringing the corporation itself within the jurisdiction for the purpose of service of process upon him, since he must be here officially, representing the corporation in its business. Bagdon v. Philadelphia, etc. Coal Co. (N. Y.) 1918A-389.

177. Agents for Service of Process—Designation by Statute. Where a state by statute designates an agent of a particular character as an agent upon whom process may be served, the corporation by sending such an agent into the state assents to the statute and clothes the agent with authority to receive service in its behalf. W. J. Armstrong Co. v. New York Central, etc. R. Co. (Minn.) 1916E-335.

(Annotated.)

#### Notes.

Right to serve process on public official or designated agent of foreign corporation in action arising out of transaction in another state. 1918A-392.

Validity of statute designating particular kind of agent of foreign corporation on whom process may be served. 1916E-339.

## (3) Limitation of Actions.

178. Right to Plead Limitations. Under N. Y. Code Civ. Proc., § 401, providing that, if when a cause of action accrues against a person he is without the state, the action may be commenced within the time limited therefor after his return to the state, and that it shall not apply while designations made by foreign corporations as prescribed by section 432, subd. 2, remain in force, considering the exception as at the time of its adoption when it referred to personal service of a summons by delivery to persons designated to accept service for foreign corporations, whether licensed to do business in the state or not, a foreign surety company which could not bring itself within the exception because not within the scope of the N. Y. General Corporation Law, but which had a representative for the service of process under the law, and which was engaged in permanent business in the state, was to be treated as a domestic corporation, and hence had the right to make the defense that an action against it was not begun in time. Comey v. United Surety Co. (N. Y.) 1917E-(Annotated.)

## (4) Pleading.

179. Failure to Comply with Statute. Where an action by a foreign corporation was begun in justice court, and the circuit court on appeal stated that the corporation had not filed any copy of its articles of incorporation, as required by statute, the supreme court, on writ of error to review a judgment for defendant, will determine the right of the corporation to maintain the action, though not complying with the stat-

ute, though the defense of noncompliance was not affirmatively pleaded. Standard Fashion Co. v. Cummings (Mich.) 1916E-413.

## (5) Defenses.

180. Right to Plead Statute of Limitations. A foreign corporation, transacting business in Florida, which maintains an agent in such state, upon whom process may be served in accordance with the provisions of paragraph 5 of section 1406 of the General Statutes of Florida, and against which a personal judgment may be rendered, is entitled to plead the statute of limitations in an action instituted against such corporation. Roess v. Malsby Co. (Fla.) 1917C-1022. (Annotated.)

### CORRECTION.

Of general verdict, see Verdicts, 11.

CORRECTION OF JUDGMENT. See Judgments, 51, 52.

## CORRECTION OF RECORD.

Appealability, see Appeal and Error, 30.

## CORROBORATION.

See Bastardy, 4, 6, 13.
Of confession, see Confession, 5, 7.
Of accomplice, see Criminal Law, 68, 72, 89.
Of witness, see Witnesses, 112.

# CORRUPT PRACTICES ACTS.

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### COSTS.

- 1. Who Entitled to Costs.
- 2. Who Liable for Costs.
- 3. What Recoverable as Costs.

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On appeal, see Appeal and Error, 485, 486. Liability of petitioning creditors, see Bankruptcy, 26.

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Constitutional Law, 95.
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In actions against executors and administrators, see Executors and Administrators, 88, 89.

. Imprisonment for nonpayment, see Imprisonment for Debt in Civil Cases, 1.

Attorney's fees on foreclosure, see Mechanics' Liens, 2.

On foreclosure of mechanics' liens, see Mechanics' Liens, 61-64.

Fee of prosecuting attorney, see Prosecuting Attorneys, 1.

On will contest, see Wills, 138, 139.

# 1. WHO ENTITLED TO COSTS.

1. Right of Attorney to Costs Allowed Client. Costs and allowances in an action or proceeding are made to a prevailing party as an indemnity for his expenses not covered by the ordinary costs taxable under the code, and belong to the party, and not to the attorney. Matter of Howell (N. Y.) 1917A-527.

# 2. WHO LIABLE FOR COSTS.

- 2. Liability for Costs. Where a purchaser of a stock of goods in bulk denied his liability to the seller's creditors under the bulk sales act, but he was adjudged to hold the goods for their benefit as a receiver, all costs of the proceedings are properly awarded against the purchaser. Stuart v. Elk Horn Bank, etc. Co. (Ark.) 1918A-268.
- 3. In Habeas Corpus Proceeding—Liability of Public Officer. An officer against whom a writ of habeas corpus is sued out is not liable for costs, nor can he be mulcted in damages, even if the restraint was wrongful. Addis v. Applegate (Iowa) 1917E-332.
- 4. Prevailing Party—Election Contest. Where two candidates for alderman have received an equal number of votes and one has been declared elected and is in possession of the office, he is the prevailing party in a suit to oust him, under Rev. St. Me. c. 6, § 74, which provides that the prevailing party shall recover costs. Murray v. Waite (Me.) 1918A-1128.
- 5. Liability to Full Costs. Where the defendant in a suit for an accounting had refused to pay any portion of plaintiff's claim and plaintiff recovered, defendant cannot complain that the entire costs were imposed on him. Miller v. Dilkes (Pa.) 1917D-555.
- 6. Liability of Intervener. A subtenant who intervenes in a suit between landlord and tenant is liable for the costs of his intervention, but the supreme court has jurisdiction to relieve the subtenant of costs of seizure where the sum due by the subtenant is too insignificant for consideration. Schwartz v. Dennis (La.) 1917D-94.
- 7. Award Against Successful Party. Where the suit by a member of a fraternal association to enjoin the collection of increased assessments to meet death claims was novel and of general interest, costs should be borne by the insurer, though it was successful on appeal, particularly where its brief and abstract were unnecessarily long. Thomas v. Knights of Maccabees (Wash.) 1917B-804.

# 3. WHAT RECOVERABLE AS COSTS.

8. Requirement of Jury Fees—Validity. Wis. Civil Court Act (Laws 1909, c. 549)

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§ 19, requiring a party desiring a jury trial in the civil court of Milwaukee to pay a fee of \$12, which is to be taxed as costs if successful in the action, is not in violation of Const. art. 1, \$ 5, declaring that the right to jury trial shall remain inviolate, particularly as jury fees were required in territorial days. Reliance Auto Repair Co. v. Nugent (Wis.) 1917B-307.

(Annotated.)

- 9. Provision in Lease for Attorney's Fee—Amount Allowed. Under a lease providing that, if the lessor prevailed in any suit for violation of any covenant of the lease, the lessee should be liable to a reasonable attorney fee in each suit not exceeding \$75, the lessor, entitled to recover rent from the lessee after a sublease, is entitled to an attorney's fee of \$75 in each of three suits for instalments of rent, consolidated in one suit. Samuels v. Ottinger (Cal.) 1916E-830.
- 10. Expenses of Proceeding Before Commissioner. In a divorce case, where defendant was examined before a commissioner, expenses actually incurred by the commissioner in such proceeding may be properly taxed against defendant as costs. Heicke v. Heicke (Wis.) 1918B-497.

#### Note.

Constitutionality of statutes requiring prepayment or taxation as costs of jury fees, 1918B-308.

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- Special assessment of county property by city, see Taxation, 123.

Taxpayer's suit to recover money illegally expended, see Taxation, 202.

Publication of ordinance in german paper insufficient, see Trees and Timber, 2.

Rights of public on docks and wharves, see Trespass, 1.

# 1. DEFINITION AND CLASSIFICATION.

- 1. So much of Mo. Rev. St. 1909, § 11745, as requires a majority of all the votes cast at an election against township organization before a county shall be declared to be under the general law is in conflict with Const. art. 9, § 9, providing that, if a majority of all the votes cast on the question shall be against township organization, it shall cease in the county. State v. Duncan. (Mo.) 1916D-1.
- 2. Organization. So much of Mo. Rev. St. 1909, § 11745, as prescribes for a given county after it has voted out township organization, a government differing from that of a county which has never adopted township organization is invalid. State v. Duncan (Mo.) 1916D-1.
- That part of Mo. Rev. St. 1909, § 11745. which provides that, on a proper petition, the county court shall resubmit, the question of township organization in like manner as is provided in article 1 of the chapter, is valid notwithstanding the invalidity of other parts of the section; for the valid part, when considered in connection with sections 11653, 11654, providing for the submission to the voters of the question of township organization and the canvass of the vote and in connection with Const. art. 9, § 9, providing that, if a majority of the votes cast on the question shall be against township organization, it shall cease in the county, and laws relating to counties not having township organization shall take effect, presents a workable scheme for the submission to the voters of the question of the continuance of township organization, and, where a proper petition for the submission of the question is presented, and an order for election is made, and a majority of the votes cast on the question is against township organization, the township organization ceases. State v. Duncan (Mo.) 1916D-1. (Annotated.)
- 4. Statute Invalid. Const. art. 9, § 9, providing that, when township organization is voted out, all laws in force in relation to counties not having township organization shall take effect in the county, renders invalid so much of Mo. Rev. St. 1909, § 11745, as provides for the appointment of officers, and appointments must be made by the Governor as authorized by section 5828. State v. Duncan (Mo.) 1916D-1.
- 5. Failure to Classify Counties by Population. Mo. Const. art. 9, § 12, authorizing the legislature, by a law uniform in opera-

tion, to provide for and regulate the fees of county officers, and permitting the classification of counties by population, when considered in connection with section 13. providing that the fees of no executive or ministerial officer of any county or municipality shall exceed \$10,000 annually, and requiring every such officer to make return quarterly to the county court of all fees received by him, does not render invalid Mo. Rev. St. 1909, § 10695, fixing fees for probate courts, and requiring payment of a part of the fees into the county treasury, for the legislature is not required, but merely permitted, to classify counties by population, and because the provision for the payment of the fees into the county treasury does not relate to the regulation of fees, but to their retention. Greene County v. Lydy (Mo.) 1917C-274.

# 2. INCLUSION OF TERRITORY.

6. Persons Entitled to Vote on Question. Under Mo. Const. 1895, art. 7, §§ 1, 2, providing for the establishment of new counties by election by the qualified electors, within the proposed area, all qualified electors within the territory to be included in the new county are entitled to vote on that question, and the legislature cannot deny that right by failing to provide a means of voting for such electors in a statute designed to carry out the constitutional provision. Callison v. Peeples (S. Car.) 1917E-469.

## 3. FISCAL MANAGEMENT.

- 7. Computation of Indebtedness—Interest on Obligations. Under Ala. Const. 1901, § 224, providing that no county shall become indebted in an amount, including present indebtedness, greater than three and one-half per cent of the assessed value, the words "become indebted" contemplate that, in calculating the amount of indebtedness, the face value of the county's obligation and accrued interest thereon must be included, but not interest not yet due. O'Rear v. Sartain (Ala.) 1918B-593. (Annotated.)
- 8. Unissued Bonds. Under Ala. Const. 1901, § 224, limiting the amount to which a county may be indebted to three and one-half per cent of the assessed valuation of the property, road bonds not issued cannot be counted as a present indebtedness. O'Rear v. Sartain (Ala.) 1918B-593.
- 9. Time as of Which Indebtedness is Computed. In determining whether a county has exceeded its debt limit, the validity of a contemplated issue of bonds depends on the condition of the indebtedness at the time of issuance, and not upon its condition at the time of the election authorizing the same. O'Rear v. Sartain (Ala.) 1918B-593.

- 10. Debt Idmit—Effect of Exceeding Idmit—Validity of Tax for Payment. Ala. Const. 1901, § 224, provides that no county shall become indebted in an amount, including present indebtedness, greater than three and one-half per cent of the assessed value of the property therein. Section 215 provides that no county shall levy a greater rate of taxation in any one year than one-half of one per cent. It is held that section 215 confers no right to levy taxes to pay an indebtedness incurred in excess of the limitation fixed by section 224. O'Rear v. Sartain (Ala.) 1918B-593.
- 11. Bonds—Sale Below Face Value. Under N. Car. Pub. Loc. Laws 1915, c. 27, authorizing the sale of road bonds by Alexander county, and providing that none of the bonds authorized shall be disposed of for a less price than their face value, a sale of the bonds which drew five per cent interest in part for cash and in part for time certificates of deposit running from three to eighteen months, with interest at two per cent, is unauthorized, for when the difference in interest is considered it would reduce the purchase price to less than the face or "par value" of the bonds, which means a value equal to the face of the bonds and accrued interest to date of sale. Moose v. Board of Commissioners (N. Car.) 1917E—1183.
- 12. Issuance of Bonds. Bonds to be issued for constructing county roads are for "necessary expenses." Moose v. Board of Commissioners (N. Car.) 1917E-1183.
- 13. Notes Issued by Commissioners. County commissioners having no power to issue negotiable notes, notes issued by them will be regarded as non-negotiable. First National Bank v. Nye County (Nev.) 1917C-1195.
- 14. Issue of Negotiable Notes. County commissioners cannot issue negotiable notes unless power is given expressly or by clear implication. First National Bank v. Nye County (Nev.) 19170-1195.
- 15. Under Nev. Act March 13, 1903 (Laws 1903, c. 78), §§ 6, 7 (Rev. Laws, §§ 3831, 3832), authorizing county commissioners, in case of great necessity or emergency, to make a temporary loan, and requiring them at the next tax levy to levy an extra tax to pay it, no power to execute a negotiable note to secure the payment can be implied. First National Bank v. Nye County (Nev.) 1917C-1195.
- 16. Giving negotiable notes for temporary loans made by county commissioners in case of great necessity or emergency, to be paid for from the next tax levy, under authority of Nev. Act March 13, 1903 (Laws 1903, c. 78), §§ 6, 7 (Rev. Laws, §§ 3831, 3832), is not within Act March 8, 1865 (Laws 1864-65, c. 80), § 8, subd. 13, empowering county commission-

ers to do things "strictly necessary" to the full discharge of their powers. First National Bank v. Nye County (Nev.) 1917C-1195.

17. Loan to County. A county having had the benefit of money obtained by county commissioners on a temporary loan under Nev. Act March 13, 1903 (Laws 1903, c. 78), § 6, is estopped to assert that there did not exist a case of great necessity or emergency authorizing the commissioners making the loan. First National Bank v. Nye County (Nev.) 1917C-1195.

# 4. POWERS.

18. Donation to State Education. Priv, Acts Tenn. 1915, c. 1, authorizing Knox county to issue bonds and therewith buy lands, title to be conveyed to the state for the use of the state university, for educational, experimental, and agricultural purposes, does not contravene Const. art. 2, \$29, prohibiting a county or municipality, unless authorized by its electors, from giving or loaning its credit to or in aid of any person, company, association, or corporation, or from becoming a stockholder with others in any company, association, or corporation; the mischief sought to be prevented being a business partnership between a municipality or county and individuals or private corporations or associations. Heiskell v. Knox County (Tenn.) 1916E-1281.

## 5. CONTRACTS.

19. Ratification of Unauthorized Contract. A county may ratify an unauthorized contract made in its behalf, if it is one which the county could have made in the first instance. Leathem v. Jackson County '(Ark.) 1917D-438.

# 6. OFFICERS AND COUNTY BOARDS.

# a. Board of Supervisors.

20. In such case, the power of the county court to audit the accounts of the county is not taken away by the grant of similar powers to the circuit court, made under Kirby's Ark. Dig. §§ 625-640, passed subsequent to the enactment of the acts delegating the power to the county court; there being no such inherent power in the circuit court as vested under the constitution in the county court, and such sections being designed to aid the circuit court in the enforcement of the criminal laws of the state. Leathem v. Jackson County (Ark.) 1917D-438. (Annotated.)

21. Power of Board. Ky. Const. art. 7, § 28, gives county courts exclusive original jurisdiction in regard to disbursement

of money for county purposes, and in every other case necessary to internal improvement and local concerns of the counties. Kirby's Ky. Dig. § 1375, invests county courts with original jurisdiction to audit, settle, and direct payment of all demands against the county, and in all other cases necessary to the internal improve-ment and local concerns of the counties. Section 7162 requires all collectors, sheriffs, clerks, constables, and other persons chargeable with moneys, to make settlement with the county court. Section 7167 provides for adjustment by the county court of accounts of delinquent officers. Section 7171 empowers the county court to re-examine, settle, and adjust prior settlements on showing of cause, and section 7174 provides for adjustment at any time within two years. Sections 1162 and 1163 provide for settlement by the county treasurer with the county court. A county judge contracted with the claimants as expert accountants to examine the books of certain officers of the county. It is held that the county court, being charged with the auditing and settlement of accounts, could employ expert accountants, and therefore could ratify a contract which it could have made in the first instance; such employment not being an illegal delegation of the power to audit, but necessary owing to the character of the work to be Leathem v. Jackson County (Ark.) 1917D-438. (Annotated.)

## b. County Commissioners.

22. Liability of Commissioners. Though county commissioners condemn a strip of land for widening a road, if they, in doing the work of widening unnecessarily injure land outside that condemned they are liable therefor. Pettit v. County Commissioners (Md.) 1916C-35.

# 7. ACTIONS.

23. Claims Against County—Necessity of Presentation—Notes. The orders of county commissioners authorizing issuance of notes, and their subsequent issuance thereof, constitute them approved liquidated demands against the county, which therefore need not be presented to the board for allowance before action thereon, and this though they be not negotiable. First National Bank v. Nye County (Nev.) 19170—1195.

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#### 1. ORGANIZATION.

1. Courts-martial. The provisions of the state constitution, establishing the judiciary department of the state government and vesting the judicial power of the state in certain named and designated courts, do not preclude the exercise, by the general assembly, of the power granted by other provisions of the constitution to establish, as an instrumentality of the executive department, a "well-regulated militia," declared by the constitution to be necessary "to the security of a free state," to provide by law how such militia shall be organized and trained, and incidentally to authorize the creation of courts-martial as one of the ancient and recognized methods by which such instrumentality may be regulated and disciplined. State v. Long (La.) 1917B-240.

## 2. JURISDICTION.

#### a. In General.

- Extraterritorial Jurisdiction. A state possesses exclusive jurisdiction over persons and property within its territory, but it cannot exercise jurisdiction over persons and property without its territory, and, to render jurisdiction of a state court effectual, it is necessary that the thing in controversy or the parties interested may be subjected to the process of the court; and, where a nonresident has property in a state, his property is subject to valid claims existing against him there, but beyond this due process of law requires appearance on personal service before he can be personally bound by any judgment. Flexner v. Farson (III.) 1916D-810.
- 3. Action to Recover Penalty. Actions against a national bank for knowingly charging and receiving an usurious rate of interest may be maintained in any state, county, or municipal court having jurisdiction in similar cases in the county or city in which such bank is located. Farmers' National Bank v. McCoy (Okla.) 1916D-1243. (Annotated.)

# Note.

Jurisdiction of action against national bank to recover penalty for taking usurious interest. 1916D-1246.

# b. Manner of Questioning.

- 4. Jurisdiction of Criminal Case. The court is not deprived of jurisdiction because the information states only legal conclusions, as it may be cured by amendment, and a defendant is not entitled to habeas corpus on that ground. Bopp v. Clark (Iowa) 1916E-417.
  - c. Local and Transitory Actions.
- 5. Action Partly Within Jurisdiction. Where a complaint alleged the destruction of a milling plant situated without the state and the personal property in and about said building or on the premises, although the plaintiff did not have a cause

of action in this state for the trespass to real estate which occurred prior to the enactment of N. Y. Code Civ: Proc. § 982a, providing for actions for damage to real estate without the state, the action could be maintained to the extent that it was brought for damage to personalty. Jacobus v. Colgate (N. Y.) 1917E-369.

- 6. Injury to Realty Outside State—Effect of Statute. N. Y. Code Civ. Proc. § 982a, enacted in 1913, providing that an action may be maintained in this state to recover damages for injuries to real estate without the state whenever such action could be maintained in relation to personal property without the state, is not retroactive, as it does not merely change the procedure for the enforcement of the right, but creates a new cause of action and supplies a remedy by which a right for the first time becomes enforceable, and statutes are to be construed as prospective unless there is a clear expression of the legislative purpose to justify a retroactive application. Jacobus v. Colgate (N. Y.) 1917E-369. (Annotated.)
- 7. Under N. Y. Code Civ. Proc. § 982a, providing that an action may be maintained in this state for damages for injuries to real estate without the state, the words "whenever such an action could be maintained in relation to personal property without the state" have no bearing upon the period of limitation, but mean that the jurisdiction shall be the same whether the subject-matter is real estate or personalty. Jacobus v. Colgate (N. Y.) 1917E-369. (Annotated.)

# d. Federal Courts.

- 8. Federal jurisdiction, having been invoked upon substantial grounds of federal law, extends to the determination of all questions involved in the case, whether resting upon state or federal law. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.
- 9. Though nominal damages were recoverable for the attorneys' failure to do anything whatever, the declaration nevertheless failed to show that the amount involved gave a federal court jurisdiction, since, where the pleadings show that there cannot legally be a judgment for an amount necessary to give jurisdiction, jurisdiction cannot attach, though the damages are laid in the declaration at a larger sum. Maryland Casualty Company v. Price (Fed.) 1917B-50.

(Annotated.)

10. The jurisdiction of a federal district court in a suit presenting a federal question, and that of the federal supreme court on appeal, extends to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made

of the federal question, or whether it be found necessary to decide it at all. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88.

11. Federal Question. A federal district court has jurisdiction, irrespective of the citizenship of the parties, of the controversy presented by bills which seek to enjoin state officers from taking steps looking to the enforcement of state and local taxes upon the intangible property of a public service corporation, assessed under state authority, upon the ground that the action of those officers in making the assessments, and their threatened action in respect of carrying them into effect, constitute action by the state which, if carried out, will violate U. S. Const. 14th Amend. as denying the equal protection of the laws. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88.

## e. Particular State Courts.

## (1) Arizona.

- 12. Offense Under Liquor Law. Under Ariz. Civ. Code 1913, par. 340, conferring on the superior courts original jurisdiction in all cases in which jurisdiction is not vested by law in some other court, and paragraph 385 giving jurisdiction to justices of the peace of criminal cases other than felonies, where the punishment is a fine not exceeding \$300, or imprisonment in the county jail not exceeding six months, or both, the offense created by the prohibition amendment to the constitution, making a person, selling, manufacturing, or introducing into the state in-toxicating liquor, guilty of a misdemeanor punishable by imprisonment for not less than 10 days nor more than 2 years and by a fine not less than \$25 and costs nor more than \$300 and costs, is within the jurisdiction of the superior court. Gherna v. State (Ariz.) 1916D-94.
- 13. Exclusive or Concurrent. Const. art. 6, § 9, provides that the number of justices of the peace, shall be provided by law, and that their jurisdiction shall not trench on that of any court of record, except that they shall have concurrent jurisdiction with the superior court where the amount of damage claimed does not exceed two hundred dollars.
  Article 6, § 6, provides that the superior court shall have original jurisdiction in all cases in which the demand or the value of the property amounts to \$200 exclusive -of interest and costs. The state sued a corporation in the superior court to recover penalties aggregating \$1,500 for 15 violations of Laws Ariz. 1912, c. 50, for bidding any corporation operating an electric light or power plant to permit any employee about its plant to be on duty more than eight hours a day. Held, that the superior court had jurisdiction, although the individual penalty assessed for

each violation was within the jurisdictional limit of justice courts, since to exclude the jurisdiction of the superior court the grant of jurisdiction to another court must be exclusive and not merely concurrent. Miami Copper Co. v. State (Ariz.) 1916E-494.

# (2) Connecticut.

14. Enforcement of Foreign Contract. Courts of Connecticut can enforce only such foreign contracts as are enforceable in the jurisdiction of their origin. Douthwright v. Champlin (Conn.) 1917E-512.

# (3) Idaho.

15. Jurisdiction of Probate Court. The jurisdiction of the probate court is limited and defined by section 21, art. 5, of the Idaho constitution to matters of probate, settlement of estates of deceased persons, and appointment of guardians; also, jurisdiction to hear and determine civil cases wherein the debt or damage claimed does not exceed the sum of \$500, exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases. State v. Dunlap (Idaho) 1918A-546.

16. Since no proceeding is pending to probate the estate of the late E. H. Harriman, and since he does not appear to have left an estate in Idaho subject to settlement under our laws, and since the proceeding commenced in the probate court does not involve the appointment of a guardian, nor in any particular come within the prescribed limits of the jurisdiction of the probate court as defined by section 21, art. 5, of the constitution, that court is without jurisdiction to entertain such proceeding, or to enter the judgment desired by plaintiff. State v. Dunlap (Idaho) 1918A-546.

## (4) Massachusetts.

17. Jurisdiction Over Commissioners. As Mass. St. 1911, c. 439, § 3, relating to assessment of damages for the erection of a bridge makes ample provision for meeting expenditures incurred under the act, the supreme judicial court, which was empowered to appoint commissioners to assess damages, has exclusive jurisdiction over such officials. Brackett v. Commonwealth (Mass.) 1918B-863.

# (5) North Dakota.

18. Prerogative Jurisdiction of Supreme Court. The prerogative jurisdiction of the supreme court may be exercised only in cases wherein the questions involved are publici juris, and the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, are affected; and this jurisdiction cannot be exercised to vindicate or protect mere private rights

regardless of their importance. State v. Taylor (N. Dak.) 1918A-583.

# f. Conflicting Jurisdiction of Civil and Military Courts.

19. In habeas corpus to determine jurisdiction of state courts, as opposed to military courts, to try offenses by members of the military, the fact that an arrest is under a city ordinance is immaterial, if the ordinance is valid. In re Wulzen (Fed.) 1917A-274.

## g. Courts-martial.

20. Status of Courts-martial. While "courts-martial" discharge judicial functions, and are in a sense courts, they are not within the meaning of article 84 of the La. constitution, declaring that the judicial power of the state shall be vested in certain named courts. State v. Long (La.) 1917B-240.

# 3. PLACE OF HOLDING.

21. Theater. It is not proper to adjourn a criminal trial for a capital offense from the regular courtroom to the stage of a public theater, without sufficient cause for so doing, the theater itself being filled with people, and under some circumstances may be so prejudicial to defendant as to require a reversal. Roberts v. State (Neb.) 1917E-1040. (Annotated.)

## Note.

Power of court to try case at place other than courthouse or courtroom. 1917E-1050.

# 4. DECISIONS AS PRECEDENTS.

a. Decisions of Federal Courts in State Tribunals.

22. The question whether the workmen's compensation act abolishes all other actions by an employee injured while unloading a ship in the navigable waters of Puget Sound is a wholly state question as to the right to maintain a common-law action, and therefore the decision of the federal district court in another case as to the interpretation of the act is not controlling upon the state court. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655.

23. A state court in deciding a federal question must conform to the latest decision of the federal supreme court thereon, though it necessitates the reversal of its own prior decisions. Albert Pick & Co. v. Jordan (Cal.) 1916C-1237.

24. Binding Effect on State Court. Decisions of federal courts arising on questions depending upon acts of Congress are entitled to weight in the state court, if not controlling. Marinette v. Goodrich Transit Co. (Wis.) 1917B-935.

25. The decisions of the supreme court of the United States, respecting the powers delegated to the general government and those reserved to the state governments, constitute the "supreme law," and are controlling on the state courts. Van Winkle v. State (Del.) 1916D-104.

# b. Decisions of State Courts in Federal Tribunals.

- 26. Construction of Municipal Charter. The decision of the highest court of a state that a certain municipal ordinance, challenged as repugnant to the federal constitution, is within the scope of the powers conferred by the state legislature upon a municipality, is conclusive upon the federal supreme court on writ of error to the state court. Thomas Cusack Co. v. Chicago (U. S.) 1917C-594.
- 27. Method of Valuation. Federal courts will follow the decision of the highest state court of Kentucky that Ky. Stat. §§ 4077-4081, governing the valuation of the intangible property of an interstate railway company for tax purposes, properly construed, require first an apportionment to Kentucky of the proper share of the entire value of the capital stock, having regard to the relation of state mileage to system mileage, followed by a deduction from the state's proportion of the capital stock value of the assessed value of the company's tangible property within the state, rather than a deduction of, the total tangible property in and out of the state from the total capital stock value before apportionment to the state. Louisville v. Greene (U. S.) 1917E-97. Louisville, etc. R. Co.
- 28. Binding Effect on Federal Supreme Court. The decision of the highest court of a state that a municipal ordinance which is asserted to violate the federal constitution is within the city's charter powers, and is not forbidden by the state constitution, is conclusive upon the federal supreme court on writ of error to the state court. Hadacheck v. Sebastian (U. S.) 1917B-927.

(Annotated.)

- 29. Scope of State Statute. The application of the provisions of N. Y. Consol. Laws, c. 31, § 14, against the employment of aliens on public works to contracts for the construction of subways in New York city, and the extent to which they affect the corporate rights of the city or of the subway contractors, are local questions not open for review in the federal supreme court on writ of error to a state court. Heim v. McCall (U. S.) 1917B-287.
- 30. Territorial Judgment. The federal supreme court will ordinarily defer to the rulings of the local courts with respect to the validity under the Hawaiian laws of a

- judgment of the Hawaiian courts. Kapiolani Estate v. Atcherley (U. S.) 1916E-142.
- 31. Federal Court Following State Decision. In a suit in a federal court involving the title to real property, if the question is balanced with doubt, the court will incline to an agreement with a decision of the highest court of the state bearing upon it, although it may not be such as to create a rule of property. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443.
- c. Decisions of Courts of Other States.
- 32. Jurisdiction of Probate Court—hffect of Lack of Jurisdiction. The probate court of another state is a court of limited jurisdiction; and, unless it had jurisdiction, its proceedings, admitting a will to probate are void and derive no benefit from the "full faith and credit" provision of the constitution. Matter of Horton (N. Y.) 1918A-611.
- 33. Full Faith and Credit Clause. The full faith and credit clause of the federal constitution and the acts of Congress thereunder apply only when the court rendering a judgment had jurisdiction of the parties and of the subject-matter and do not preclude an inquiry into the jurisdiction of the court, when an action is brought in the courts of a sister state on the judgment. Flexner v. Farson (Ill.) 1916D-810.
- 34. Following Other Jurisdictions. The courts of a state may refuse to follow even a consensus of authority in all other states, or a well-recognized rule of common law, on the ground that it is not suited to the genius of the state or is opposed to its public policy; the public policy of a state being shown by its statutes and decisions. Northcut v. Church (Tenn.) 1918B-545.

## d. Advisory Opinions.

35. An advisory opinion given by the justices of the supreme court to the legislature is not the exercise of a judicial function, and has not the quality of judicial authority. Laughlin v. Portland (Me.) 1916C-734.

## e. Obiter Dicta.

36. Expressions of the court in an opinion, which go beyond the case, are to be respected, but should not control the judgment in a subsequent suit when the point is presented for decision. McCoy v. Handlin (S. Dak.) 1917A-1046.

# 5. RECORDS.

37. Correction of Record. On application to the lower court to have the record in that court corrected so as to prop-

erly state what occurred, the court below if satisfied from its own knowledge, or from the evidence adduced, that the clerk's docket entries were erroneous or incomplete, had the power and duty to have them corrected. Dutton v. State (Md.) 1916C-89.

## 6. FEES.

38. Payment of Fees into County Treasury. The proviso in Mo. Rev. St. 1909, § 10695, for the payment into the county treasury of a part of the fees collected by judges of probate courts, is not unconstitutional as a sale of justice prohibited by Const. art. 2, § 10. Greene County v. Lydy (Mo.) 1917C-274.

## COVENANT.

Assignability, see Assignments, 10.

Measure of damages for breach, see Damages, 16.

Running with the land, see Deeds, 76. Of title, see Deeds, 77-81.

In leases, see Landlord and Tenant, 4-7,

Renewal by holding over, see Landlord and Tenant, 49.

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#### CREDIBLE.

Meaning, see Wills, 23.

# CREDIBLE WITNESS.

Defined, see Wills, 25,

### CREDIBILITY OF WITNESSES.

See Witnesses, 89-95. Cross-examination to discredit, see Witnesses, 75-81.

# CREDIT INSURANCE.

See Insurance, 50-56.

### CREDITOR AND DEBTOR.

Privileged communications between, see Libel and Slander, 59.

# CREDITORS' BILLS.

- 1. Right to Maintain.
- 2. Jurisdiction.
- 3. Property Subject.

Ten years to judgment upheld, see Laches.

# 1. RIGHT TO MAINTAIN.

1. Exhausting Remedy at Law. A creditor may resort to a creditor's suit without exhausting his ordinary remedy at law. Fidelity Mortgage Bond Co. v. Morris (Ala.) 1917C-952.

- 2. Purpose in Issue of Bonds. Where a creditors' bill against a mining corporation alleged that bonds, which purported to be for the purpose of taking up outstanding indebtedness, were in fact issued to protect the company in the event of any calamity, such as an explosion in the mines, proof that the holders of the corporate stock undertook, by various reorganizations, to exchange their stock holdings for bonds of the defendant company forms no basis of a decree for complainants. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.
- 3. Requisites of Bill. Where the complainants in a creditors' bill attack the validity of a mortgage and bonds given by defendant corporation, the bill should set out facts relied upon to establish fraud in the transaction, and mere general statements will not suffice. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

## 2. JURISDICTION.

- 4. Waiver by Failure to Demur. In a creditor's bill to enforce his claim, brought on the theory of defendant's violation of the Bulk Sales Act, defendant, by failing to demur to the bill of complainant, or to claim the right of demurrer in his answer on jurisdictional grounds, and by answering to the bill on the merits, and by taking proofs thereon, waives the question of jurisdiction, on the ground that the claim had not been reduced to judgment. Coffey v. McGahey (Mich.) 1916C-923.
- 5. Bankruptcy—Effect of Proceeding—Pending Creditors' Bill. The commencement of a bankruptcy proceeding against a corporation, in which there has been no adjudication of bankruptcy and no receiver appointed, is insufficient to deprive the state court of jurisdiction of a general creditors' bill against the corporation. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.
- 6. The objection to jurisdiction of the state courts of a general creditors' bill because of commencement of bankruptcy proceedings against the defendant should be presented in the trial court, and, if overruled, an appeal taken from the decision. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.

# 3. PROPERTY SUBJECT.

7. Action to Subject Spendthrift Trust—Necessary Parties. In suit by the judgment creditor of the beneficiary of an invalid spendthrift trust to compel a corporation to transfer to him stock in it, the corpus of the trust, which had been sold to him on execution sale, a party who had an interest in the trust by its terms to the extent of a debt owed her by the

1916C-1918B.

beneficiary, though a proper party, is not a necessary party, since whether the creditor took the stock absolutely, by transfer on the books, or otherwise, he would take it subject to the interest of the party interested in the trust; she not being made a party to the suit. McColgan v. Walter Magee (Cal.) 1917D-1050.

#### CRIME.

See Criminal Law. Defined, see Criminal Law, 7. Words imputing crime, see Libel and Slander, 24, 25.

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- 14. Fairness of Trial, 256.
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Stay of civil action pending prosecution, see Actions and Proceedings, 14.

Admissions of co-conspirator, see Admissions and Declarations, 12.

Errors available without exception in capital cases, see Appeal and Error, 353.

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Liability of corporations for crime, see Corporations, 21–24.

Attempt distinguished from preparation, see False Pretenses, 8.

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Swearing jury before and after arraignment, see Former Jeopardy, 3.

Plea of jeopardy, see Former Jeopardy, 9-12.

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Offenses against Sunday laws, see Sundays and Holidays, 10.

Direction of conviction, see Verdicts, 27.

## 1. CRIMINAL STATUTES.

# a. Stay of Operation of Statute.

1. Held, the rule announced being confined strictly to a criminal case, that to convict a defendant for an offense committed after a decision of the court holding a criminal statute not applicable to the facts, and before its reversal in a subsequent decision, would be to violate the constitutional provisions against the infliction of cruel and unusual punishments. State v. Longino (Miss.) 1916E-371.

(Annotated.)

2. Effect of Decision Subsequently Overruled. Miss. Code 1906, § 1169, provides that it shall be a criminal offense for the president, cashier, teller, etc., conducting the business of receiving on deposit money, etc., to receive any deposit while knowing the institution is insolvent. The statute was judicially declared not to apply to certain acts, but subsequently the ruling of the court was reversed and such acts held a criminal offense under the statute. Between the two decisions defendants committed such acts. Held, that a holding by the court whether a criminal statute is, or is not, applicable to a particular state of facts is within the spirit of the constitutional prohibition against the passage of ex post facto laws, the decision of a court in construing a statute being as much a part of the law of the land as a legislative enactment, unlike their decisions relating to the common law, which are mere evidence of the law, and that no conviction may be had under the statute in question for violation committed between the first and second decisions of the court. State v. Longino (Miss.) 1916E-371.

(Annotated.)

# Note.

Criminality of act committed after decision holding statute inapplicable and before reversal of decision. 1916E-373.

## 2. JURISDICTION OF OFFENSES.

3. Offense Committed Partly in One State and Partly in Another. Under the provision of N. Y. Penal Law (Consol. Laws, c. 40), § 1930, that a person who commits within the state any crime, in whole or in part, is liable to punishment

within the state, it is not necessary to jurisdiction of the New York courts over a prosecution for obtaining money by false pretenses, based on acts committed partly in another state, that the transaction should constitute a crime under the law of the foreign state where part of the acts are committed; it being sufficient that the transaction would be a crime under the law of New York if committed entirely within this state. People v. Zayas (N. Y.) 1917E-309. (Annotated.)

4. Concurrent Jurisdiction of Boundary Waters-Offenses-Identity of Prohibition. Where defendant was convicted of fishing for salmon in the Columbia river without a license, under Ore. L. O. L. \$ 5298, denouncing such an offense committed in any of the waters of the state, and where the statutory provisions of the state of Washington, on the same point, in the exercise of its concurrent jurisdiction with Oregon over the Columbia river, contain practically the same provisions, the emphasis being upon the fact of fishing without a license, conviction here is proper under the federal rule that, in cases of concurrent jurisdiction, the statutory provisions of the two states must be practically identical to have a conviction in either. State v. Catholic (Ore.) 1917B-913. (Annotated.)

#### Note.

Jurisdiction to try prisoner forcibly or unlawfully brought within jurisdiction. 1917D-229.

### 3. ELEMENTS OF CRIME.

- 5. Criminal Law Distinction Between Felony and Misdemeanor. Under Md. Code Pub. Gen. Laws 1904, art. 27, § 17, providing the punishment for an assault with intent to rape, such offense is a misdemeanor, though punishable, in the discretion of the court, with death or imprisonment in the penitentiary for 20 years, and not a "felony," since the fact that a crime is punishable in the penitentiary or is infamous does not make it a felony, and is not even an "infamous crime," which depends on the character of the crime, and not upon the nature of the punishment; and hence it is not necessary that accused shall be arraigned. Dutton v. State (Md.) 1916C-89.
- 6. Under Ariz. Pen. Code 1913, §§ 16, 17, dividing crimes into felonies and misdemeanors, defining a felony as a crime punishable by death or imprisonment in the state prison, and every other crime as a misdemeanor, the place of punishment fixes the grade of the crime, and the imprisonment for a misdemeanor must be in the county jail, and, the prohibition amendment declaring a violation thereof, a misdemeanor fixes the county jail as the

place of imprisonment. Gherna ▼. State (Ariz.) 1916D-94.

- 7. What Constitutes Crime. The hiring of a school teacher at less than the minimum wage, in violation of Iowa Acts 35th Gen. Assem. c. 249, section 4 of which provides that any school officer violating the act shall be fined from \$25 to \$100, is a "crime" within Code, § 5092, defining a "crime" as an act committed in violation of a public law forbidding it, and is triable as a "misdemeanor" under Code, §§ 5093, 5094, declaring a "felony" to be a public offense punishable by imprisonment in the penitentiary, and every other public offense a "misdemeanor," and section 4905, further defining a "misdemeanor" as the doing of any act prohibited by a statute which provides no penalty, it not being essential that the statute declare that its violation shall be a crime, and the col-lection of the fine by civil action being impossible until the amount is determined in a criminal prosecution, section 5095 forbidding punishment for a public offense except upon legal conviction. Bopp v. Clark (Iowa) 1916E-417.
- 8. Intent—When Essential. Under the rule that, when an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which makes the offense, the intent of milk dealers entering into an unlawful combination to raise the price is immaterial in determining their guilt of a common-law conspiracy to raise the price. State v. Craft (N. Car.) 1917B-1013.
- 9. Enticement as Defense. In a prosecution for conspiring to demand money wherewith corruptly to influence a city council, the defense generally available, where infringement of a property right is charged, that defendants were enticed to the commission of the crime, thus negativing want of consent, an essential element, is not applicable, since the public, the injured party, had not consented. Hummelshime v. State (Md.) 1917E-1072.

# Notes.

Responsibility of deaf and dumb persons for crime. 1917B-240.

Inducement to commit offense with view to prosecution therefor as defense to such prosecution. 1916C-730.

## 4. PARTIES TO CRIME.

10. Principal in Second Degree. Under Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Fed. St. Ann. 1909 Supp. p. 495]), § 332, providing that all aiders or abettors of any crime are principals, where defendant was charged with knowingly and fraudulently aiding and abetting a bankrupt corporation, of which he was president and general manager, to conceal its

assets from its trustee, it is not necessary that the corporation should be first convicted before the conviction of accused. Kaufman v. United States (Fed.) 1916C-466

# 5. PRELIMINARY COMPLAINT AND EXAMINATION.

- 11. Waiver of Examination. Utah Const. art. 1, § 13, provides that offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by accused, with the consent of Utah Comp. Laws 1907, § 4670, the state. which was in force before the adoption of the constitution, provides that the testimony of each witness in cases of homicide must be reduced to writing as a deposition by the magistrate, or under his direction. Held that, where accused with the consent of the state waived the preliminary examination, he must be held to have waived the necessity of the magistrate's hearing any testimony as to the charge against him, so that there was no testimony to be heard or reduced to writing. State v. Mewhinney (Utah) 1916C-537.
- 12. Presumption Supporting Acts of Magistrate. In the absence of any showing to the contrary, it must be presumed that the examining magistrate performed the duty, imposed on him by statute, to warn one accused of crime of his right to the assistance of an attorney. State v. Mewhinney (Utah) 1916C-537.
- 13. Ordering New Complaint Filed. Where on a preliminary examination it develops that the crime charged in the complaint has not been committed, but that some other crime has probably been committed, the magistrate may direct the county attorney to prepare a new complaint and direct the rearrest of accused and give him opportunity to either waive or insist on an examination on the new charge. State v. Pay (Utah) 1917E-173.
- 14. Preliminary Complaint. The complaint need not state the offense charged in technical language, nor in such specific terms as is required in an information, and is sufficient where the jurisdictional facts appear and the crime is stated in ordinary language. State v. Pay (Utah) 1917E-173.
- 15. Preliminary Examination. Under Utah Const. art. 1, § 13, providing for the prosecution of offenses by information after examination and commitment by a magistrate, and Utah Comp. Laws 1907, §§ 4604, 4610, 4615, defining a criminal complaint and prescribing its requisite, and sections 4657 and 4665, authorizing the issuance of a warrant and requiring the magistrate to read to accused the complaint before proceeding with the exam-

ination, and sections 4675 and 4692, declaring where it appears from the examination that a public offense has been committed, and that there is sufficient cause to believe accused guilty, the magistrate must hold him for trial, and that where one has been examined and committed the district attorney must file an information charging the offense for which accused is held to answer, or any other offense disclosed by the testimony, whether charged in the complaint or not, a criminal prosecution must be begun by a complaint containing the statutory requisite, and accused can only be held for trial after a preliminary examination for the crime charged in the complaint or one included therein. State v. Pay (Utah) 1917E-173.

### 6. DEMURRER TO INDICTMENT.

- 16. Questions Raised by Demurrer. By direct provision of Iowa Code, § 5328, demurrer can present only the questions whether the indictment substantially conforms to code requirements, and whether it pleads facts constituting a legal defense to the prosecution. State v. McAninch (Iowa) 1918A-559.
- 17. Objection on Ground of Duplicity. Duplicity in an indictment is not reached by demurrer. State v. McAninch (Iowa) 1918A-559.

## 7. RIGHTS OF ACCUSED.

- a. Right to Preliminary Examination.
- 18. The right of accused to a preliminary examination is a substantial one and refers to the charge stated in the complaint. State v. Pay (Utah) 1917E-173.
- 19. Accused may waive his right to a preliminary examination. State v. Pay (Utah) 1917E-173. (Annotated.)
- 20. Notwithstanding Laws Wis. 1905, c. 63, amending Laws of 1899, c. 218, so as to give the district court concurrent jurisdiction with the municipal court of offenses arising within the county of Milwaukee the punishment of which does not exceed one year's imprisonment or a fine of \$500, or both, no preliminary examination is required for minor offenses, where the examining magistrate has jurisdiction to try defendant for the offense charged. State v. Solomon (Wis.) 1916E-309.

(Annotated.)

21. The right to a preliminary examination is entirely statutory; the proceeding being unknown at common law. State v. Solomon (Wis.) 1916E-309.

(Annotated.)

22. St. Wis. 1911, \$ 4781 et seq. giving to persons charged with offenses not triable before a justice of the peace, the right to a

preliminary examination, do not give such right to one charged with an offense, the exclusive jurisdiction to try which was given to the district court by Laws 1899, c. 218, § 5, and the exclusive jurisdiction to hold a preliminary examination for which was given to the same court by Laws 1905, c. 63, since the statutory scheme for preliminary examinations contemplates that they be held in a separate court from the one which has jurisdiction to try the case. State v. Solomon (Wis.) 1916E-309. (Annotated.)

# Notes.

Right of accused person to preliminary examination. 1916E-312.

Waiver of preliminary examination by accused person. 1917E-179.

# b. Time to Prepare for Trial.

- 23. Fixing Date of Trial. The part of an order transferring a criminal case from one district court to another which assigns the cause for trial on a designated future date, though not binding on the district court to which the case is transferred, is not prejudicial to accused who thereby obtained notice that the cause will likely be called for trial on the date fixed, and he cannot complaint because the trial proceeded on that date without showing that he did not have time in which to prepare his defense. State v. Giudice (Iowa) 1917C-1160.
- 24. Information and Trial at Same Term. Comp. Laws N. Dak. 1913, § 10628, provides that, during each term of the district court at which a grand jury has not been summoned, the state's attorney shall file information against all persons accused of having committed a crime or public offense, and authorizes the filing of such an information and the trial of the defendant at such term, even though the preliminary examination was held during such term of the court, provided that a reasonable time and opportunity is afforded for the preparation of his defense. State v. Kilmer (N. Dak.) 1917E-116.

# c. Right to Public Trial.

25. Exclusion of Public. In determining whether any part of the public shall be excluded from the trial of a criminal case the trial court is allowed some discretion, and no exclusion should be permitted which might injuriously and improperly affect the prisoner, and under no circumstances should a trial be so conducted as to have the appearance of a star chamber proceeding; and hence the trial of a charge of assault with intent to rape, held by the court in the petit jury room instead of the courtroom, and with the consent of defendant's attorney, where it does not appear that any one whom defendant or his attorney desired to

be present was excluded, is not a deprivation of defendant's rights. Dutton v. State (Md.) 1916C-89.

26. In a criminal prosecution, the court made an order that on account of the nature of the case the bailiffs should not admit any members of the public who were not already in the courtroom, and that persons then in the courtroom could not leave and return. The court excepted newspaper men and attorneys. It is held that the court could not, under Mont. Const. art. 3, \$16, exclude all members of the public on account of the nature of the case. State v. Keeler (Mont.) 1917E-619.

(Annotated.)

27. What Constitutes. The statute requires criminal trials to be held in the courtroom provided by the county board. Neb. Rev. St. 1913, § 1162. The law requires that trials be public, but this requirement is satisfied by admitting those who could conveniently be accommodated in the courtroom, where the law requires such trials to be held, without interrupting the calm and orderly course of justice. Roberts v. State (Neb.) 1917E-1040.

28. Public Trial. Under Mont. Const. art. 3, § 16, declaring that in all criminal prosecutions accused shall have the right to a public trial, there is a presumption of prejudice where accused shows that he was denied a public trial. State v. Keeler (Mont.) 1917E-619. (Annotated.)

# Note.

Right of criminal court to exclude persons from courtroom, 1917E-625.

# d. Right to be Present at Trial.

29. Proceedings in Absence of Accused. In a prosecution for libel, the action of the court, during one of the adjournments of the trial and in the absence of defendant, in addressing all of the jurors in attendance upon the court touching a matter foreign to defendant's case, was not error. State v. Haffer (Wash.) 1917E-229.

# e. Right to Inspect Evidence and Know Names of Witnesses.

30. Witness not Indorsed on Information. A witness whose name is not indorsed on the information may be examined on behalf of the state in a criminal prosecution, where it is shown that the attorney for the defendant was given due notice of the state's intention to call such witness, and when, prior to the filing of the information, the prosecution, though it was aware that such witness had some knowledge of the occurrence, had no knowledge that his testimony would be in any way material to the issues. State v. Kilmer (N. Dak.) 1917E-116.

# f. Arraignment and Plea.

31. Necessity of Presence of Counsel. Where defendant's counsel was granted ten minutes to confer with witnesses, and could not be found at the expiration of twenty-five minutes, whereupon the court proceeded to arraign the defendant, who was present, and whose counsel returned during the reading of the indictment and entered a plea of not guilty, the absence of counsel does not render the arraignment erroneous. Mason v. State (Tex.) 1917D-1094.

32. Waiver. Failure to arraign a defendant formally is not a fatal objection, where such defendant was present in court and testified as a witness upon his trial in his own behalf, and was represented by counsel, and no objection is interposed to proceeding with the trial without such arraignment. State v. Klasner (N. Mex.) 1917D-824. (Annotated.)

#### Note.

Waiver of arraignment in criminal case. 1917D-829.

## g. Right to Confront Witnesses.

- 33. Private Examination of Witness. Under Md. Declaration of Rights, art. 21, providing that in all criminal prosecutions every one has the right to be confronted with the witnesses against him, the examination of the prosecutrix in a trial for assault with intent to rape by the court out of the presence of the defendant, except as he was called to the door for identification, is a deprivation of right and reversible error. Dutton v. State (Md.) 1916C-89.
- 34. Confrontation of Witnesses. The constitutional right of confrontation is satisfied when the advantage of seeing the witness face to face and the opportunity to cross-examine him has once been accorded the accused. Territory v. Curran (Hawaii) 1918A-234.

# h. Right to be Heard by Counsel.

- 35. Right to Appear by Counsel at Inquest. A coroner's inquest is merely a preliminary investigation and not a trial involving the merits, and a suspected person has no right to appear by counsel and cross-examine the witnesses, as the only object of such a course would be to prevent a full investigation, in so far as it might tend to incriminate him, thus defeating the purpose of the inquest. State v. Griffin (S. Car.) 1916D-392. (Annotated.)
- 36. Waiver of Rights. The transcript of the proceedings before an examining magistrate, affirmatively showing that the defendant "waived the service of an attorney," shows that defendant was apprised

of his right to such services. State v. Mewhinney (Utah) 1916C-537.

#### Notes.

Right of accused or suspected person to appear by counsel at coroner's inquest. 1916D-394.

Right of accused to consult with or sit by counsel during trial. 1916D-204.

# 8. RIGHT OF PRIVATE COUNSEL TO PROSECUTE.

37. Right of Private Counsel to Assist Prosecution. A member of the bar privately employed by citizens interested in the suppression of crime may, with the consent of the state attorney and the court, be permitted to participate in the prosecution of a criminal cause in the circuit courts of this state, as assistant to the state attorney. Robinson v. State (Fla.) 1917D-506. (Annotated.)

#### Note.

Right of private counsel to assist prosecution in criminal case. 1917D-512.

## 9. ELECTION BETWEEN COUNTS.

38. Requiring Election. Although it may be the general rule in the case of a felony that the court will permit the prosecution to give evidence of only one felonious transaction, it is also the rule that when it appears on the opening of the case and during the trial that there is no more than one criminal transaction involved, and the joinder of the different counts is meant only to meet the various aspects in which the evidence may present itself, the court will not restrict the prosecuting officer to particular counts, and will suffer a general verdict to be taken on the whole. State v. Bickford (N. Dak.) 1916D-140.

# 10. RECEPTION OF EVIDENCE.

- 39. Order of Proof. The order of proof upon the trial of a cause is largely within the control of the trial judge, and his discretion must largely control. State v. Bickford (N. Dak.) 1916D-140.
- 40. The order in which evidence will be introduced is in the discretion of the trial judge. People v. Becker (Kan.) 1917A-600.

# 11. ADMISSIBILITY AND SUFFI-CIENCY OF EVIDENCE.

### (a) In General.

41. That Witness not Called was in Pay of District Attorney. Defendant cannot complain that he was not allowed to show that a witness for the state on the first trial, who denied his testimony on motion for new trial, and who did not testify at the second trial, but who immediately prior to the last trial was within the

jurisdiction of the court, was in the pay and under the control of the district attorney. People v. Becker (Kan.) 1917A-600.

- 42. Order of Proof. It is not error to admit acts and declarations of conspirators in evidence before all proof as to conspiracy is in; the court charging that the evidence was only admissible in case conspiracy was shown. People v. Becker (Kan.) 1917A-600.
- 43. Statement of Prosecuting Attorney. In a criminal prosecution, evidence that the state's attorney, after first hearing the prosecuting witness' story, stated that there was no ground upon which to arrest the defendant, is irrelevant, and should not be permitted to go to the jury. Riggins v. State (Md.) 1916E-1117.
- 44. Negative Evidence. Such evidence is incompetent, because purely negative in character, and designed merely to show that the detective had been unable to discover evidence of the defendant's guilt. People v. Roach (N. Y.) 1917A-410.
- 45. Corroborative Evidence. Evidence that tracks were found leading to the place where the cow was killed is also admissible as tending to corroborate the testimony of the prosecuting witness. Lee v. State (Ariz.) 1917B-131.
- 46. Admission of Guilt by Third Person. Evidence of declaration of third person, tending to show he committed the homicide, is inadmissible. State v. Farnam (Ore.) 1918A-318.

## b. Identity of Accused.

- 47. Identification of Accused Sufficient. In trial for assault with intent to rob, evidence by the assaulted party that while he was driving home, about eleven o'clock at night, accused climbed on the back of his wagon and pulled him back, turning over the seat, and snatched out of his pocket a pocket-book containing money, and that he looked accused square in the face and recognized him in moonlight, although combated by evidence of accused that the assaulted party was under the influence of liquor, was sufficient to support verdict based on identification of accused. Gordon v. State (Ark.) 1918A-419.
- 45. As to Identity of Accused. The identity of one charged with crime may be established by natural and reasonable inferences deducible from proven facts, and may rest wholly on circumstantial evidence. In re Hilton (Utah) 1918A-271.

### Notes.

Finger prints. 1917A-417.

Admissibility in criminal case of evidence obtained by requiring defendant to furnish shoe to compare with footprint. 1917D-237.

# c. Character or Reputation.

49. Good Character of Accused. In a prosecution for receiving the earnings of a common prostitute, testimony that accused, a police officer, enjoyed a good reputation for being a faithful officer is properly excluded, not being material to the offense charged. State v. Schuman (Wash.) 1918A-633.

50. Where the reputation for truth and veracity of one accused of crime was not questioned by the state and the crime did not involve his reputation for truth he cannot introduce evidence thereof. State v. Schuman (Wash.) 1918A-633.

# d. Testimony at Former Trial or on Preliminary Hearing.

51. Testimony at Former Trial. L. O. L. § 1533, makes the rules of evidence in criminal cases the same as in civil cases, except as otherwise specially provided. Section 727 authorizes the testimony of a witness deceased or out of the state or unable to testify, given in a former action, suit, or proceeding between the same parties, relating to the same matter, to be received. Const. art. 1, § 11, guarantees the accused the right to meet the witnesses face to face. Held, that testimony of witnesses out of the state given at a former trial in a prosecution for larceny, the witnesses then being face to face with accused, is admissible, so far as relevant, in a subsequent prosécution of the same defendant for polygamy. State v. Von Klein (Ore.) 1916C-1054.

52. The rule excluding the testimony given by a witness at a former trial, if the deposition could have been taken, is more strict in criminal than in civil cases. Levi v. State (Ind.) 1917A-654.

(Annotated.)

53. The showing that witnesses who testified at a former trial of a criminal case were nonresidents at that time and had been ever since, that the prosecuting attorney knew where they were residing, but the only effort made to procure their attendance was the issuance of subpoenas, that the deposition of one of the witnesses was taken with the defendant's consent. but no effort was made to procure the deposition of the others, and no showing was made that the testimony of such witnesses was necessary, or that it could not be readily procured through other wit-nesses, was not a sufficient showing to authorize the court, in the exercise of its discretion, to admit the former testimony of such witnesses. Levi v. State (Ind.) 1917A-654. (Annotated.)

54. Testimony given at a former trial is admissible at a subsequent trial of a criminal case only when necessary to pre-

vent the miscarriage of justice. Levi v. State (Ind.) 1917A-654. (Annotated.)

55. Admissibility of Former Testimony of Absent Witness. Const. art. 1, § 12, giving an accused the right to be confronted with witnesses against him, is not violated by the admission of testimony of witnesses taken at the preliminary hearing, who were shown to have been absent from the state at the time of the trial. State v. Inlow (Utah) 1917A-741.

56. The absence from the jurisdiction of a witness for the prosecution, though only temporary, is a ground for the admission of his testimony given at a former trial of the case when the defendant has opposed a postponement of the case and insisted upon an immediate trial. Territory v. Curran (Hawaii) 1918A-234.

(Annotated.)

57. The party offering the testimony of witnesses who testified at a former trial of a criminal case has the burden of showing affirmatively all the facts necessary to bring the evidence within the exception to the rule of exclusion. Levi v. State (Ind.) 1917A-654. (Annotated.)

### e. Proof of Other Crimes.

58. As Incident to Relevant Evidence. In a prosecution for polygamy, where a witness, having referred to the plural wife as Mrs. L., stated that she was known also as E. N., the question whether she was the same E. N. who had complained against the defendant charging him with the larceny of \$3,300 worth of diamonds is admissible for the purpose of identification and is not objectionable as tending to show another offense. State v. Von Klein (Ore.) 1916C-1054.

59. Proof of Other Offenses. In a prosecution for extortion by threatening to accuse another of the larceny of a cow, where the theory of the prosecution was that defendant compelled the prosecuting witness to kill a cow belonging to another so that defendant and his confederates could accuse him of the crime, and then extorted money from him to forego making the accusation, evidence that the defendant pointed a gun at the witness, and thereby forced him to kill the cow, is admissible as part of the transaction, although it tends to show the commission of another crime by defendant. Lee v. State (Ariz.) 1917B-131.

## f. Conduct of Accused.

60. Folly of Acts Attributed to Accused. A jury is not bound to hold that a specified event has not occurred because its occurrence involves unwise or foolish or

blundering conduct on the part of the accused person. People v. Becker (Kan.) 1917A-600.

- 61. Conduct of Accused After Offense. Where accused was informed shortly after the infliction of fatal wounds of decedent's death and of the fact that decedent had written accused's name, and that accused stated that he would go to a certain place, evidence that accused dressed in a hurry is competent as showing his conduct immediately after the offense. State v. Giudice (Iowa) 1917C-1160.
- 62. Refusal to Come to State Without Requisition. In a prosecution for larceny of a cow, admission of evidence that defendant refused to come to the state without requisition and was arrested and confined in another state pending requisition is error, since it was his right so to do, and would not show guilt or guilty conscience. Harris v. State (Wyo.) 1917A-1201.
- 63. In a prosecution for larceny of a cow, exclusion of defendant's explanation of his refusal to come to the state without requisition, after admission of evidence showing such refusal and his arrest on account thereof, is error. Harris v. State (Wyo.) 1917A-1201.
- 64. Appearance and Manner of Accused. In a prosecution for homicide, testimony by a witness that the defendant stated to him the evening after the homicide, and before his arrest, that he had not been in the city where the homicide occurred, and that while he was talking defendant was nervous and excited and had a haggard appearance, which was unusual for him, is admissible. Mason v. State (Tex.) 1917D—1094.

## g. Sufficiency of Evidence.

- 65. Degree of Proof. In a prosecution for crime, the defendant's guilt must be proved beyond a reasonable doubt. State v. Tetrault (N. H.) 1918B-425.
- 66. Verdict Sustained. The remaining assignments of error are without substantial merit. The verdict is supported by the evidence. Bird v. State (Ga.) 1916C-205.
- 67. Proof of Motive. Proof of the existence of a particular motive is not essential to establish the guilt of a person accused of crime. People v. Becker (N. Y.) 19174-600.
- 68. Corroboration of Accomplice. Under Kan. Code Cr. Proc. § 399, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the crime, it is not required that the whole case shall be proved outside the testimony of accomplices, but the law is

- complied with if there is some evidence fairly tending to connect defendant with the commission of the crime, so that his conviction will not rest entirely on the evidence of the accomplices. People v. Becker (Kan.) 1917A-600.
- 69. Penalties. A request for an instruction that the crime alleged in the petition must be proved beyond a reasonable doubt is properly refused. All that is required of the state in civil actions for the recovery of a penalty under section 4191, Comp. Laws Okla. 1909 (Rev. Laws 1910, sec. 3619), is to prove the crime by a preponderance of the evidence. Hammett v. State (Okla.) 1916D-1148.
- 70. Degree of Proof. To justify a verdict of guilty, it is not sufficient that the evidence create a suspicion or probability of guilt; it must exclude every reasonable hypothesis, except that of guilt. Wooden v. Commonwealth (Va.) 1917D-
- 71. Evidence Sufficient. The evidence sustains the verdict. State v. Ward (Minn.) 1916C-674,

# h. Testimony of Accomplice.

- 72. Necessity of Corroboration. A person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious, in so convicting. State v. Shaft (N. Car.) 1916C-627.
- 73. On a criminal trial, the testimony of an accomplice is competent. State v. Shaft (N. Car.) 1916C-627.

## i. Alibi.

74. Evidence in a trial for homicide held to make the defense of alibi a question for the jury. People v. Roach (N. Y.) 1917A-410.

## 12. INSTRUCTIONS.

### a. In General.

- 75. Requests Covered by General Charge. The requests to charge the jury were substantially covered by the general charge of the court, and it was not error to decline them. Bird v. State (Ga.) 1916C-205.
- 76. As to Duty of Jurors to Consult and Deliberate. In a prosecution for larceny an instruction that it is the duty of each juryman to give careful consideration to the views his fellow jurymen present upon the testimony, that he should not shut his ears, and stubbornly stand upon the position he first takes, and that it should be the object of all jurors to arrive at a common conclusion, and to deliberate together with calmness, and that it was their duty to agree upon a verdict, if that was possible, is not erroneous, though it failed to

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state that the verdict should be that of each juror, and should be considered with candor. Harris v. State (N. Y.) 1917A-1201

- 77. Refusal of Request Charge Substantially Given. It is not error to refuse a requested charge substantially covered by a charge given. Longmire v. State (Tex.) 1917A-726.
- 78. Urging Jury to Agree. For the court in a murder case to say in its charge that, unless the jury do its duty all labor expended would be lost, and that counsel and court have tried to perform their duty, and let it not be said that the jury neglected to perform theirs, and that he hoped they would endeavor to arrive at a conclusion, and that it would be based on evidence and in accord with their conscience, is not error. People v. Becker (Kan.) 1917A-600.
- 79. Test of Fairness. That the appellate court, on reading the entire charge in a murder case, is unable to determine whether the trial court thought defendant guilty or innocent, is a sufficient test of its fairness. People v. Becker (Kan.) 1917A-600.
- 80. Applicability to Evidence. An instruction is not erroneous because it is based on one of the possible interpretations of an ambiguous document in evidence, particularly where there is other evidence which unequivocally bears that interpretation. Partridge v. United States (D. C.) 1917D-622.
- 81. Failure of Prosecution to Call Witness. In a trial for murder defendant's requested charge that since the exact time when deceased was killed was material, the state's failure to call his son, who had lived with him, required the inference that his testimony, if given, would have shown beyond a reasonable doubt that deceased was killed before 10 P. M. of the day on which he was murdered, is too broad to justify the court in charging it. People v. Roach (N. Y.) 1917A-410.
- 82. Defining Unrelated Crime. In a prosecution for extortion by a threat to accuse another of a crime as defined by Ariz, Pen. Code 1913, § 513, subd. 2, it is error for the court to read to the jury subdivisions 1, 3, and 4 of that section defining extortion by other threats. Lee v. State (Ariz.) 1917B-131.
- 83. Malicious Mischief. There was no error in rulings in the admission or rejection of evidence, or in failing to give a requested instruction. State v. Ward (Minn.) 1916C-674.

## b. Reasonable Doubt.

84. Definition of Reasonable Doubt. An instruction that a reasonable doubt in

the jury box is exactly the same kind of reasonable doubt that an honest man meets up with in human life is not error. State v. Pitt (N. Car.) 1916C-422.

- 85. Application to Particular Issue. Where the court applies the doctrine of reasonable doubt to the whole case and gives an approved charge on circumstantial evidence, it is not necessary to apply the law of reasonable doubt to each fact in the chain of circumstances. Mason v. State (Tex.) 1917D-1094.
- 86. As to Degree of Offense. A charge that the jury could not convict of the highest offense charged, and to acquit of that crime, unless satisfied beyond a reasonable doubt that accused was guilty of that crime, with a similar charge as to each of the included offenses, concluding with a charge to acquit accused if they found none of the offenses proved beyond a reasonable doubt, sufficiently charges that, if there was a reasonable doubt as to guilt of one of the offenses included, it should be dropped, and the next in order inquired into. State v. Ashbury (Iowa) 1918A-856,

# c. Presumption of Innocence.

87. Effect of Proof of Good Character. The defendant is presumed innocent, even where evidence of his good character is not offered, though evidence of good character, when considered in connection with all the other evidence, may create in the minds of the jurors a reasonable doubt, when without such evidence none would exist. People v. Roach (N. Y.) 1917A-410.

# d. Failure of Accused to Testify.

88. Comment on Scope of Testimony of Accused. An accused who takes the stand in his own behalf and voluntarily testifies for himself may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in which he participated, and concerning which he is silence to the inferences naturally to be drawn from it, and justifying comment by the court in his charge to the effect that the jury may take this omission into consideration in reaching a verdict. Caminetti v. United States (U. S.) 1917B-1168.

## e. Corroboration of Accomplice.

89. Where the trial judge is satisfied that there is some evidence corroborative of the testimony of an accomplice, then it is for the jury to determine whether the corroboration is sufficient to show guilt. People v. Becker (Kan.) 1917A-600.

# f. Credibility of Accused.

90. Singling Out Testimony. While an instruction upon the weight and credibil-

ity to be given testimony may be abstractly correct, it is error to single out some particular witness or evidence for its application. State v. Ashbury (Iowa) 1918Å-856.

## g. Circumstantial Evidence.

- 91. Where one charged with burglary admits the entry and the subsequent larceny, but denies that he intended to commit larceny at the time of the entry, it is not necessary for the court to charge that, in order to convict where the only evidence of intent is circumstantial, the circumstances must be such as to exclude every reasonable hypothesis except that of guilt. State v. Lapoint (Vt.) 1916C-318.
- 92. As to Circumstantial Evidence. On a criminal trial, the modification of an instruction that, where the state relies upon circumstances to establish defendants' guilt, it must prove each individual circumstance so relied on to the satisfaction of the jury to a moral certainty or beyond a reasonable doubt, or that the jury must disregard any such circumstances from further consideration, by adding that the force of all circumstances is with the jury, is not erroneous; the modification not being confusing or misleading but emphasizing the proposition that the force and effect of the testimony is to be determined by the jury. State v. Griffin (S. Car.) 1916D-392.

## h. Capacity of Accused.

- 93. Capacity to Commit Crime. It is not error for the court to refuse to hold that a deaf mute was incapable of committing a murder. Belcher v. Commonwealth (Ky.) 1917B-238. (Annotated.)
- 94. Whether a deaf mute was mentally incapable of committing a murder is, on conflicting evidence, a question peculiarly for the jury. Belcher v. Commonwealth (Ky.) 1917B-238. (Annotated.)

# i. Testimony of Accomplice.

95. Failure to Give Cautionary Instructions. A conviction under the U. S. White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, c. 395, Fed. St. Ann. 1912 Supp. p. 419), making criminal the transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, will not be reversed because of the refusal of the trial court to instruct the jury that the testimony of the women was that of accomplices, and was to be received with great caution, and to be believed only when corroborated by other testimony. Caminetti v. United States (U. S.) 1917B-1168.

# j. Good Character of Accused.

- 96. In an instruction, that when a person is charged with the commission of a crime the law presumes that he is a man of "average" character and that the failure to call witnesses to prove his general good character raises no presumption against it, the use of the word "average" in place of the usual adjective "good" is not prejudicial. State v. Mewhinney (Utah) 1916C-537.
- 97. As to Effect of Proof of Good Character. In a trial for murder, the refusal to charge for defendant that his unquestioned good character is presumptively evidence of his innocence is not error, when considered in connection with a charge that evidence of his good character in itself may be sufficient to create a reasonable doubt, and that he is presumptively innocent until the proof shows otherwise. People v. Roach (N. Y.) 1917A-410.

# 13. CONDUCT AND REMARKS OF JUDGE.

- 98. The judge making an order to keep the jury together during a murder trial should assume the responsibility of the order, and not indicate that the order is made at the instance of the state or accused. State v. Giudice (Iowa) 1917C-1160.
- 99. Limiting Time for Argument. It is within the discretion of the trial court to limit the time for argument in a criminal case. Samuels v. United States (Fed.) 1917A-711. (Annotated.)
- 100. Comment on Evidence. Where the only evidence that the prosecuting witnesses used drugs was hearsay, the court's remark in excluding medical testimony of the effect of the use of drugs upon the mind, that there was no testimony that any one of the witnesses was an habitual user of drugs, is not objectionable as a comment upon the evidence. State v. Schuman (Wash.) 1918A-633.
- 101. Rebuke to Witness. Where the judge, following a question to a witness, stated that it looked like a man who had been justice of the peace ought to have sense enough to answer the questions asked, the statement being a reprimand addressed solely to the witness and not to the jury, and having no bearing upon his credibility, is within the court's proper function. Patterson v. State (Ala.) 1916C-968.
- 102. Comment on Evidence. A remark by the trial judge in overruling an objection to a certain question, that it was a part of the res gestae, is not a comment on the weight of the testimony. Mason v. State (Tex.) 1917D-1094.

103. Restraining Misconduct of Counsel. A bill of exceptions complaining of the action of the court in refusing to permit defendant's attorney to state reasons for objection to testimony and upon his insisting, ordering him to sit down and thereafter ordering the sheriff to sit him down, presents no error, where the bill shows that the same objections had been made to the testimony of other witnesses for reasons then stated, and the court qualified the bill by adding that the counsel gave him considerable trouble and would not stop talking when commanded to do so. Mason v. State (Tex.) 1917D-1094.

104. A refusal to require that the district attorney occupy a place on the floor of the courtroom where other counsel sat, instead of sitting in the space between the bench and the bar, according to an established custom, was not error. Commonwealth v. Boyd (Pa.) 1916D-201.

105. Questioning Accused Before Sentence. When the prisoner is asked if he has anything to say before sentence is passed the proper practice is to note such inquiry in the record. Dutton v. State (Md.) 1916C-89.

Note.

Effect of failure to ask convicted person if he has anything to say before sentence. 1916C-95.

# 14. FAIRNESS OF TRIAL.

106. Prejudicial Influences. A murder trial is not rendered unfair or staged in a hostile atmosphere because before trial newspaper articles appeared accusing defendant's brother with tampering with witnesses, and defendant's counsel moved for postponement and to punish the district attorney for contempt, as having been the author of them, which motions were denied, as without evidence to support them, or because a newspaper, during the selection of the jury, published an article claimed to be the opening address of the prosecuting attorney, for which the newspaper was fined, all of which proceedings were had in chambers, and no objections being made to the jurors as selected. People v. Becker (Kan.) 1917A—600.

107. Latitude Allowed Parties. Defendant is not denied a fair trial because in exceptional instances greater latitude was allowed the district attorney on cross-examination of witnesses than was allowed defendant's counsel. People v. Becker (Kan.) 1917A-600.

CRIMINAL.LIBEL.
See Libel and Slander, 165-167.

CRIMINAL NEGLIGENCE. See Automobiles, 63.

### CROPS.

Parol reservation, see Frauds, Statute of, 10.

Sale by parol, see Frauds, Statute of, 10, 11.

Tenant's right as against landlord's vendee, see Landlord and Tenant, 53.

- 1. Injury to Crop—Measure of Damages. In an action for loss of growing crops caused by defendant's cutting off plaintiff's water supply, the measure of damages is the reasonable value of the crops when the damage occurred, not the rental value of the land. North Sterling Isrigation District v. Dickman (Colo.) 1916D-973.
- 2. Sale Apart from Soil. The title to growing crops passes to the purchaser before severance from the soil, being an exception to the rule that a chattel sold, which is annexed to the soil, would remain a part of the realty until after severance Wetkopsky v. New Haven Gas Light Co. (Conn.) 1916D-968.

### CROSS-BILL.

See Equity, 15, 16; Quieting Title, 10, 11.

CROSS-ERRORS.

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CROSS-EXAMINATION.

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CROSSINGS.

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- See Assault, 14-17; Automobiles, 52-56; Contracts, 63-77, 95, 96; Conversion, 9-13; Crops, 1; Death by Wrongful Act, 45-53; Ejectment, 4; False Imprisonment, 5-10; Malicious Prosecution, 29-35; Replevin, 5-11; Specific Performance, 10, 11; Trespass, 10-12.

Duty of adjoining owner to minimize damages, see Adjoining Landowners, 10.

Damages in action by adjoining owner, see Adjoining Landowners, 14-17.

Harmless error in admitting evidence, see Appeal and Error, 240.

In breach of promise suits, see Breach of Promise of Marriage, 15-17.

In actions against carriers, see Carriers of Goods, 41-45.

Measure of damages for breach of covenant, see Deeds, 85.

Compensation in condemnation, see Eminent Domain, 29-55.

Penalty for failure to pay loss, see Fire Insurance, 46.

In action for criminal conversation, see Husband and Wife, 67.

For wrongful eviction, see Landlord and Tenant, 42, 43.

Effect of malice, see Libel and Slander, 8, 9, 13-15, 136, 151.

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Measure of damages for collision, see Ships and Shipping, 1, 3.

Right of abutting owner on change of grade, see Streets and Highways, 11, 13, 14.

In action for delay of telegram, see Telegraphs and Telephones, 35.

For vendor's breach, see Vendor and Purchaser, 15.

# 1. EXEMPLARY DAMAGES.

- 1. Exemplary Damages. Exemplary damages cannot be recovered in an action for the breach of a contract by a physician to attend a patient. Hood v. Moffett (Miss.) 1917E-410. (Annotated.)
- 2. Elements Considered-Wealth of Defendant. Where, under the pleadings of a case, exemplary damages may be allowed, the pecuniary ability of the defendant is a proper matter for the consideration of the jury. Dwyer v. Libert (Idaho) 1918B-973.

#### Note.

Exemplary damages in action on contract other than contract to marry. 1917E-412.

# 2. MITIGATION OF DAMAGES.

3. Sick Benefits as Offset. An instruction, in an action prosecuted by an administrator of a decedent sustaining a personal injury, that in assessing the damages defendant was entitled to credit for any amount decedent might have received by way of sick benefits on account of his injuries was properly refused, because allowing a credit to defendant for sick benefits, though he had not contributed thereto. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

# 3. MEASURE AND ELEMENTS OF DAMAGES.

# a. In General.

- 4. Loss of Earning Capacity. One receiving personal injuries because of another's negligence is entitled to damages for any disability he has sustained, including loss of earning capacity. Miller v. Delaware River Trans. Co. (N. J.) 1916C-165.
- 5. Where disability to labor, etc., is clearly proved in a personal injury action, the jury may award a reasonable sum therefor, irrespective of whether the injured person is shown to have any definite income. Miller v. Delaware River Trans. Co. (N. J.) 1916C-165.
- 6. Personal Injury. The damages recoverable in actions for personal injuries are for all the legal and natural consequences proximately resulting from the negligence alleged, though the particular form or nature of the results were not contemplated or foreseen. King v. Cooney-Eckstein Co. (Fla.) 1916C-163.

# b. In Actions for Breach of Contract.

- 7. Loss of Profits. Recovery may be had for loss of profits occasioned by breach of contract, where the business of which plaintiff was deprived was contemplated or can reasonably be presumed to have been contemplated by parties when the contract was made, and it is reasonably certain that gain or profit would have been derived therefrom, although the amount of such gain may be uncertain. McGinnis v. Studebaker Corporation (Ore.) 1917B-1190.
- 8. Humiliation from Eviction. A striking employee, evicted from a house occupied by him as part compensation for his services, is not entitled to damages for the mortification, humiliation, and injured feelings caused by having his household effects put into the street in the presence of onlookers, where it appears that most of the onlookers were strikers or sympathizers with the strikers and with plaintiff. Lane v. Au Sable Electric Co. (Mich.) 1916C-1108.
- 9. Loss of Profits. Where plaintiff agrees to perform certain work for defendant and is prevented from doing so by defendant's failure, he is entitled to recover the profits which the evidence makes it reasonably certain that he would have made if the defendant had carried out his contract. Streudle v. Leroy (Ark.) 1917D—618.
- 10. Market Value—What Constitutes. Where a manufacturer and wholesaler located in one city sells goods to a retailer located in another, the market value at the former city, plus the cost of transportation to the buyer, is presumptively the market value at the retailer's city. Her-

- man & Ben Marks v. Haas (Iowa) 1917D-543.
- 11. Mental Anguish. Where a physician breached a contract to treat a patient and physical pain resulted, damages may be recovered for mental anguish accompanying it. Hood v. Moffett (Miss.) 1917E-410.

# c. In Actions for Personal Injuries.

- 12. Pain and Suffering. Plaintiff, in an action for injury from being struck on the foot by a flying lump of coal from defendant's tender, making an operation necessary and which would confine him to his bed for several weeks, may recover for suffering which resulted or will reasonably result in the future from the injury. St. Louis, etc. R. Co. v. Armbrust (Ark.) 1917D-537.
- 13. Consideration of Life Expectancy. In an action for damages from the loss of an eye, the court charged that, if the jury were reasonably satisfied from the evidence that plaintiff was permanently injured then he was entitled to recover "such a sum as the evidence reasonably satisfies you his earning capacity has been decreased, as placed at interest at 8% per annum will by taking a part of the principal and all of the interest each year, at the end of his life expectancy as shown by the American Experience Tables of Mortality that have been introduced in evidence, leave nothing." It is held that this was error, as the rule that the court was attempting to state is applicable only to cases of death, and the measure of damages for a permanent injury not resulting in death is compensation for the disabling effect of the injury, past and prospective, including damages for loss of time and the incapacity to do as profitable labor as before the injury, as well as the mental and physical suffering. Louisville. etc. R. Co. v. Carter (Ala.) 1917E-292.
- 14. Effect of Previous Partial Disability. In an action for injuries to plaintiff's left eye, evidence as to the condition of his right eye subsequent to the injury was admissible, since, if his right eye was diseased or defective, the consequences to follow from the complete loss of his left eye would be more grave and damnifying, while, if the diseased or defective condition of the right eye was aggravated by the injury to and loss of the left eye, this is a proper fact for the jury's consideration in ascertaining the damages. Louisville, etc. R. Co. v. Carter (Ala.) 1917E-292.

# d. In Actions for Injuries to Property.

15. Injury to Land by Seepage. The measure of damages to land caused by seepage is the difference between the value of the land before and after the injury, not the reasonable cost of draining the land,

though evidence of such cost is admissible as an aid in determining the value of the land after the seepage. North Sterling Irrigation District v. Dickman (Colo.) 1916D-973.

#### Note

Right to recover damages for loss of use in case of injury to article used for pleasure. 1917A-127.

## e. In Actions for Breach of Covenant.

16. Loss of profits, when they can be ascertained, is a proper measure of damages where by the act of a lessor the tenant is deprived of the use and occupation of the premises covered by the lease. Stewart v. Murphy (Kan.) 1917C-612.

### 4. PLEADING.

17. Impotency. In an action for personal injuries under a petition alleging that plaintiff's body was severely and permanently wounded, bruised, etc.; that the bones, flesh, and ligaments of his hips, pelvis, legs, and ankle were broken, bruised, etc.; that he suffered great bodily and mental pain and anguish as a result thereof; that he was disabled and prevented from attending to his business affairs, or doing anything towards gaining a liveli-hood; and that he was permanently injured and crippled for life and had suffered and would continue to suffer great bodily pain, annoyance, inconvenience, and expense-evidence is not admissible that the injuries resulted in impotency, as the petition neither alleged such injury nor contained an allegation of a general nature embracing it within its terms, and, where conditions or diseases will not necessarily result from the injuries, they must be pleaded. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375. (Annotated.)

#### Note.

Necessity that impotency be pleaded specially in action for personal injuries. 1916C-383.

### 5. EVIDENCE.

# a. Admissibility.

- 18. Mortality Tables. In an action for a personal injury consisting of the loss of an eye, mortality tables were admissible in connection with evidence tending to show decreased earning capacity on the question of probable life expectancy; the injury being permanent. Louisville, etc. R. Co. v. Carter (Ala.) 1917E-292.
- 19. Damage to Other Property. Where plaintiff had become the owner of two contiguous tracts before the drying up of the spring on one of them by mining, evidence of damages to the other tract resulting from such injury was competent upon the issue of damages. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

# b. Sufficiency.

20. Value of Lost Time. A jury should be given some substantial evidence upon questions that are not matters of common knowledge, and physicians' charges and the value of lost time are not such matters. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

## c. Burden of Proof.

- 21. In an action for damages, the burden is upon the plaintiff to prove by a preponderance of the evidence each element of damage sustained. If it appears that the verdict includes an item of damage not so proved, a remittitur will be required. Kriss v. Union Pacific R. Co. (Neb.) 1918A-1122.
- 22. Cause of Injury. In an action for personal injuries, plaintiff, to sustain the burden resting upon him, must introduce testimony making it more probable that the conditions on account of which a recovery is sought were caused by the accident than that they were due to some other cause. Blair v. Seitner Dry Goods Co. (Mich.) 1916C-882.

## 6. INSTRUCTIONS.

- 23. In an action for damages for personal injuries, it is error to instruct that the jury may award such damages as they think plaintiff is entitled to recover; the correct rule of recovery being such an amount, if anything, as is established by a preponderance of the evidence. Rugenstein v. Ottenheimer (Ore.) 1917E-953.
- 24. An instruction on the measure of damages, erroneous because not telling the jury that their finding must be based on evidence, is not prejudicial error, as the oath of the juror is sufficient to compel him to conform his finding to the evidence. Weigel v. McCloskey (Ark.) 1916C-503.
- 25. Requiring Verdict to be Based on Evidence. An instruction on the measure of damages, which does not tell the jury that their finding must be based on the evidence, is erroneous. Weigel v. McCloskey (Ark.) 1916C-503.

# 7. VERDICT.

## a. Excessive Damages.

# (1) Review in General.

26. As such instruction gives a totally inapplicable measure or rule of damages, and necessarily implies that plaintiff's life expectancy was as shown by the mortality tables, whereas those tables are only evidence to be considered in ascertaining the probable life expectancy, it is prejudicial to the defendant's substantial rights. Louisville, etc. R. Co. v. Carter (Ala.) 1917E—292.

1916C-1918B.

27. Instruction Allowing Harmless. The giving of instructions authorizing the allowance of punitive damages is not prejudicial where the verdict shows that only actual damages were awarded. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

## (2) Power of Court to Order Remittitur.

28. Excessiveness of Damages. It is held that the verdict of the jury and judgment of the court awarding plaintiff the sum of \$12,000 was excessive in view of all the facts and circumstances in evidence, and that said verdict and judgment be reduced to \$8,640; or that upon failure of plaintiff to accept such modified judgment, the judgment be reversed in toto, and a new trial granted. McAlinden v. St. Marie's Hospital Association (Idaho) 1918A-380. (Annotated.)

# (3) What are Excessive Damages.

# (a) Personal Injuries.

- 29. Internal Injury and Loss of Leg. In view of the conflict in medical testimony as to the permanency of the injuries of a servant 54 years of age, whose injuries consisted of paralysis of one leg and internal injuries, it is held that an award of \$5,000 could not be determined excessive. Remsnider v. Union Savings, etc. Co. (Wash.) 1917D-40.
- 30. Verdict not Excessive. A verdict of \$5,000 for an injury to plaintiff's foot, causing intense pain, and which in the four months between the injury and the trial had but little improved, necessitating an operation which might result in a complete recovery, though it would leave the foot permanently weaker, so that plaintiff, who had been earning \$1.50 a day, has been unable to work since, is not excessive. St. Louis, etc. R. Co. v. Armbrust (Ark.) 1917D-537.
- 31. A verdict for \$3,202 for injuries to a child is not excessive, where his left hand was so injured that it was necessary to amputate the little finger, and where the hand became stiff and lacked the power of gripping, and where it is doubtful whether the hand will ever be as strong as a normal hand. Gregg v. King County (Wash.) 1916C-135.
- 32. A verdict awarding \$27,000 to a railroad engineer thirty-two years old for injuries permanently incapacitating him from labor will not be set aside as excessive. Canadian Pacific Ry. v. Jackson (Can.) 1916C-912. (Annotated.)
- 33. Eight thousand seven hundred dollars is not an excessive recovery for personal injury to a locomotive fireman twenty-eight years old, who earned \$125 a month when injured, where his skull was fractured, he was wholly incapacitated

for labor for a year, and his injury appears to be permanent, at least unless relief can be secured by an operation. Rowlands v. Chicago, etc. B. Co. (Wis.) 1916E-714.

# (b) Death by Wrongful Act.

- 34. A verdict of \$20,000 against a rail-road for the wrongful killing of a man, twenty-eight years of age, in robust health, and earning \$100 a month, who left a widow and three children, aged, respectively, six years, two years, and six months, is not excessive. Illinois Central R. Co. v. Causey (Miss.) 1917A-1281.
- 35. When from the evidence the probabilities of financial support from the son, had he lived, could not exceed \$4,000, a verdict for \$6,000 should be reduced to the former sum. Denver v. Atchison, etc. R. Co. (Kan.) 1917A-1007.
- 36. A verdict for \$18,000 for the wrongful death of a street car passenger, who was married and left three girls of tender age, and a husband, and who was an accountant and aided her husband in figuring on contracts in his business, and was working to help maintain the home, is not excessive. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.
- 37. In an action for death, when struck by an automobile, of a child eight years old, of ordinary brightness, having an expectancy of life over forty-nine years, verdict of \$3,300 is not excessive. Crawford v. McElhinney (Iowa) 1917E-221.
- 38. An award of \$8,000 in favor of the administrator of a deceased boiler maker, who was earning from \$56 to \$108 per month at the time defendant's negligence caused his death, is not excessive, even though he was not a man of robust health; tappearing that he was not incapacitated at the time of the fatality. Nicoll v. Sweet (Iowa) 1916C-661.
- 39. Where deceased, who was in fair health and spent most of his evenings with his family, was forty-nine years old, and had an expectancy of about nineteen years, and earned from \$20 to \$25 a week, an award of \$4,000 damages for his death is not excessive. Richardson v. Sioux City (Iowa) 1918A-618.

# (c) Assault.

40. Assault. A recovery of \$3,990 for assault and battery, and of \$1,300 for malicious prosecution, held not excessive. Bursow v. Doerr (Neb.) 1916C-248.

(Annotated.)

# (d) Libel and Slander.

41. Damages not Excessive. Where defendant, being sent for by his father to

get some medicine, sent back word for him to make "that damned bitch that sits dressed up by him all the time go," meaning plaintiff, defendant's stepmother, and afterwards, in their presence, said he meant what he said, a verdict of \$3,000 is not so grossly excessive as to shock the moral sense or to indicate that the jury were actuated by prejudice, so as to authorize the court to set it aside on that ground, or to require plaintiff to take a less amount as a condition of not granting a new trial. Boyd v. Boyd (Va.) 1916D-1173. (Annotated.)

42. Verdict for \$1,000 to one of whom defendant stated on three occasions that he was a thief and should be arrested is held not to be excessive. Viss v. Calligan (Wash.) 1918A-819.

#### Note.

What is excessive verdict in action for libel or slander. 1916D-1175.

# (e) Alienation of Affections.

43. A verdict of \$2700 damages for alienation of the affections of the plaintiff's husband reviewed and held not to be excessive. Weber v. Weber (Ark.) 1916C-743. (Annotated.)

# (f) Action Against Telegraph Company.

44. Mental Anguish-Damages Excessive. Where a telegraph company negligently delayed the transmission of a message informing plaintiff that his fatherin-law, whom he had not seen for over seven years, with whom he had had intimate relations, had died, and the delay prevented plaintiff from reaching the place of death in time for the funeral, an award of \$250 damages is excessive by \$200, where the body, which was not embalmed, would have been decomposed had the funeral been delayed to await plaintiff's coming, and the only service plaintiff could have rendered would have been to follow the remains of his father-in-law to the grave. Western Union Tel, Co. v. Blake (Ark.) 1916C-521. (Annotated.)

# (g) False Imprisonment.

45. Excessiveness. Where a warden, having charge of convict labor hired out to a contractor, refused to release a convict on the delivery of a pardon to him on the mistaken assumption that only the contractor had such authority, and the convict was detained 4 or 5 hours and was compelled to work 2½ hours after receipt of the pardon, but no indignities were offered him, a verdict of \$1,000 for the false imprisonment is excessive, and a verdict for \$25 would be affirmed. Weigel v. McCloskey (Ark.) 1916C-503.

(Annotated.)

- 46. A verdict of \$4,000 for alleged wrongful ejection of plaintiff from defendant's train, and his arrest and detention for an hour, without a showing of any physical force or brutal treatment or physical injury, even if plaintiff was not drunk or disorderly, as alleged, is in excess of what will justly compensate him for the suffering endured. Cincinnati, etc. R. Co. v. Cundiff (Ky.) 1916C-513. (Annotated.)
- 47. Damages not Excessive. Nor can we judicially say the verdict and judgment for plaintiff for \$200 was excessive. Howell v. Wysor (W. Va.) 1916C-519.

(Annotated.)

## (h) Rape.

48. Damages not Excessive. Verdict for plaintiff for \$5,000 in a civil action for rape is not excessive. Jensen v. Lawrence (Wash.) 1917E-133. (Annotated.)

# (i) Malpractice.

- 49. Where a physician wrongfully diagnosed plaintiff's trouble as cystic tumors, instead of pregnancy, and when she was operated upon none were found, and she suffered much shock and underwent pain during her confinement, an award of \$500 is not excessive. Just v. Littlefield (Wash.) 1917D-705.
- 50. The damages awarded are not excessive. Viita v. Fleming (Minn.) 1917E-678.
- 51. Verdict not Excessive. Where a surgeon, in treating a fractured collar bone, did not exercise the degree of care which the law requires, resulting in the fragments overlapping and causing a deformity and condition which rendered the plaintiff a cripple and necessitated an operation by another surgeon, who made an incision down to the bone, refractured it by the use of instruments, made a hole in each fragment, and inserted a wire to hold the bones in place and prevent overlapping until a new union was effected, in view of the pain and suffering, expense, and loss of time necessarily entailed, a verdict for \$1,000 is not excessive and does not indicate that the jury was influenced by bias or prejudice. Craghead v. McCullough (Colo.) 1916C-1075. Annotated.)
- 52. Verdict Excessive. A verdict of \$7,385 for malpractice is not seasonably setting a fracture of a femur held excessive to the extent of \$2,000. Cranford v. O'Shea (Wash.) 1916C-1081.

(Annotated.)

# Note.

What is excessive or inadequate verdict in action against physician for malpractice. 1916C-1078.

- (j) Criminal Conversation.
- 53. Damages not Excessive. In an action for criminal conversation, a verdict for \$3,500 did not show an abuse of the jury's discretion as to awarding punitive or exemplary damages. Jowett v. Wallace (Me.) 1917A-754.

# (k) Malicious Prosecution.

- 54. Excessiveness of Punitive Damages. Where, in a malicious prosecution suit, \$25 compensatory damages and \$1,000 punitive damages were assessed, it is held the disparity between the two kinds of damages was too great, and the punitive damages should be reduced to \$200. Gordon v. McLearn (Ark.) 1918A-482.
- 55. Recovery not Excessive. Where plaintiff and her husband were arrested for larceny, and the hearing was held in a country precinct 80 miles from the county seat where plaintiffs' attorneys resided, and without railroad connection, an attorney's fee of \$250 will not be held unreasonable, though there is no testimony to show its reasonableness. McIntosh v. Wales (Wyo.) 1916C-273. (Annotated.)

# DAMNUM ABSQUE INJURIA.

Damage to riparian land by floating logs, see Trees and Timber, 23.

## DANGEROUS EMPLOYMENT ACT.

Liability of owner to contractor's employee, see Independent Contractors, 5.

# DARK PASSAGE.

Duty to light, see Landlord and Tenant, 20.

## DAYS.

Meaning, see Time, 2.

## DEAD BODY.

See Cemeteries; Coroners; Death by Wrongful Act.

Burial insurance, see Insurance, 59.

- 1. Property Right in Dead Body. A son has a legal right to the possession of the dead body of his father, and any unlawful interference with that right is an actionable wrong. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726. (Annotated.)
- 2. There is no right of property in a dead body in the ordinary commercial use of the term. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726. (Annotated.)
- 3. Unnecessary Burial at Sea. Where a steamship passenger died, and the body was embalmed and put in such condition that it could have been carried to New

- York, the common law duty of the steamship company was to carry the body to New York and to deliver it to the next of kin for burial, and for breach of such duty a son has a cause of action. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726.
- 4. Duty to Bury. At common law it is the duty of an individual under whose roof a poor person dies to carry the body decently covered to the place of burial, and the body cannot be cast out so as to expose it to violation or offend the feelings or injure the health of the living. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726.
- 5. Right of Dissection. Under Penal Law (Consol. Laws, c. 40), § 2211, as to burial of dead bodies, right of dissection exists only when a coroner is authorized by law to hold an inquest, or when the next of kin authorizes dissection to learn the cause of death. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726.
- 6. Demand for Excessive Fare. A brother-in-law of decedent took charge at the request of decedent's husband, of the arrangements to transport decedent's body and he purchased a ticket for the corpse. The undertaker obtained a check therefor from the station baggage agent, and the corpse was received by the carrier for transportation so checked. The ticket collector wrongfully demanded fare from the brother-in-law for the corpse, and also exacted excessive fare. It is held that the brother-in-law had sufficient legal rights to justify a recovery of actual and punitive damages caused by the wrongful act of the ticket collector. Osteen v. Southern R. Co. (S. Car.) 1917C-505.

(Annotated.)

- 7. Title to Lot. In a proceeding for the exhumation of a dead body, heard on affidavits, the title to a cemetery lot wherein the burial occurred cannot be determined. State v. Clifford (Wash.) 1916D-329.
- 8. Where a stepdaughter who held title to a cemetery lot did not object immediately upon the interment therein of the body of her stepfather according to the directions of the surviving widow, it will not be ordered exhumed upon objection of the stepdaughter two years later, made to procure an examination of the body to show that because of impotency certain persons were not deceased's children, even though deceased had expressed a wish to be interred in another place. State v. Clifford (Wash.) 1916D-329.

(Annotated.)

9. Under Rem. & Bal. Code, \$ 1345, providing that every illegitimate child shall be considered as an heir to the person who shall in writing before witnesses have acknowledged himself to be the father, a husband, who in an action against his wife

for divorce on the ground of adultery alleged in his complaint and testified that some of the children of the marriage were his own, made such children his heirs, and hence the husband's body should not be ordered exhumed to show that such children were not his heirs because he was State v. Clifford (Wash.) impotent. 1916D-329. (Annotated.)

- 10. Power to Order Exhumation. Where the paternity of children is in issue, the body of the supposed father should not, more than two years after burial, be or-dered exhumed for examination to determine his capacity, where it is questionable whether the examination would reveal anything, and the showing as to whether he was castrated is conflicting. State v. Clifford (Wash.) 1916D-329. (Annotated.)
- 11. Action for Injury-Parties. A son suing a steamship company which buried his deceased father's body at sea for mental anguish and personal damage need not join his brothers and sisters as plaintiffs. Finley v. Atlantic Transport Co. (N. Y.) 1917D-726.

#### Note.

Power of court to order exhumation of dead body for evidentiary purposes. 1916D-331.

# DEADLY WEAPON.

See Weapons, 3.

## DEAD PERSON.

Defamation of dead, see Libel and Slander, 34.

#### DEALER

Meaning, see Interstate Commerce, 4. Meaning, see Licenses, 25.

## DEATH.

See Homicide.

Abatement of actions, see Actions and Proceedings, 16-18.

Dying declarations, see Admissions and Declarations, 21-24.

Termination of agency, see Agency, 3. Property of deceased alien, see Ambassadors and Consuls, 2, 4-7.

Dissolution of attachment by death, see Attachment, 8, 10, 11.

Terminates agreement to marry, Breach of Promise of Marriage, 4.

Revocation of dedication by, see Dedication, 23.

Monument not a funeral expense, see Executors and Administrators, 26.

Of spouse, effect on homestead, see Homestead, 20, 21. Liability of husband for wife's funeral,

see Husband and Wife, 46, 47.

Of joint tenant, survivorship, see Joint Tenants, 1, 2, 4.

Cause of death, see Life Insurance, 38, 40. Proof of death, see Life Insurance, 43-44. As abating will contest, see Wills, 121.

Testimony as to transactions with person since deceased, see Witnesses, 35-46.

- 1. Time of Death Presumed from Absence. In such case, the presumption is that the absentee died during the first seven years of his unexplained absence. There is no presumption that his death occurred at any particular time during said period. McLaughlin v. Sovereign Camp (Neb.) 1917A-79. (Annotated.)
- 2. Presumption from Absence. "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." Holdrege v. Livingston, 79 Neb. 238. McLaughlin v. Sovereign Camp (Neb.) 1917A-79.
- 3. Grant of Letters of Administration as Evidence of Death. Acts 33d Gen. Assem. c. 200, provides that, when a resident of this state owning property, or any person who may have been a resident and acquired property rights within the state, absents himself from his usual place of residence and conceals his whereabouts from his family without known cause for a period of seven years, or where any such person has gone to parts unknown for a period of ten years, a petition may be filed in the district court setting forth the facts by any person entitled to administer upon such absentee's estate if he were known to be dead, setting forth the names of the persons who would be his legal heirs if he were dead, so far as known, and praying for the issuance of letters of administration upon the estate, which may be issued. In an action against a fraternal benefit insurance organization by the beneficiary of a death benefit certificate, plaintiff introduced as evidence of her husband's death letters of administration upon his estate issued to her by the district court under chapter 200, on account of insured's continued absence. It is held that such letters of administration upon the absentee's estate were not admissible, since they were without probative value as to his death; the statute providing for the administration of absentees' estates, and not for those of decedents. Werner v. Fraternal Bankers' Reserve Soc. (Iowa) 1918A-1005.
- (Annotated.) 4. Presumption of Death from Absence. The unexplained absence from home for seven years of a person raises the pre-sumption of his death. Werner v. Fraternal Bankers' Reserve Soc. (Iowa) 1918A-1005.

#### Notes.

Grant of letters testamentary or of administration as evidence of death. 1918A-

Time of death within rule as to presumption of death from absence. 1917A-

## DEATH BY WRONGFUL ACT.

- 1. Origin and Nature of Right of Action, 264.
- 2. Suit in Foreign Jurisdiction, 264.

3. Limitation of Actions, 265.

4. Who may Sue, 265.

- a. Illegitimate Relatives, 265.
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- a. Form of Action, 265.
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- 6. Measure of Damages, 268.
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sul, see Ambassadors and Consuls, 4-7. Harmless error in excluding evidence, see

Appeal and Error, 272. Excessiveness of damages, see Damages.

34-39.

Liability under Employers' Liability Act, see Master and Servant, 73. Failure to furnish fire-escapes, see Fires,

Fraudulent release of claim, see Release

and Discharge, 5. No recovery for pension of deceased, see

Ships and Shipping, 3.

1. ORIGIN AND NATURE OF KIGHT OF ACTION.

- 1. Nature of Right to Recover. A right to recover for the death of another is statutory. McLaughlin v. United Railroads (Cal.) 1916D-337.
- 2. The right of action for wrongful death given by Shannon's Code, § 4025 et seq., is that which the deceased would have had if he had lived, and the recovery is in right of the deceased. Sharp v. Cincinnati, etc. R. Co. (Tenn.) 1917C-1212.
- 3. An action under the Homicide Act (Code 1907, § 2486), authorizing actions for damages for any wrongful act, omission, or negligence causing the death of another, is a civil, not a penal or quasi criminal, action, though the damages are punitive. Watson v. Adams (Ala.) 1916E-565.
- 4. In action for wrongful death by negligence under Code Civ. Proc. §§ 1902-

- 1905, the executor or administrator of decedent is a mere nominal party without any interest in the damages, holding them, when recovered, as trustee or agent for the beneficiaries; the claim of the beneficiaries being of the same character as claims for injuries to the property of claimants. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 5. The cause of action for death from negligence created by Code Civ. Proc. §§ 1902-1905, is original and not derivative, and is not a part of the estate of decedent, but damages are allowed, not for inury to his estate, but for an injury, through loss of him, to the estate of the beneficiaries. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 6. Defenses-Release by Injured Person. Laws 1909, c. 301, § 1, declares that, whenever the death of a person shall be caused by wrongful act, neglect, or default such as would have entitled the party to maintain an action and recover damages, then the corporation or person who would have been liable if death had not ensued shall be liable in an action for damages notwithstanding the death of the person injured. Section 3 provides that every such action shall be for the exclusive benefit of the wife, or husband, or children, or, if there be neither of them, then for the parents and next of kin of the person whose death shall be so caused. It is held that, where a husband who was injured executed a release to the wrongdoer before his death, an action might be maintained for the benefit of the dependent wife, children, or next of kin, for the stat-ute creates a wholly new "cause of action," which consists of a right belonging to one person and some wrongful act or omission by another by which the right has been violated, and the provision with respect to the right of the injured person to maintain an action merely requires that the wrong in the first instance should give rise to a cause of action. Rowe v. Richards (S. Dak.) 1918A-294.

(Annotated.)

## Notes.

Death of human being as element of recovery in civil action between third persons. 1917B-886.

## 2. SUIT IN FOREIGN JURISDICTION.

7. An administrator may be appointed to bring an action for wrongful death wherever the defendant may be found, though the decedent was a nonresident and left no assets in the state other than such right of action, and though he sustained the injuries causing his death in another state, as the right of action itself is property and is transitory, and exists wherever the defendant may be found. Howard v. Nashville, etc. R. Co. (Tenn.) 1917A-844. (Annotated.)

- 8. What Law Governs. A right of action for wrongful death is governed by the laws of the state where the injury occurred. Sharpe v. Cincinnati, etc. R. Co. (Tenn.) 1917C-1212.
- 9. A right of action for wrongful death is transitory and may be enforced against the defendant wherever he may be found, provided it is not contrary to the policy of the forum and is allowed by the state wherein the injury occurred, except in those cases controlled by federal statutes. Howard v. Nashville, etc. R. Co. (Tenn.) 1917A-844.

## 3. LIMITATION OF ACTIONS.

- 10. In an action against a railroad for death of its employee, a change from the widow as party plaintiff to the administrator as such was no change of the cause of action within the statute of limitations, though the purpose of the amendment was to bring the case within the Federal Employers' Liability Act (Fed. St. Ann. 1909 Supp. 584) under which the widow cannot recover. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902. (Annotated.)
- 11. Amendment Omitting Reference to State Statute. In a widow's action against a railroad for death of its employee, where plaintiff's original pleadings referred to the Georgia statutes, the amendment of such pleadings to omit all reference to such statute and to show that decedent was employed in interstate commerce when killed, defendant's plea having shown such fact originally, upon substitution of decedent's administrator as plaintiff under the Federal Employers' Liability Act, was not a change of cause of action within the statute of limitations. since the reference to the Georgia statute could be disregarded as surplusage. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902
- 12. Effect of Bar of Action for Injury. Since a right of action for injuries belongs to the injured person, terminates at his death, and depends on the common law, while the right to damages for wrongful death resulting from such injuries belongs exclusively to the administrator and is a creature of statute, limitations having run against an action for injuries to decedent is no bar to the administrator's right to recover for wrongful death. Causey v. Seaboard Air Line R. Co. (N. Car.) 1916C-707. (Annotated.)
- 13. Necessity That Plaintiff Plead Compliance With Statute of Limitations. Under Code Civ. Proc. § 1902, providing that the executor or administrator of a decedent who has left surviving husband, wife,

or next of kin may maintain an action to recover damages for a wrongful act, resulting in death of such decedent, and providing that "such an action must be commenced within two years" after the decedent's death, it is not necessary that it appear from the face of the complaint that action was commenced within two years. Sharrow v. Inland Lines (N. Y.) 1916D-1236. (Annotated.)

#### Notes.

Pleading statute of limitations in action for death by wrongful act. 1916D-1241.

Commencement of running of statute of limitations against action for death by wrongful act. 1916C-713.

## 4. WHO MAY SUE.

## a. Illegitimate Relatives.

14. Mother of Illegitimate Child. Under our statute the mother of an illegitimate minor child, and the mother alone, has the right to sue for and recover damages for the death of such child by the wrongful act, negligence, carelessness, or default of another. Hadley v. Tallahassee (Fla.) 1916C-719. (Annotated.)

#### Notes.

Right of persons other than parent to recover for death of illegitimate child. 1916E-454.

Right of parent to recover for death of illegitimate child. 1916C-720.

## b. Nonresident Aliens.

15. Rights of Alien Beneficiary. The alienage of the beneficiaries of the cause of action for death by negligence, given by Code Civ. Proc. §§ 1902-1905, does not affect their rights. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.

## 5. ACTIONS.

## a. Form of Action.

16. Trial on Wrong Theory — Effect. Where the trial of an action for death of a passenger, flung overboard by the lurching of a steamship, proceeds on the theory that the case was governed by St. 1907, c. 375, imposing a penalty for negligently causing the death of a human being in instances where no other remedy is given, there is a mistrial, since such statute has no application to death of a passenger caused by the negligence of a common carrier, a matter regulated by Rev. Laws, c. 70, § 6, providing a statutory penalty for death caused by the negligence of common carriers, the rule of damages and grounds of liability established by the two acts being different. Hanley v. Eastern Steamship Corp. (Mass.) 1917D-1034.

#### b. Defenses.

- 17. Settlement by Administrator of Action for Injuries. Where the plaintiff dies during the pendency of an action for personal injury, and a revivor is had in the name of an administrator, who accepts a payment in full satisfaction of all claims, no further recovery can be had for the benefit of the next of kin, upon the theory that the death was due to the injury which was the basis of the original action. Berner v. Whittelsey Mercantile Co. (Kan.) 1916D-350. (Annotated.)
- 18. Antecedent Disease. Where plaintiff's intestate died of traumatic pneumonia, caused by being struck by a falling cornice of defendant's building, the fact that deceased was predisposed to disease will not excuse defendant from liability for negligence. Nicoll v. Sweet (Iowa) 1916C-661.

## c. Evidence.

- 19. Admissibility of Coroner's Verdict. In an action for the death of a person struck by defendant's automobile truck, a verdict of a coroner's jury, in which it was stated that in the opinion of the jurors the driver of the truck was blameless, is properly admitted, as the finding of a coroner's jury is admissible in evidence, and the question whether the driver was blameless was an essential matter before the jury for its investigation, and properly included in its verdict. Devine v. Brunswick-Balke-Collender Co. (III.) 1917B-887. (Annotated.)
- 20. Cause of Death. In an action for death by wrongful act the burden is on the plaintiff to show that the death of his intestate was proximately caused by the injuries received through the defendant's negligence and not by a pre-existing disease. Carmody v. Capital Traction Co. (D. C.) 1916D-706.
- 21. Property Left by Deceased. While, in an action for the death of one who left a widow, but no children, it would be improper to show what property she received from him, admission of evidence of the amount of property he left, it not appearing what disposition of it he made by his will, or what debts he left, cannot be said to have been prejudicial to defendant. Mahlstedt v. Ideal Lighting Co. (III.) 1917D-209.
- 22. The common-law rule that a wife is not competent to testify to any fact or transaction, knowledge of which was obtained by means of the marriage relation, does not prevent her after his death testifying in behalf of his estate to facts relating to him coming to her knowledge independently of him, and not because of any confidential relation between them. Mahlstedt v. Ideal Lighting Co. (III.) 1917D-209. (Annotated.)

- 23. Complaints of Suffering. In an action for wrongful death, while the administrator is not entitled to recover for deceased's conscious suffering, evidence of complaints made by deceased of pain and suffering soon after the injury is admissible as bearing on the extent and location of his injuries. Nicoll v. Sweet (Iowa) 1916C-661.
- 24. Damages Held Excessive. In a parent's action for loss of services, etc., of a minor son, killed in defendant's employment, evidence held not to sustain a finding that the boy's probable earnings, less the expense of maintenance, etc., together with the amount allowed for funeral expenses, would amount to more than \$1,000, so that the judgment would be reduced to that amount. Carnego v. Crescent Coal Co. (Iowa) 1916D-794.
- 25. Sufficiency. Evidence that a certain sum was paid as the funeral expenses of a minor son did not authorize the submission of the reasonable expenses of the funeral to the jury, in a father's action for loss of services, etc., in absence of other evidence as to the reasonable cost of the burial. Carnego v. Crescent Coal Co. (Iowa) 1916D-794. (Annotated.)
- 26. Inheritance from Deceased. In an action by children for the negligent death of a parent, evidence of the property received by them in the distribution of the state of the deceased parent is not admissible. McLaughlin v. United Railroads (Cal.) 1916D-337. (Annotated)
- 27. Evidence of Domestic Relations of Deceased. In an action for wrongful death, evidence of the number of children of deceased is admissible, just as the fact of his marriage, to show an incentive to thrift and accumulation. Nicoll v. Sweet (Iowa) 1916C-661. (Annotated.)
- 28. Payment of Funeral Expenses. In a parent's action for loss of services of a minor child killed by defendant's negligence, evidence that a witness paid a certain sum for the minor's funeral expenses on behalf of the boy's father, who gave the witness the money was admissible as tending to show that funeral expenses had been incurred, though not sufficient to show the reasonableness of such expenses. Carnego v. Crescent Coal Co. (Iowa) 1916D-794.
- 29. Nature of Injury Received. A description of the injuries received by a child killed by a street car is properly admitted, it tending to show they were received in the manner claimed by plaintiff, defendant claiming they were received in another manner. Wende v. Chicago City R. Co. (III.) 1918A-222.
- 30. What Testimony is Negative. Where, in an action against a railroad company for the wrongful death of a Pullman car employee engaged in repairing cars, due to the shifting of a car without warning

to him, the witnesses who testified that no warning was given while deceased was where he could have heard it had special opportunities, by reason of their being engaged in the railroad yard in occupations similar in the matter of danger, to hear and remember such warning if it had been given, their testimony was not purely negative in character. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

31. Mortality Tables. Though the American experience mortality tables are made up from selected lives, such tables are admissible in an action for wrongful death of one who it appeared had previously been a sufferer with asthma, since they show only the probable continuance of life, and do not show the continuance of earning power. Fifield's Administratrix v. Rochester (Vt.) 1918A-1016.

(Annotated.)

32. Affection for Children. Though the action is only for the pecuniary loss sustained by deceased's children from his death, evidence that he taught his little girl her Sunday school lessons, and wanted her to go to Sunday school, and made her practice her music lessons, is admissible to show he had an affection for his children, took an interest in their welfare, and on that account would be likely to contribute in the future to their support. Chicago, etc. R. Co. v. Gunn (Ark.) 1916E—648. (Annotated.)

## Notes.

Admissibility in action for death by wrongful act of evidence of habits or physical condition of deceased. 1916E-652.

Admissibility in action for death by wrongful act of evidence of property inherited by plaintiff from deceased. 1916D-340.

Admissibility in action for death by wrongful act of evidence of domestic relations of deceased. 1916C-671.

Admissibility of coroner's verdict as evidence in subsequent proceedings. 1917B-892.

Admissibility, in action for death by wrongful act, of mortality tables to show probable duration of life. 1918A-1021.

## d. Instructions.

- 33. Instructions as to Measure of Damages. Where, in an action for negligent death, the court fairly instructs the jury on the measure of compensation, refusal to charge that the pecuniary value of the life of decedent to plaintiffs is the value in money of the life of decedent to plaintiffs at the time of her death is properly refused. McLaughlin v. United Railroads (Cal.) 1916D-337.
- 34. An instruction in an action by children for the negligent death of a parent that the pecuniary value of the life of

decedent to the children is the value in money of the life of decedent to them is properly refused because misleading for failing to define the term "value in money." McLaughlin v. United Railroad (Cal.) 1916D-337.

- 35. Inability to Obtain Insurance. In an action for wrongful death, evidence that deceased could not obtain life insurance because of his health is admissible as a circumstance bearing on the value of his life, though not of great importance. Nicoll v. Sweet (Iowa) 1916C-661.
- 36. In an action for wrongful death, where the court admitted evidence of the number and ages of decedent's children, an instruction that the amount of damages could not be increased by reason of decedent's having left children, and that the evidence was admitted only upon the question of incentive to industry, is not contradictory or misleading. Nicoll v. Sweet (Iowa) 1916C-661.

(Annotated.)

- 37. Negligence. Where, in an action for the death of a person struck by an automobile truck, a verdict of the coroner's jury, exonerating the driver of the truck, is admitted in evidence, it is error to charge that this verdict was not conclusive. but that the jury should consider it in determining whether or not the driver was guilty of the negligence charged in the declaration, since, while the verdict was competent evidence, its weight was for the jury, and the court had no right to invade the province of the jury and tell them, or attempt to tell them, what weight should be attached thereto, and the instruction was equivalent to a statement that the court regarded such verdict as very strong evidence. Devine v. Brunswick-Balke-Collender Co. (III.) 1917B-887. (Annotated.)
- 38. Such instruction is also objectionable, as it was no more the duty of the jury to consider such verdict than to consider any other competent evidence, and their attention should not have been particularly directed to such verdict. Devine v. Brunswick-Balke-Collender .Co. (III.) 1917B-887. (Annotated.)
- 39. Damages. In an action for the death of a minor, an instruction that in assessing damages the jury were not confined to the pecuniary value of the services of the minor to the next of kin until she had reached majority, but might consider the pecuniary benefit which the next of kin might have received from the minor had she not been killed at any age, while not proper as a rule for measuring damages, is not erroneous, because it merely informed the jury they were not merely confined to the pecuniary value of the minor's services until she reached majority. Lichtenstein v. L. Fish Furniture Co (III.) 1918A-1087.

- 40. Action for Death of Child Falling into Pocl. In an action for death of a child, caused by falling into a drain into which was discharged hot water from the boilers of a cotton mill, an instruction that it was not necessary to prove that the pool of water was not of itself attractive to children is properly refused as argumentative. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.
- 41. In an action for death of a child from falling into a drain, into which the hot water from mill boilers was discharged, an instruction that the necessity for having the blow-off pipe in the operation of the mill was not an excuse for negligence in not having the place of discharge properly guarded is properly refused as abstract and misleading, where there was no attempt to show that such necessity of a blow-off pipe was an excuse for negligence, and there was no showing that the place of discharge, as distinguished from other places in the drain, was guarded or not. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.
- 42. In an action for death of a child from falling into a drain into which the hot water from mill boilers was discharged, a charge that plaintiff was not required to prove the nature of children, as the jury is presumed to know such nature as well as witnesses, is properly refused as argumentative. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.
- 43. In an action for death of a child from falling into a drain into which the hot water from mill boilers was discharged, an instruction that it was not necessary that plaintiff prove that defendant actually knew that any child ever actually went or played in any part of the open space in which the drain was situated, nor that defendant actually knew that such open place was attractive to children, is properly refused as misleading. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.

## e. Questions for Jury.

44. Dependents. In an action under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]), for the death of an employee, for the benefit of his brothers and sister, evidence that the brothers and the sister are of tender age and without estate makes a question for the jury as to whether they are dependent upon deceased. Kenney v. Seaboard Air Line R. Co. (N. Car.) 1916E-450.

## 6. MEASURE OF DAMAGES.

#### a. Generally.

45. There is no fixed rule for the jury to follow in awarding damages for wrong-

- ful death, except that all the elements which enter into the value of a human life as they appear from the evidence should be considered by the jury in the exercise of their discretion in making the award. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637.
- 46. The measure of damages for wrongful death is the value of decedent's life to his estate, had he not perished. Nicoll v. Sweet (Iowa) 1916C-661.

#### b. For Death of Child.

- 47. A parent suing for loss of services of a minor employee killed by defendant's negligence was entitled to recover the present worth of his son's probable earnings up to the time he would have become of age, less the probable cost of clothing, maintenance, etc. Carnego v. Crescent Coal Co. (Iowa) 1916D-794.
- 48. The word "expenses" as used in Code, § 3471, permitting a father to maintain an action for the actual loss of services and for expenses resulting from the injury or death of a minor child, includes expenses for a suitable burial. Carnego v. Crescent Coal Co. (Iowa) 1916D-794.
- 49. Recovery by Parent—Funeral Expenses. At common law it was a father's duty to defray the necessary burial expenses of his child, and if the child died from injuries after surviving for a time, the parent could recover for the loss of his services up to his death, together with expenses for a suitable burial. Carnego v. Crescent Coal Co. (Iowa) 1916D-794.
- 50. Damages—Instructions Capitalizing Income. In a mother's action for the wrongful death of her son, the court instructed the jury to allow the capital sum which would represent the money which plaintiff had a reasonable expectation of receiving from decedent during the term of her natural life, and then capitalize that in a fixed sum and let that be the verdict. It is held that the word "capitalize" as so used meant to convert a periodical payment into a sum in hand, and, the jury being presumed to have so understood it, the instruction was correct. Brown v. Erie R. Co. (N. J.) 1917C-496.

## c. For Death of Husband.

51. Earnings in Unlawful Occupation. In an action for the death of a hackman, where, though he pandered to immorality, there is no evidence that he received any compensation, the refusal of requests that damages for his death could not be assessed on the basis of his immoral profits is not error, where the court limited the jury in awarding damages to a consideration of his legitimate earnings. Richardson v. Sioux City (Iowa) 1918A-618.

## d. For Death of Parent.

52. Under Code Civ. Proc. § 377, authorizing the jury to give such damages for death as under the circumstances may be just compensation, damages for grief and wounded feelings cannot be awarded, nor can the suffering by decedent in consequence of receiving the fatal injuries be considered, but the law seeks only to compensate in terms of money for the loss, and, where children sue for the death of a parent, they may recover their reasonable expectation of financial benefit from the continued existence of the parent, including in this estimate the loss of the nurture, instruction, training, and care of which the children have been deprived. McLaughlin v. United Railroads (Cal.) 1916D-337.

53. Federal Employers' Liability Act. In an action under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. 584]), the widow and minor child of decedent being beneficiaries, the measure of damages is such sum as the widow might reasonably have expected to receive from her husband for support, and such sum as such child would have expected for support during minority, plus compensation for the loss of care, counsel, training, and education which, under the evidence, it might have reasonably received from the parent. Nashville, etc. By. v. Anderson (Tenn.) 1917D-902.

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## DEDICATION.

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## 1. IN GENERAL.

1. What Constitutes — Sale With Reference to Map. A vendor may be estopped to deny dedication of land to the public use as a highway when he has sold property abutting thereon to individuals on the faith of a recorded map. Eltinge v. Santos (Cal.) 1917A-1143.

1916C-1918B.

- 2. Who may Dedicate. A dedication or gift of land for a public use can be made only by the owner. A purchaser of land encumbered with a security deed, in possession under a bond for title, as against his vendor and encumbrancer, has no such power. But where such purchaser makes an express offer to dedicate for a public use, as against his grantee and the public he will be estopped from denying that he is without power to dedicate because of the incompleteness of his title. Hoole v. Attorney General, 22 Ala. 190. Jacobs' Pharmacy Co. v. Luckie (Ga.) 1917A—1105.
- 3. Estoppel to Deny Dedication. Where the grantee of lands from an owner, who by exhibiting a plat to intending purchasers had dedicated highways marked thereon, could have ascertained the fact by white stakes driven in the ground, to mark the borders of the highways, so as to induce an inquiry as to the source, nature, and extent of the easements, such grantee is estopped to deny that the original owner had made a parol dedication binding upon it, although it secured title for valuable consideration by mesne conveyances. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.

## 2. WHAT CONSTITUTES.

## a. Intent of Owner.

- 4. How Made. Dedication is an appropriation of land to a public use by the owner, and accepted for such use by or on behalf of the public, and may be express, by deed or explicit oral or written declaration, or some other explicit manifestation of purpose, or it may be implied by some act or course of conduct from which a reasonable inference of the intent may be drawn, or which is inconsistent with any other theory. Harris v. St. Helens (Ore.) 1916D-1073.
- 5. Intent Essential to Dedication. To constitute a dedication, the owner must intend to devote his property to a public use, and this intention must be clearly and unequivocally manifested by his acts. Harris v. St. Helens (Ore.) 1916D-1073.

## b. Acceptance.

- 6. An express acceptance may be shown by some order, resolution, or action of the public authorities made and entered of record. While an implied acceptance of a dedication may be inferred from the acts of the public authorities in treating the land offered as public property. Chicago, etc. R. Co. Chicago (III.) 1917A-1146.
- 7. Levy of Tax as Refusal to Accept. Where there has been no acceptance, formal or otherwise, by the city or by the public, of land dedicated for public use,

- the levy and collection of taxes and special assessments shows an intention not to accept the dedication. Hanford v. Seattle (Wash.) 1917B-195.
- 8. Implied Acceptance of Dedication. A formal acceptance of a dedication of a street is unnecessary, since approval by the municipality will be implied. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.
- 9. What Constitutes Acceptance. Where a city ordinance purported to dedicate to the public certain property for use as a park, and thereafter museums were erected on a part thereof and used by the public, and other portions were either leased to tenants or used as a public dumping ground, and were not opened for park purposes, there is no acceptance of the dedication of these other portions. Board of Trustees of Phila. Museums v. Trustees of Univ. of Pa. (Pa.) 1917D-449.
- 10. Necessity of Acceptance. A "dedication" is the joint effect of the offer by the owner to dedicate and acceptance by the public, and there can be no dedication without the participation of both, though the dedicator is a municipality; and hence the passage of a city ordinance, setting apart land for public uses, being a mere offer to dedicate, becomes binding only by acceptance and use by the public for the purposes stated. Board of Trustees of Phila. Museums v. Trustees of Univ. of Pa. (Pa.) 1917D-449. (Annotated.)
- Acceptance. as 11. Presumption to Where the streets and alleys of a sudivision are dedicated to the public, an acceptance of the principal streets by the municipality raises a presumption that the others have been accepted, but this presumption cannot prevail, where the acceptance, except as shown by the filing of a map showing all the streets, was limited to the streets in part of a subdivision, and defendants held open and notorious possession of others for at least thirty years. Chicago, etc. R. Co. v. Chicago (Ill.) 1917A-1146.
- 12. Proof. The mere filing of a plat showing the existence of streets which the owner had once offered to dedicate will not, where nothing else was done by the municipality, show an acceptance. Chicago, etc. R. Co. v. Chicago (Ill.) 1917A-1146.
- 13. Dedication Complete when. A common-law dedication is complete only upon acceptance. Chicago, etc. R. Co. v. Chicago (Ill.) 1917A-1146.
- 14. Acceptance by Public. Where an owner offers to dedicate land to the public use as a park or street, the public may accept the offer by use or by formal action. Eltinge v. Santos (Cal.) 1917A-1143.
- 15. Acceptance by Municipality. Except where a municipality may not have

charter powers to accept a dedication, an acceptance by its duly authorized officers may be express, by deed, or other matter of record, or, unless prohibited by a statute or ordinance, the acceptance may be implied from acts showing that the municipality has assumed control and possession of the property. Harris v. St. Helens (Ore.) 1916D-1073.

#### Note.

Necessity for acceptance where land is dedicated to public use by municipality. 1917D-452.

## c. Evidence of Dedication.

- 16. In a suit to determine an adverse interest in realty, evidence held sufficient to show an intention on the part of the owner of lots, selling them through an agent, to make a parol dedication to the public, as indicated upon a printed plat shown purchasers, of parts of certain streets bordering on certain blocks as highways sixty feet in width. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.
- 17. By Parol. To establish a parol dedication, evidence must be adduced tending to substantiate a clear intention to devote some particularly described land to a public use. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.
- 18. Sale of Lots With Reference to Plat. A sale of lots, according to a plat and the execution of deeds therefor by the owner of the plat, constitutes a ratification of such plat as filed. Hanford v. Seattle (Wash.) 1917B-195. (Annotated.)
- 19. Estoppel to Deny. In a suit to determine an adverse interest in realty, where plaintiff was seeking to establish that certain streets on which his lots abutted were sixty feet in width, and before delivery of his deed the original purchaser from the owner, who dedicated the ways, had examined the block, stepped the width of the highways bordering them, found them to be sixty feet, and saw them marked out with white stakes similar to one received in evidence, his attention being then attracted to the post, the admission in evidence of testimony relating to the stakes, as marking the lines of one of the streets, is proper. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.
- 20. "Reserved." Under Ore. L. O. L., § 718, providing that the terms of a writing are presumed prima facie to have been used in their primary and general acceptation, where a plat filing for record has a strip marked "Reserved for Wharves," the word "Reserved" means kept for future use; retained; kept back. Harris v. St. Helens (Ore.) 1916D-1073.
- 21. Reservation on Plat. The filing for record of a plat of land divided into lots

and blocks with a strip allowing the river front marked "Strand, Reserved for Wharves," does not constitute a dedication of the land so marked. Harris v. St. Helens (Ore.) 1916D-1073.

(Annotated.)

#### Notes.

Reservation of land on map or plat for specified purpose as dedication thereof to public. 1916D-1079.

Dedication of park or square by selling lots according to map or plat. 1917B-197.

#### 3. REVOCATION.

- 22. Revocation of Dedication. Where the owner of land filed a map showing an intention to dedicate a strip as a public way, and his successor in title thereafter filed another map evincing an intention to withdraw the first owner's offer of dedication, there having been no acceptance of the offer by the public between the filing of the first map and the revocation of the offer by the second, the original owner's successor in title can so revoke the offer of dedication. Eltinge v. Santos (Cal.) 1917A-1143. (Annotated.)
- 23. Death of Dedicator. The death of a dedicator of public streets impliedly revokes his offer of dedication. Chicago, etc. R. Co. v. Chicago (Ill.) 1917A-1146.

  (Annotated.)
- 24. Right to Revoke Dedication. Where an owner of an interest in land agrees to donate to a county a strip for the purpose of widening a public highway, subject to other property owners along the highway giving the necessary land to widen it to a certain extent, and where it appears that some of the abutters refuse to donate, and others because of their minority, are unable to make a dedication, the landowner making the proposed dedication may formally withdraw the same, notwithstanding on the day previous to his withdrawal, the county authorities have passed a resolution accepting all donations made before that time. Jacobs' Pharmacy Co. v. Luckie (Ga.) 1917A-1105.

25. Where the owner of land surveys it into lots, blocks, and streets, and prepares a map thereof, showing streets of certain width, which he exhibits to intending purchasers, who bought before he changed his mind as to the width of the streets, and superseded the map which he had exhibited by a recorded plat differing therefrom as to the width of the streets, he irrevocably dedicates to the public the highways as shown by the map, without acceptance by any corporate authority, as such circumstances create an estoppel in pais. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.

(Annotated.)

(Annotated.)

·DIGEST. 1916C-1918B.

26. How Revoked. A dedication by plat of lands for public purposes may be revoked before acceptance by conveying the land as private property. Hanford v. Seattle (Wash.) 1917B-195.

27. Where plat and deed of dedication contain no evidence of intent of plattor to donate a block known as "East Park," for public purposes or for any specific use, and where no public use was made of land, and taxes and special assessments were collected, and the land was transferred by deed as private property, it is held, under Wash. Code 1881, §§ 2332, 2339, there was nothing more than an ambiguous dedication of such tract which had been revoked, so that city could not claim land as public park (citing Words Phrases). Hanford v. Seattle and (Wash.) 1917B-195. (Annotated.)

#### Note.

Revocability of dedication of land to public use. 1917A-1109.

## 4. Right to Assert Dedication.

28. Bar by Limitations. successor in title of the original owner of lands, who, before selling, plats them so as to dedicate highways to the public, does not improve or encroach on such highways, the statute of limitations never begins to run against the right of the successor in title of an original purchaser from the original owner to insist on the maintenance of the highways, since the grantees of a dedicator may extinguish the right of the public in a street only by an unlawful encroachment thereon for a term equal to the period of the statute of limitations, which purpresture raises an estoppel. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.

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See Chattel Mortgages; Escrow; Estates; Lis Pendens; Mortgages; Quieting Title; Recording Acts; Remainders; Rescission, Cancellation and Reformation; Vendor and Purchaser.

Presumption of execution from acknowledgment, see Acknowledgments, 3.

Proof of delivery, see Admissions and Declarations, 8.

Of homestead, execution by wife, see Homestead, 11.

Liability of wife on covenants, see Husband and Wife, 45.

Life tenant's attempt to convey fee, effect, see Life Estates, 4.

Conveyances of mining interests, see Mines and Mining, 2, 3.

Deed intended as mortgage, see Mortgages and Deeds of Trust, 6-12.

Rule against perpetuities, see Perpetuities,

Record as notice, see Recording Acts, 9, 10, 11, 13.

Reformation, see Rescission, Cancellation and Reformation, 3, 5, 6.

Cancellation, see Rescission, Cancellation and Reformation, 12.

Tax deeds, see Taxation, 111-115.

Interpretation according to local meaning, see Usages and Customs, 2.

Building restrictions, see Vendor and Purchaser, 22-26.

## 1. REQUISITES.

#### a. In General,

- 1. Operative Words of Conveyance. Operative words manifesting intent to transfer the property are absolutely essential to the conveyance of title. The intent must be disclosed by the words of the deed not the mere acts of the parties. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.
- The requisites 2. Requisites of Deed. of a deed are persons able to contract for the purposes intended by the deed which must contain a grantor and a grantee and describe a thing granted, and the parties must be sufficiently described or the deed is void. Duffield v. Duffield (Ill.) 1916D-859.

## b. Execution.

3. "Execution" of Deed as Including Delivery. "Execution," as applied to a deed, DEEDS. 273

includes effective delivery. Williams v. Kidd (Cal.) 1916E-703.

## c. Delivery.

## (1) In General.

- 4. Delivery of Deed Defined. Delivery of a deed is the act, however evidenced, by which the deed takes effect and title thereby passes. Williams v. Kidd (Cal.) 1916E-703.
- .5. Intent to Transfer Present Title. A deed, to transfer real property, must be delivered by the grantor with intent to transfer title, and the test under which delivery is to be determined is in ascertaining whether, in parting with the possession of the deed, the grantor intended to divest himself of title; if he did there was an effective delivery, and, if not, there was no delivery. Williams v. Kidd (Cal.) 1916E-703.
- 6. Deed Taken by Violence. Where a vendor and a purchaser met to complete a sale of land, and the purchaser laid the money down and reached for the deed, whereupon the vendor knocked him down and took both the deed and money, it is held that there was no valid delivery of the deed. Coe v. Wormell (Wash.) 1917C-679.
- 7. Delivery Held Sufficient. The facts concerning the delivery of a deed considered, and held sufficient to constitute a valid delivery. Withers v. Barnes (Kan.) 1917B-55.

## (2) Delivery to Third Person.

- 8. The mere fact that a deed was signed and acknowledged by the grantor and at the same time handed to the husband of the grantee, with directions to the husband to keep the deed and give it to the grantee when the grantor was dead, and that the husband did so, was not alone conclusive evidence of a delivery with intent to vest in the grantee a present title. Williams v. Kidd (Cal.) 1916E-703.
- 9. Deposit for Delivery After Grantor's Death. A grantor may place his deed in the hands of a third person for delivery to the grantee on the death of the grantor, and such a delivery is effectual to pass a present title if the intention of the grantor is to make the delivery absolute. Williams v. Kidd (Cal.) 1916E-703.
- 10. Where a deed is deposited by the grantor with a third person, to be handed to the grantee on the death of the grantor, there is no delivery unless accompanied by an intention of the grantor that title shall immediately pass to the grantee, and where the deed is handed to the third person without any intention of a present transfer of title, but, on the contrary, with an intention of the grantor

to reserve the right of dominion over the deed and the right to revoke or recall it, there is no effective delivery, and where the grantor, when depositing the deed, intends that it shall only be delivered to the grantee after the death of the grantor, and title shall vest only on delivery to the grantee, the deed is inoperative as an attempt by the grantor to make a testamentary disposition. Williams v. Kidd (Cal.) 1916E-703.

11. Where a deed was delivered by the grantor to a third person to deliver to the grantee on the grantor's death, the grantee. producing the deed, established a prima facie case of delivery, which was overcome by proof of the fact that the grantee had no knowledge of the existence of the deed, and did not come into possession of it until after the death of the grantor. Williams v. Kidd (Cal.) 1916E-703.

## (3) Evidence of Delivery.

12. Where the issue was whether a grantor had ever parted with title, acts, conduct, and declarations of the grantor with reference to the property after the execution of a deed thereof were admissible on the issue of intent to deliver the deed. Williams v. Kidd (Cal.) 1916E-703.

(Annotated.)

- 13. Where a grantor delivered the deed to the husband of the grantee, with instructions to deliver the same to the grantee on the grantor's death, and the issue was whether the delivery was effective to pass a present title, the fact that the husband made no mention of the deed to the grantee until after the death of the grantor, though no secreey was enjoined on him by the grantor, could be considered to show that there was no delivery of the deed with intent to pass a present title, and that the husband knew it. Williams v. Kidd (Cal.) 1916E-703.
- 14. Where a grantor delivered the deed to the notary who took the acknowledgment, with instructions to deliver to the grantee on the grantor's death, and the deed was part of a plan by the grantor to dispose of all his property, a separate deed being contemplated for each piece of property, but the plan was never fully carried out, the fact that the notary knew that the plan was abandoned and that he made no entry of the deed in his notarial record as required by Pol. Code, § 794, could be considered in determining the question of effective delivery of the deed. Williams v. Kidd (Cal.) 1916E-703.
- 15. The failure of a third person to whom a deed had been delivered by the grantor, with instructions to deliver to the grantoe on the grantor's death, to call the grantor's attention to the fact that he could not make a sale of part of the prop-

erty covered by the deed, as contemplated by the grantor, could be considered in determining whether the delivery was effective to pass title. Williams v. Kidd (Cal.) 1916E-703.

16. Evidence held to sustain a finding that a deed was not delivered by the grantor with intent to transfer a present title. Williams v. Kidd (Cal.) 1916E-703.

#### Note.

Admissibility of declaration of grantor after conveyance as to delivery of deed. 1916E-713.

## d. Acceptance.

17. Refusal by One Grantee to Accept. The provision for the son, is not so complicated with the other gifts specified in the deed that the failure of one destroys them all. Miller v. Miller (Kan.) 1917A-918.

## 2. TIME OF TAKING EFFECT.

18. Rights of Senior Grantee. The senior grant vests the legal title in the holder and is always the paramount title, unless it has been lost by the adverse possession of another or he has renounced his title; and the law vests the possession of land in the paramount title holder, and a senior grantee is by operation of law in the constructive possession of the land, where it is not in the actual possession of another. Tennis Coal Co. v. Sackett (Ky.) 1917-629.

18½. Presumption as to Date. Prima facie, the date of a deed is the day of its execution, notwithstanding it was acknowledged at a later date. Dulin v. Ohio River R. Co. (W. Va.) 1916D-1183.

19. Taking Effect After Grantor's Death. A deed duly acknowledged, delivered, and recorded, which recites that the grantor, in consideration of a nominal sum paid in cash, and of love and affection, grants, bargains, sells, and conveys to the grantee specified real estate, "this deed not to take until after my death," conveys the title to the grantee subject to a life estate of the grantor, and is not testamentary in character. Phillips v. Phillips (Ala.) 1916D-994. (Annotated.)

#### Note.

Construction of instrument in form of deed to become effective upon death of grantor. 1916D-996.

#### 3. VALIDITY.

## a. Omission of Grantor's Name.

20. Grantor not Named in Body. An option to purchase land owned by a husband and wife jointly, apparently made by the husband alone, but signed by the

wife, is valid and binds the wife's interest. Agar v. Streeter (Mich.) 1916E-518. (Annotated.)

#### Note.

Effect of omission of grantor's name from body of deed. 1916E-521.

## b. Name of Grantee.

21. Deed to Grantee not in Existence. The grantee named in a deed must be a person, natural or artificial, capable of taking title at the time of the conveyance. Duffield v. Duffield (III.) 1916D-859.

(Annotated.)

22. A deed to heirs of a living person, without specifying their names, describes no one as grantee, and is void, for a living person has no heirs. Duffield v. Duffield (III.) 1916D-859. (Annotated.)

#### c. Consideration.

23. Future Support. A deed for lands made by a grantor, in consideration of "support during her natural life" therein recited, is not a gift, but is founded upon a valuable consideration, and when made by one having the mental capacity to make it, and without fraud, duress or undue influence, will be sustained. Soper v. Cisco (N. J.) 1918B-452.

#### d. Undue Influence and Fraud.

24. The rule that undue influence is not to be presumed from the mere relation of parent and child, in case of a conveyance from a parent to a child, does not conflict with the broad rule that where parties stand in confidential relation to each other a conveyance from the weaker to the dominant party is presumed to result from undue influence, and therefore, where facts are shown, other than the mere relation of parent and child, establishing between the parties a confidential relation in which the child is the dominant party, a conveyance from the parent to the child is presumed to be tainted with undue influence, and the burden is upon the child of show the bona fides of the transaction. Soper v. Cisco (N. J.) 1918B-452.

(Annotated.)

25. A mother, seventy-seven years of age, in the full possession of her mental faculties and in good physical health, made a deed for her homestead property to her daughter, forty-five years of age, who had been her chief support for fifteen years prior thereto. The consideration for the deed was \$300 and "support during her natural life" therein expressed. It was drawn by and acknowledged before a competent lawyer, with whom the mother conferred privately, and was recorded immediately. The property was then worth about \$5,000, but of small rental value and

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not readily marketable. The bargain was made at the solicitation of the mother, the daughter being reluctant. No effort was made to keep the transaction secret. Before and at the time of making the deed and until eleven years thereafter, when failing mental faculties rendered some restraint necessary, the mother had perfect liberty of action and freely saw such of her other children as she wished to see and who wished to see her. Her daughter supported the mother satisfactorily at the homestead for sixteen years after the deed was made, when the mother, without any fault of the daughter, went away and re-fused to return. Held, that the bargain was a natural and provident one for the mother to make and was not the product of undue influence, and will not be set aside for failure to show that the mother had "independent advice." Soper v. Cisco (N. J.) 1918B-452. (Annotated.)

## Note.

Presumption and burden of proof of undue influence in case of conveyance intervivos by parent to child. 1918B-457.

## e. Mental Incapacity.

- 26. Capacity of Grantor—Test. The test of mental capacity to make a deed is that a person shall have ability to understand the nature and effect of the act in which he is engaged and the business he is transacting. Soper v. Cisco (N. J.) 1918B-452.
- f. Conveyance in Fee to Take Effect in Future.
- 27. Limitation of Future Estate. A grantor has power to limit a future estate by his deed. Duffield v. Duffield (Ill.) 1916D-859.

## g. Conveyance of Expectancy.

- 28. A deed which on its face purports to convey a bare contingency or possibility, and in which there is nothing to show a present right in the vendor to sell a future benefit, is void.
- (a) A covenant of warranty in such deed will not inure to the benefit of the vendee, or his heirs, so as to subject after-acquired property of the vendor to such covenant. Dailey v. Springfield (Ga.) 1917D-943.

  (Annotated.)
- 29. Accordingly, where a vendor for a named consideration conveyed to a vendee "all the present rights in or title to all interests that" the vendor "may become possessed of either by inheritance or by deed from" the mother of the vendor, in certain city lots which the mother "now owns" in a certain city, and any interest he "may in the future become possessed of in any other city property, . . . either by deed or inheritance from" the mother,

this was an attempt to convey a mere naked possibility without any present interest, and was void.

terest, and was void.

(a) Where in such case an action was brought by the widow of the vendee, who was his sole heir, in her own right (there being no debts against the estate), to recover an interest in certain realty belonging to and the proceeds of certain other property derived from the mother's estate, after her death, a demurrer to such petition was properly sustained. Dailey v. Springfield (Ga.) 1917D-943.

(Annotated.)

#### h. Restrictive Conditions.

30. Restraint on Alienation—Validity. A restraint on the alienation of an equitable life estate, although in form of a covenant rather than condition, is invalid. Lee v. Oates (N. Car.) 1917A-514.

- 31. Public Policy. A covenant which is against public policy is not enforceable. Lee v. Oates (N. Car.) 1917A-514.
- 32. A condition in a deed, for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, is not against the public policy of the state, as creating a tenure of property unknown to the law, in view of La. Rev. Civ. Code, arts. 490, 491, 709, 1764, and 2013, giving the fullest liberty to contract and dispose of one's property. Queensborough Land Co. v. Cazeau (La.) 1916D-1248.

(Annotated.)

- 33. Condition Against Sale to Negro. A condition in a deed, for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, does not violate Const. U. S. Amend. 14; since, so far as prohibiting discrimination against the negro race, it applies only to state legislation, and not to contracts of individuals. Queensborough Land Co. v. Cazeau (La.) 1916D-1248. (Annotated.)
- 34. Restraint of Marriage—Validity of Condition in Deed. A condition subsequent in general restraint of marriage, contained in a deed to land, will be disregarded as invalid, and marriage will work no forfeiture. Gard v. Mason (N. Car.) 1917D-281. (Annotated.)
- 35. Validity of Condition Against Sale of Liquor. A townsite company, the stockholders of which owned a controlling interest in another corporation, engaged in mining adjacent to the townsite to induce workmen and employees of the coal company to make their homes in the proposed town, constructed houses thereon to be sold to such employees, and for that purpose procured a loan from a brewing company secured by a deed of trust on all the townsite property except two certain blocks and two lots in other blocks, and as a part of the transaction, and to effectuate a scheme

to restrict and limit the traffic in intoxicating liquors, agreed to convey such lots to the brewing company, and to insert, in all other deeds conveying lots, a condition that intoxicating liquors should never be sold on the premises except by druggists for medicinal purposes. It is held that such condition in conveyances of lots did not contravene public policy, and was valid and enforceable, as it was not intended to exclude absolutely the sale of intoxicating liquors, or to prevent competition therein in a broad and general sense, or in any way to control prices to the detriment of the public, especially as the business of selling intoxicating liquor at retail has never been a matter of common right nor a lawful trade except under such authority as is specially conferred by the sovereignty. Fusha v. Dacona Town Site Co. (Colo.) 1917C-108. (Annotated.)

36. Every owner of real estate in fee simple has the legal right to dispose of it either absolutely or conditionally and to regulate the manner in which it shall be used and occupied as he may deem just and proper, providing the conditions and restrictions imposed are not violative of the public good or subversive of the public interests, and, if conditions in a deed are made in good faith for a valuable consideration and do not stipulate for anything malum in se or malum prohibitum, they do not contravene public policy and should be enforced. Fusha v. Dacona Town Site Co. (Colo.) 1917C-108.

#### Notes.

Validity of condition in deed in restraint of marriage. 1917D-282.

Validity of partial or limited restraint on alienation of fee simple estate. 1916D-1254.

Validity of condition in deed prohibiting sale of liquor on land granted. 1917C-110.

Building restriction on restrictive agreement as binding public or public service corporation. 1918B-591.

## i. Nonexistent Grantee.

37. Where a deed purports to grant a present estate in possession to a certain grantee or grantees, and the grantee or any of the grantees are not in being when the deed is executed, no title passes to him or them, and heirs or heirs of the body of a living person are within the rule. Duffield v. Duffield (III.) 1916D-859.

(Annotated.)

Validity and effect of deed or grant of present estate to grantee not in existence. 1916D-864.

## 4. CONSTRUCTION.

## a. In general.

38. The intention of parties to a deed must be gathered from the language used,

which, in case of doubt, must be taken most strongly against the grantor. Bridgewater Milling Co. v. Fredericksburg Power Co. (Va.) 1916D-1027.

- 39. Grantors are presumed to intend what the words in their deeds import, and the same license of construction permitted in the case of wills is not allowed in the construction of deeds. Duffield v. Duffield (III.) 1916D-859.
- 40. A deed between a grantor and a person named and described as a son of the grantor, and the heirs of his body, as grantee, and which declared that the grantor in consideration of love and affection and the conditions stated, conditionally granted and conveyed to "the said grantee" described real estate on conditions specified, granted a present estate in possession to the grantee named and to the heirs having no existence, and the deed vested the title in the grantee named. Duffield v. Duffield (Ill.) 1916D-859. (Annotated.)
- 41. "Natural Heirs." The term "natural heirs," in a deed to one and her natural heirs, with no context to explain it, is to be given its legal and technical meaning, as it cannot be assumed the word "natural" was surplusage. Maynard v. Henderson (Ark.) 1917A-1157.

(Annotated.)

- 42. The term "natural heirs," in a deed to one and to her natural heirs, is not to be construed as meaning heirs generally, but as heirs of the body. Maynard v. Henderson (Ark.) 1917A-1157.
  - (Annotated.)
- 43. Intention of Parties. In construing a deed, regard must be had to the situation of the parties, the subject-matter of the agreement, and the object which the parties had in view at the time and intended to accomplish. Bridgewater Milling Corp. v. Fredericksburg Power Co. (Va.) 1916D-1027.
- 44. Construction of Clauses Together. The function or office of the reddendum in a deed is primary and it is equal, in dignity and virtue, to the premises. To ascertain the intent of the grantor and the effect of the deed, both must be read together and permitted to operate. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.
  - b. Doubtful or Uncertain Description.
- 45. Meaning of "More or Less." Where a farm is sold, described to contain 104 acres more or less, except 28.50 acres more or less sold to a railroad, a shortage of about three acres in the property passing to the purchaser is covered by the words "more or less," as such words are intended to cover a reasonable excess or deficit. Frey v. Etzel (Wis.) 1917D-153.

(Annotated.)

46. Uncertainty of Description. The law leans against the destruction of a deed for

uncertainty of description, and will construe, where it can be done consistently with the rules, so as to effect, and not to defeat, the intention of the parties. Nolen v. Henry (Ala.) 1917B-792.

47. A grantor, owning a large body of surrounding land, conveyed ten acres, to be laid off so as to include a certain shoal on the creek, which in fact was in section 15; the deed describing it as being in sections 16 and 22, to be laid off so as to include that certain shoal, the land to be surveyed and platted, and a certified plat to become a part of deed to complete a description, in view of the recording of the plat referred to therein, is an uncertain description, which may be aided by parol proof, and which comes within the maxim, "Id certum est, quod certum reddipotest." Nolen v. Henry (Ala.) 1917B-792.

#### Note.

Construction of term "more or less" in deed of realty. 1917D-155.

#### c. Conditions.

- 48. Construction Against Restriction. Where the right to enforce a restriction contained in the conveyance as to the use of the property conveyed is doubtful, all doubt should be resolved in favor of the free use thereof for lawful purposes by the owner of the fee: Hunt v. Held (Ohio) 1916C-1051.
- 49. Condition Against Sale to Negro. A condition in a deed, for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, is a condition subsequent, or a resolutory condition, the accomplishment of which has the effect of restoring matters to the situation in which they were before the contract was entered into. (La. Rev. Civ. Code, art. 2045.) Queensborough Land Co. v. Cazeau (La.) 1916D-1248.
- 50. Covenant to Use for Residence Purposes. A clause in a conveyance restricting the use of the property conveyed "for residence purposes only" does not prohibit the erection of a double or two-family house on the premises. Hunt v. Held (Ohio) 1916C-1051. (Annotated.)
- 51. The word "residence," as used in a covenant restricting the use of property to residence purposes, is equivalent to "residential" in contradistinction to "business," and has reference to the use or mode of occupancy to which the property may be put. A building used as a place of abode, and in which no business is carried on, is used for "fesidence purposes," whether occupied by one family or a number of families. Hunt v. Held (Ohio) 1916C-1051.

  (Annotated.)
- 52. Invalid Condition. Invalid conditions or provisions against alienation in a

deed do not defeat the estate to which they are annexed; but it stands, and the invalid conditions are rejected. Lee v. Oates (N. Car.) 1917A-514.

53. Estoppel—To Urge Invalidity of Restraint on Alienation. A void restraint on alienation in a deed cannot be enforced on ground of estoppel against persons signing the deed. Lee v. Oates (N. Car.) 1917A-514.

## d. Exceptions and Reservations.

54. Rights of Grantor of Railroad Right of Way. Where the owner of a body of land, through which a private road is maintained by him as a way necessary for ingress and egress between his residence and his farm and timbered lands located thereon, sells a strip of land through his tract to a railroad company for the purpose of locating a railroad thereon in such way as to intersect with the private road, and executes to the purchaser a formal deed, whereby he conveys the bargained land to the purchaser in fee simple, with a general warranty of title, and recites in the deed that the land is conveyed "absolutely and without reservation," there is no implied reservation of a right to continue the use of the road at the point of intersection with the land so granted; and under authority of the deed, the grantee, in so far as it might affect the grantor, can close the road. Carlton v. Seaboard Air-Line Ry. (Ga.) 1917A-497.

(Annotated.)

- 55. Repugnancy. An exception of severable matter, expressed in sufficient terms and placed immediately after the habendum in a deed, is not repugnant in the legal sense of the term to the granting clause, and is valid. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.
- 56. The space or position in a deed usually accorded to the reddendum may be used for a clause excepting a severable thing from the premises or granting clause of the deed, and an exception so made is not repugnant to the grant, unless it is in irreconcilable conflict therewith. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.
- 57. Effect of Exception. An exception eliminates from the operation of the terms of the granting clause so much of what would otherwise pass by them as is embraced in the terms of the exception, and the deed, as a whole passes what is embraced in the terms of the grant less what is included in the exception. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.
- 58. Exception of Minerals. An exception of the minerals in a tract of land, granted in general terms, by the premises of the deed, made by a clause in space

usually occupied by the reddendum, is valid. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.

- 59. The following terms in such a deed: "Excepting therein all coal or other minerals or mineral waters which are to be held in common by all the heirs" of the grantor, sufficiently manifest intent to except the minerals in the land from the operation of the deed. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.
- 60. Distinction Between Exception and Reservation. A reservation in a deed of proper subject-matter of an exception is, in law, an exception, though incapable of operation as a reservation, since it expresses unequivocal intent not to part with the thing reserved. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.

  (Annotated.)
- 61. Exception Abortive Attempt to Nullify. An abortive attempt, in a deed in which an exception is made, to grant the subject-matter of the exception, neither negatives the intent to except nor invalidates the exception. Freudenberger Oil Co. v. Simmons (W. Va.) 1918A-873.

#### Note

Distinction between exception and reservation in deed. 1918A-877.

- e. Inconsistent Provisions or Recitals.
- 62. Construction Estate Limited by Habendum Clause. Though the granting clause of a deed is "grants, bargains, sells, and conveys the lands," which under Kirby's Ark. Dig. § 731, imports a conveyance of a fee simple, "unless limited by express words of such deed," the following provision: "It is understood that said property is to be used as a game and fish preserve only and the conveyors . . . reserve . . . the right to cut and remove all timber . . . and it is a condition . . . should [the grantee] abandon the property . . . said lands shall revert to [the grantors] or its successors," not constituting, strictly speaking, an habendum clause, but clauses descriptive of the interest conveyed and of the purpose of the conveyance, limits the conveyance to the privilege of hunting and fishing; there being no such repugnancy between the granting clause and the succeeding clauses as necessitates a choice between conflicting provisions. Stokes v. State (Ark.) 1917D-657. (Annotated.)
- 63. Inconsistency of Granting and Habendum Clauses. While, if a deed clearly and by apt terms grants a title in fee simple, any limitation thereof in the habendum clause repugnant to or inconsistent with the estate so created is void, yet, in determining the intent the whole deed is to be looked to, and the granting clause, being merely "sell and convey

... undivided one-third interest," and intention to create a joint tenancy with right of survivorship clearly appearing from the deed in its entirety, it is to be given that effect. Wood v. Logue (Iowa) 1917B-116.

## f. Estate or Interest Conveyed.

- 64. It is also immaterial that the strip of land described in the map as a street was never used by any owner of the adjoining lands. Eltinge v. Santos (Cal.) 1917A-1143.
- 65. In such case it is immaterial that for many years a warehouse was maintained on a buyer's land, and that such warehouse had no opening toward the street. Eltinge v. Santos (Cal.) 1917A-1143.
- 66. Sale With Reference to Map—Rights of Purchaser. Where the vendor of land passed the deeds thereto before a certain map was recorded, the descriptions of the deeds referring to the map and recognizing that a street existed as delineated on such map as being adjacent to the property sold, the subsequent recordation of the map binds the vendor and his successors, so far as the private buyers are concerned, to accord to them a right of way over the land described as a street. Eltinge v. Santos (Cal.) 1917A-1143.
- 67. Estate Created. The nature and quantity of interests granted by a deed may be ascertained by the instrument itself and must be determined as a matter of law, and the intent is that which is apparent and manifest in the deed itself. Duffield v. Duffield (III.) 1916D-859.
- 68. Limitation Clauses. In construing a deed the portions defining and limiting the estate granted are the granting clause and habendum. Duffield v. Duffield (III.) 1916D-859.
- 69. Deed to One and Bodily Heirs. A deed to one and her bodily heirs creates a fee tail at common law, by Kirby's Ark. Dig. § 735, turned into a life estate in the first taker, with remainder in fee in her children. Maynard v. Henderson (Ark.) 1917A-1157.
- 70. What Estates may be Created. As used in Gen. Stats. Kan. 1868. c. 22, § 3, providing that conveyance of land, or of any other estate or interest therein, may be made by deeds, the words "conveyances of land" mean the land itself in fee simple, and "any other estate or interest therein" includes estates of freehold and less than freehold, of inheritance and not of inheritance, absolute and limited, present and future, vested and contingent, and any other kind a grantor may choose to invent consistent with public policy. Miller v. Miller (Kan.) 1917A-918.
- 71. Appurtenances. A grant of a lot abutting on a city street vests title to a

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coal vault under and an opening in a pavement, though in terms not expressly including either of them. Such title is, however, subject to the easement of the public for street purposes. Hill v. Norton (W. Va.) 1917D-489.

72. Quitclaim by Judgment Creditor. The holder of a judgment has no estate or interest in land subject to the judgment lien, but only a right to have it applied to the satisfaction of his debt, and hence an instrument executed by him quitclaiming a part of the land to a purchaser from the judgment debtor merely releases and exonerates such land from the judgment lien. Brown v. Harding (N. Car.) 1917C-548.

#### Note.

Construction of habendum clause in deed in connection with premises. 1917D-661.

- g. Evidence in Aid of Construction.
- 73. Where plaintiff, in a suit to establish ownership of various tracts of land and to the coal and minerals thereunder, substantially shows that the lands sued for were within his grant and not included in any prior grants or exclusions, the burden shifts to the defendant to show that the lands were included in an exclusion or prior grant. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 74. Grant of Lands Inclusion of Particular Tract. In such suit the evidence is held to show that such tracts were not embraced in any of the exceptions in the patent to the original patentee or in plaintiff's deed from the devisees under his will. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 75. Impeachment by Parol. The intention of the grantor is to be ascertained from the language employed in the deed. In case of doubt, interpretation may be aided by evidence of the situation and circumstances of the grantor and his relation to the grantees at the time the deed would take effect if valid, but it cannot be impeached by testimony of the grantor that he did not intend anybody should have the land if his son refused to take. Miller v. Miller (Kan.) 1917A-918.

# 5. COVENANTS RUNNING WITH LAND IN GENERAL.

76. A condition, in a deed for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, expressly declaring that it runs with the land, creates a real, as distinguished from a personal, obligation, and is valid under La. Rev. Civ. Code, art. 1901, giving the effect of laws to agreements legally entered into, and articles 11 and 12 prohibiting contracts against law and good morals.

Queensborough Land Co. v. Cazeau (La.) 1916D-1248. (Annotated.)

#### 6. COVENANTS OF TITLE.

## a. Warranty.

- 77. After Acquired Title. A deed by an expectant heir conveying with general warranty all of his interest in the real estate of his mother, though in effect a quitclaim deed, is sufficient to estop the grantor with respect to a title subsequently acquired by descent, as a quitclaim deed is sufficient to convey an absolute fee-simple title. Blackwell v. Harrelson (S. Car.) 1916E-1263.
- 78. Conclusiveness Against Covenantor of Judgment Against Covenantee. Notice of the suit and opportunity to defend it must be given to the warrantor of a title, or a judgment against the title in a suit against his grantee will not be available against him, if available at all, in favor of the successful assailant of the title. Kapi-olani Estate v. Atcherley (U. S.) 1916E-142. (Annotated.)
- 79. What Constitutes Breach of Warranty. Language of the deeds in question in this case examined, and held not a recognition of a highway right over the locus in quo. McAndrews, etc. Co. v. Camden National Bank (N. J.) 1917C-146. (Annotated.)
- 80. Whether the existence of an actual traveled highway across an open tract of land conveyed without mention thereof is a breach of a general covenant of warranty—quaere. McAndrews, etc. Co. v. Camden National Bank (N. J.) 1917C-146. (Annotated.)
- 81. When there is no open highway across land conveyed, and no indication on the ground of such highway to apprise the grantee of its physical existence, and no subjection of the land to highway uses recognized in the title deeds by express mention or reference to other documents, a prior dedication to public use, afterward accepted by the public and enforced by judgment, will support a suit for breach of warranty. McAndrews, etc. Co. v. Camden National Bank (N. J.) 1917C-146. (Annotated.)

#### Note.

Necessity of notice to covenantor of good title to defend eviction proceeding in order to conclude him in action on covenant. 1916E-148.

- b. Against Incumbrances.
- (1) What Constitutes Breach.
- 82. Railroad Right of Way as Breach of Covenant. Railroad tracks in existence and operation across a tract of land, when conveyed by deed containing a covenant

of warranty and against incumbrances, are incumbrances, where the grantee, though inspecting the premises before purchase, was misled by the grantor into believing that the railroads were paying rent for the right of way. Schwartz v. Black (Tenn.) 1916C-1195. (Annotated.)

- 83. Easement to Take Ice. A covenant that the grantor was well seised of the premises as of a good, sure, perfect, absolute, and indefeasible estate of inheritance, and that the same are free from all incumbrances which the grantor will forever warrant and defend, is breached by a reservation of the right to harvest ice formed on a pond within the land, which also required party in possession to maintain the water at a certain height; for the title to ice formed on ponds and streams belongs to the owner of the bed. Gadow v. Hunholz (Wis.) 1917D-91.
- 84. A landowner covenanted that the premises were free from incumbrances, but his title was subject to the right of others to harvest ice from a pond thereon. The owner of the ice right refused to dispose of it to the grantee, but the grantee was not called upon to keep the water up to a certain level, as the reservation required. It is held that, though the covenant was breached when the deed was made, the right reserved was in the nature of an "easement" or a "profit a prendre," which is the right to take the soil or a product thereof, and hence there was a constructive eviction entitling the grantee immediately to recover the amount of his damages. Gadow v. Hunholz (Wis.) 1917D-91. (Annotated.)

#### Note.

Nature and effect of grant of right to take ice from another's premises. 1917D-93.

- (2) Measure of Damages for Breach.
- 85. Easement Benefiting Land. Where, in a suit by a grantee for breach of general covenant of warranty and against incumbrances, because of railroad tracks and rights of way over the land, the evidence shows that the railroads are beneficial to the premises, the grantee cannot recover substantial damages. Schwartz v. Black (Tenn.) 1916C-1195.

#### 7. RECITALS.

86. Impeaching Recital in Deed. Where a deed by a husband for the benefit of his wife recited a valuable consideration, the burden of showing that the deed was executed in consideration of marriage rests on the husband suing for the restoration of the property after divorce of the parties. Anheier v. De Long (Ky.) 1917A—1239.

87. Contradiction by Parol. Ky. Civ. Code Prac. § 425, requiring a judgment of divorce to contain an order restoring any property which either spouse obtained from the other during marriage in consideration thereof, where a divorced husband seeks to recover property conveyed to the wife directly or indirectly in consideration of the marriage, the recital in the deed of a valuable consideration may be contradicted by parol, even in the absence of any fraud or mistake. Anheier v. De Long (Ky.) 1917A-1239.

## DEEDS OF TRUST.

See Mortgages.

#### DEER.

Right to kill within inclosure, see Animals, 21.

Killing deer in defense of property, see Animals, 22.

## DE FACTO OFFICERS.

See Public Officers, 30, 35, 58-60.

## DEFAMATION.

See Libel and Slander.

## DEFAULT.

See Pleading, 106.

## DEFAULT JUDGMENTS.

See Judgments, 46-50.

## DEFENDANTS.

See Parties to Actions.

#### DEFINITENESS.

'As essential to remedy, see Specific Performance, 2.

## DEFINITIONS.

See Words and Phrases.

## DEFRAUDING CREDITORS.

See Fraudulent Sales and Conveyances.

## DELAY.

See Laches.

## DEL CREDERE AGENTS.

See Agency, 9.

# DELEGATION OF LEGISLATIVE POWER.

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#### DELEGATION OF POWER.

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#### DELIVERY.

See Escrow, 1-12,

Of deed, proof, see Admissions and Declarations, 9.

Of negotiable paper, see Bills and Notes, 17-19.

Of deeds, see Deeds, 4-16.

Bar of statute removed by, see Frauds, Statute of, 6, 9.

Of gifts, see Gifts, 4, 5, 12, 13. Meaning, see Intoxicating Liquors, 81. As essential to pardon, see Pardons, 1. Of surety bond, see Suretyship, 7.

#### DELAY.

In telegram, see Telegraphs and Telephones, 27, 28.

#### DELUSION.

Defined, see Insanity, 24. Defined, see Wills, 62.

#### DEMAND.

Prerequisite to action for forfeiture, see Forfeitures, 1.

## DEMAND AND PRESENTMENT.

See Bills and Notes, 31, 32.

#### DEMURRAGE.

State regulation of, see Carriers of Goods, 20.

#### DEMURRER.

See Equity, 20; Pleading, 38-62.
Ruling on held harmless error, see Appeal and Error, 223-227.
To indictment, see Criminal Law, 16.

## DEMURRER TO EVIDENCE.

See Trial, 51.

#### DEPARTURE.

See Pleading, 98.

## DEPENDENTS.

Who are under Employers' Liability Act, see Master and Servant, 74, 75. Who are, under Workmen's Compensation Act, see Master and Servant, 265-269.

## DEPOSITARIES.

See Escrow.

#### DEPOSITIONS.

1. Right to Take, 281.

2. Necessity and Sumciency of Notice, 281.

3. Admissibility in Evidence, 282.

Review, see Appeal and Error, 105. Deposition at former trial, admissibility, see Evidence, 84.

#### 1. RIGHT TO TAKE.

- 1. Proof of Incapacity of Testator. An action will not lie to perpetuate testimony as to the alleged incompetent mental condition of one who has executed a will and who is still living. Pond v. Faust (Wash.) 1918A-736.
- 2. Necessity and Sufficiency of Notice. A notice to take deposition of a witness about to go out of the commonwealth and not to return in time for trial, directed to "James C. McClellan," while the party's name was "James C. McLellan," and seasonably served, is sufficient, though subsequent notice, not seasonably served, correctly gave the name of the party. McLellan v. Fuller (Mass.) 1917B-1.
- 3. Under Ala. Code 1907, § 4032, as amended by Acts 1911, p. 487, providing, relative to depositions, that when the testimony is desired under section 4030, subd. 3, authorizing the taking of depositions when the witness resides more than 100 miles from the place of trial or is absent from the state, the testimony may, unless the opposite party makes the affi-davit therein prescribed, be taken by interrogatories, that the moving party may file interrogatories, of which and of the residence of the witness and of the commissioner to be appointed he must give the opposite party notice, and that, if thereupon such opposite party shall make affidavit that in his belief it is material that the testimony of such witness be taken orally, the clerk shall issue a commission to take such testimony by oral examination, provided, however, that in all cases in which testimony is to be taken by interrogatories the party against whom the testimony is proposed to be taken shall, within the time allowed to file cross-interrogatories, have the right to demand reasonable notice of the time and place of taking the testimony and to attend such examination and cross-examine the witnesses orally in all cases where depositions are taken on commissions from the law courts, the party against whom it is proposed to take the testimony within the time for filing crossinterrogatories has a right to demand reasonable notice of the time and place of taking the testimony, and to attend and cross-examine the witnesses orally, though the meaning of the statute is somewhat obscure. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.
- 4. Necessity of Naming Witness. The notice directing the commission to take

the depositions of persons named "and others," depositions taken of others than those named are admissible. In re Rawlings' Will (N. Car.) 1918A-948.

(Annotated.)

#### Note.

Necessity and sufficiency of naming of witness in notice of taking deposition. 1918A-950.

## ADMISSIBILITY IN EVIDENCE.

- 5. Depositions Taken Before Such statute does not render inadmissible a deposition of the surviving party to a transaction taken before the death of the other party, though it is offered in evidence after such death. Beaston v. Portland Trust, etc. Bank (Wash.) 1917B-488. (Annotated.)
- 6. Right of Adverse Party to Use. When a party takes a deposition and files it, but declines to read it, his adversary may read it, but he must introduce the whole. Jonas v. South Covington, etc. R. Co. (Ky.) 1916E-965. (Annotated.)

## DEPOSITS.

See Banks and Banking, 13-22, 24-56.

#### DEPOTS.

See Carriers of Passengers; Railroads.

### DESCENT AND DISTRIBUTION.

- 1. Nature and Right of Succession, 282.
- 2. Property Subject to Succession, 282.
- 3. Who may Inherit, 282.
  a. Illegitimate Children, 282.
  b. Inheritance Through Illegitimates, 282.
- 4. Actions Concerning Property of Intestates, 283.
- 5. Assignment of Prospective Inheritance,

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Inheritance from foster parent, see Adoption of Children, 5, 6.

Inheritance from adopted child, see Adoption of Children, 7-9.

Inheritance by aliens, see Aliens, 5-7. Distribution to heirs, legatees and creditors, see Executors and Administrators. 57 - 61.

## 1. NATURE AND RIGHT OF SUCCES-SION.

- 1. Time of Ascertainment. The son has no heirs at all while living. Who the heirs of his body may be cannot be ascertained until his death, and children now in being take nothing under the deed unless they outlive their father. Miller v. Miller (Kan.) 1917A-918.
- Nature of Right to Inherit or Take by Will. The right to inherit or to take

by will and the right to devise and to bequeath are not natural and inalienable rights, nor are they guaranteed by the state or federal constitutions. Moody v. Hagen (N. Dak.) 1918A-933.

(Annotated.)

#### Note.

Right to take property by inheritance or will as natural right protected by constitution. 1918A-939.

## 2. PROPERTY SUBJECT TO SUCCES-SION.

- 3. Survival of Actions. In such case, if the injury occurred during the lifetime of plaintiff's devisor, the right of action does not descend to plaintiff as the devisee, but survives to the devisor's personal representatives. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 4. Situs of Corporate Stock. Shares of stock in a corporation are personal property, and descend according to the laws of the state which was the domicil of the owner at the time of his death, and the certificates of shares of corporate stock, which constitute evidence of ownership, are transferred according to the laws of the state wherein the corporation was organized. State v. Dunlap (Idaho) 1918A-546. (Annotated.)

## 3. WHO MAY INHERIT.

## a. Illegitimate Children.

- 5. As used in Kan. Gen. St. 1909, § 2956, providing that illegitimate children shall inherit from the father whenever they have been recognized by him as his children, but such recognition must have been general and notorious, or else in writing, "general" means "extensive," though not "universal" and "notorious" is synonymous with "open." Record v. Ellis (Kan.) 1917C-822. (Annotated.)
- 6. From or Through Mother. It is the law in Connecticut that a child born out of wedlock is the child of its mother, capable of inheriting from her and through her. Moore v. Saxton (Conn.) 1917C-534.
- 7. Inheritance from Father. The testimony examined and found not to support a finding of general and notorious recognition by the father of the plaintiff's sonship as required by the statute (Kan. Gen. Stat. 1909, § 2956), in order to entitle him to inherit from the father. Record v. Elis (Kan.) 1917C-822. (Annotated.)

## Note.

Right of illegitimate child to inherit from or through father. 1917C-826.

- b. Inheritance Through Illegitimates.
- 8. Construction of Statute. Under S. Car. Civ. Code 1912, § 3562, which was en-

acted in 1906, and which provides that any illegitimate child whose mother shall die intestate shall, so far as her property is concerned, be an heir at law as to such property, the children of an illegitimate child who died prior to 1906 are heirs of their grandmother, the mother of the illegitimate child, who died subsequent to 1906; as the act is remedial, and so construed is not retrospective, since it looks forward to the time when the distribution of the intestate's estate is to be made, especially in view of section 3555, providing that the lineal descendants of an "estate" (intestate) shall represent their respective parents and take among them the share or shares to which their parents would have been entitled had such parents survived the intestate, and, moreover, the legislature in using the technical term "heir at law" must have intended to invest the illegitimate children with inheritable blood such as other heirs at law pos-Trout v. Burnette (S. Car.) 1916E-(Annotated.) 911.

#### Note.

Law governing status of person as legitimate or illegitimate. 1917C-537.

# 4. ACTIONS CONCERNING PROPERTY OF INTESTATES.

Liability of Heirs for Debts—Enforcement-Laches. On a bill to charge the lands of a decedent in the hands of the heirs with a sum alleged to be the property of his surviving children to which they became entitled upon his death as part of their mother's estate, it appeared that complainants' mother on her death in 1895, intestate, was seized in fee-simple of an improved lot, that the property vested in her children as tenants in common, subject to the life estate of their surviving father, that the surviving husband and children immediately sold the lot, that the father gave two-thirds of the proceeds to the children and retained the other third for his own use during his lifetime, though he was entitled to the use of the whole proceeds for life, and the father and the children treated the property as his for 18 years until his death. It is held that as courts of equity do not countenance laches or long delays and refuse to interfere in favor of a party guilty of laches or unreasonable acquiescence in the assertion of stale demands, the bill was properly Henderson v. Harper (Md.) dismissed. 1917C-93. (Annotated.)

# 5. ASSIGNMENT OF PROSPECTIVE INHERITANCE.

10. Release of Expectancy to Answer. Where, as he may, the prospective heir of a living person releases his expectancy to the ancestor, a court of equity will enforce the contract for the benefit of the other

heirs. Donough v. Garland (III.) 1916E-1238.

11. Assignment of Expectancy to Stranger. Where the prospective heir of a living person assigns or transfers his expectancy, the transaction operates as a contract by the assignor to convey the legal estate or interest when it vests in him, which will be enforced in equity when the expectancy has become a vested interest. Donough v. Garland (Ill.) 1916E-1238.

(Annotated.)

- 12. Release to Ancestor. The release to a living ancestor by his prospective heir of such heir's expectancy is not within the terms of the statute of descent (Hurd's Rev. St. III. 1913, c. 39, §§ 4, 8), relating to advancements received by a child or lineal descendant toward his share of the estate. Donough v. Garland (III.) 1916E-1238.
- 13. Where an heir presumptive releases his expectancy as such to his ancestor, the release operates to extinguish his right of inheritance; the line of inheritance is ended by the release, which is binding not only upon the heir, but upon those taking as heirs in his place. Donough v. Garland (III.) 1916E-1238.
- 14. Assignment of Expectancy to Stranger. Where an heir presumptive assigns his expectancy as such to a third person, instead of releasing it to his ancestor, his right of inheritance is not extinguished, but the assignment will be enforced as a contract to convey the legal interest when it ceases to be an expectancy and becomes a vested estate, and the assignee acquires a right to the estate only if it ever vests in the heir. Donough v. Garland (Ill.) 1916E-1238. (Annotated.)

## Note.

Validity of transfer of expectancy in estate made by heir or beneficiary to stranger. 1916E-1241.

## DESCRIPTION.

In contract to sell land, see Vendor and Purchaser, 5.

## DESERTION.

See Divorce, 9-14, 37-43.

#### DESIRE.

Meaning, see Wills, 192, 194, 195

## DESTRUCTION.

Of will as revival of former one, see Wills, 113.

## DETAINER.

See Forcible Entry and Detainer.

## DIGEST. 1916C-1918B.

#### DETECTIVES.

See Licenses, 23,

Sheriff's duty as to detectives, see Sheriffs and Constables, 7.

Communications with employer as privileged, see Witnesses, 33½.

#### DETENTION.

See False Imprisonment.

DETINUE.

See Replevin.

#### DEVISES.

See Wills.

Contract to devise, see Specific Performance, 5, 6, 9.

#### DIAGNOSIS.

Liability for error, see Physicians and Surgeons, 21.

#### DIARY.

As evidence, see Evidence, 103, 104.

#### DICTA.

As precedents, see Stare Decisis, 10.

## DICTAPHONE.

Admissibility of evidence procured by, see Homicide. 35.

## DILIGENCE.

Dismissal for want of, see Dismissal and Nonsuit, 4-9.

Sufficiency of showing diligence to secure evidence, see New Trial, 22-24, 33, 34.

## DIPLOMATIC OFFICERS.

See Ambassadors and Consuls.

## DIRECT ATTACK.

On judgment, see Judgment, 80.

#### DIRECTING VERDICT.

See Verdicts, 14-35.

## DIRECTORS.

Powers and duties, see Corporations, 52, 53.

## DISAFFIRMANCE.

Of contract by minor, see Infants, 8-14.

## DISBARMENT OF ATTORNEYS. See Attorneys, 44-68.

#### DISCHARGE.

See Release and Discharge.

Of bankrupt, see Bankruptcy, 24, 25. As consideration, see Bills and Notes, 12.

Of negotiable paper, see Bills and Notes, 12. of negotiable paper, see Bills and Notes, 35-37.

Of servant, see Master and Servant, 3-5, 8. Of surety, see Suretyship, 15-19. Effect of release of cosurety, see Surety-

ship, 25.

#### DISCIPLINE.

Punishment of convicts, see Convicts, 3.

## DISCLAIMER.

General powers no authority for, see Attorneys, 8.

#### DISCONTINUANCE.

See Dismissal and Nonsuit.

#### DISCOUNT.

Provision for, effect on negotiability, see Bills and Notes, 21.

#### DISCOVERY.

Order to produce books not reviewable, see Certiorari. 3.

- 1. Showing of Materiality. Though, under Iowa Code, § 4654, providing that the district court may in its discretion require the production of any papers or books which are material to the just determination of any cause pending before it, the application for such order must affirmatively show that the evidence is material, yet an express averment is not necessary, and where, in an action for libel plaintiff applied for an order to require defendant newspaper to produce its circulation lists, and the petition set out in detail what was expected to be proved by such evidence, it is sufficient as showing the materiality of the evidence. Dalton v. Calhoun County District Court (Iowa) 1916D-695.
- 2. Production of Newspaper Circulation Books. An order of the court, in an action for libel, requiring defendant therein to produce as evidence its circulation books, is not an unreasonable search and seizure in violation of the constitution. Dalton v. Calhoun County District Court (Iowa) 1916D-695.
- 3. Privilege—Transcript of Court Proceedings. A transcript of shorthand notes of a proceeding in court which the attorney of a stranger thereto procured to be taken for his information in anticipated litigation is not privileged from inspection. Lambert v. Home (Eng.) 1916C—872. (Annotated.)
- 4. Production of Document, In an action against a newspaper for libel, the

circulation books of the newspaper are material evidence showing the extent of the injury, and the fact that defendant in its answer admitted the circulation as broadly as charged does not render it immaterial, since plaintiff, notwithstanding the admissions, has the right to introduce the evidence. Dalton v. Calhoun County District Court (Iowa) 1916D-695. (Annotated.)

## Notes.

Transcript of court proceedings as privileged from inspection. 1916C-876.

Effect on right to production of document of admission by opposing party as to its contents. 1916D-698.

#### DISCRETIONARY ACTS.

Not compellable, see Mandamus, 3.

#### DISCRETION OF COURT.

Permitting reading law to jury, see Argument and Conduct of Counsel, 27.

In disbarment proceedings, see Attorneys, 48, 52.

In ruling on challenges, see Jury, 27, 28. On motion for new trial, see New Trial, 1, 22, 25, 40, 42, 43.

Physicial examination of plaintiff, see Physical Examination, 2.

Amendment without terms, see Pleading, 70.

In imposing sentence, see Sentence and Punishment, 17-19.

As to continuance, see Trial, 1.
As to exhibitions before jury, see Trial,

As to qualification of experts, see Witnesses, 11.

## DISEASE.

See Health.

As defense, see Breach of Promise of Marriare, 1, 5-8.

Workmen's Compensation Act as applying to, see Master and Servant, 110, 193-198, 200.

As affecting testamentary capacity, see Wills, 83, 86.

## DISHWASHER.

As within Workmen's Compensation Act, see Master and Servant, 226.

# DISMISSAL AND NONSUIT.

See Equity, 21-25.

Of appeal, see Appeal and Error, 82-88. Right of client to dismiss, see Attorneys, 15.

Of condemnation proceedings, see Eminent Domain, 92-96.

Sufficiency as termination of suit, see Malicious Prosecution, 5, 6.

Discontinuance of special assessment proceedings, see Taxation, 138.

Of taxpayer's suit, see Taxation, 203.

- 1. Motion to Dismiss Properly Denied. Certain motions to dismiss, made at the close of plaintiff's case and again at the close of all the testimony, held properly denied. Price v. Minnesota, etc. R. Co. (Minn.) 1916C-267.
- 2. Failure of Proof. Where the testimony for plaintiff, in a personal injury case, leaves the cause of the accident to mere speculation, a nonsuit should be entered. Holmberg v. Jacobs (Ore.) 1917D-
- 3. Taking Case from Jury-Insufficiency of Evidence. The court should not take a case from the jury upon a motion for a nonsuit or upon a motion to direct the jury to return a verdict for defendant, un-less it appears that the evidence in plaintiff's behalf, upon the most favorable construction that the jury would be at liberty to give, would not warrant a verdict for plaintiff. McAlinden v. St. Maries Hospital Assoc. (Idaho) 1918A-380.
- 4. Dismissal for Want of Prosecution. The fact that one of defendant's counsel died within the five year period and the other ceased to act will not excuse plaintiff from bringing the action to trial within that time, as he could have required defendant to appoint another attorney, or appear in person. Larkin v. Superior Court (Cal.) 1917D-670.
- 5. After defendant's answer, plaintiff's attorney died, and defendant served no notice on plaintiff in accordance with Cal. Code Civ. Proc., § 286, declaring that when an attorney dies or ceases to act a party to an action for whom he was acting must, before any further proceedings are had against him, be required by the adverse party by written notice to appoint another attorney or appear in person. Section 583 provides that if an action is not brought to trial within five years after answer it shall be dismissed. It is held that the defendant's failure to file notice demanding the appointment of an attorney for the plaintiff did not preclude him from claiming a dismissal for plaintiff's failure to bring the case to trial within five years. Larkin v. Superior Court (Cal.) 1917D-670.
- 6. That the original defendant administrator died within the five-year period arter answer in which actions must, under Cal. Code Civ. Proc. § 583, be brought to trial, and no other administrator was appointed until after the expiration of that period, will not excuse plaintiff's failure to bring the action to trial and so preclude dismissal. Larkin v. Superior Court (Cal.) 1917D-670.
- 7. Where the answer was filed June 30. 1909, and the minutes of the court showed that on November 27th, the date set for trial, the parties appeared in court and through their counsel stipulated that trial should be fixed for April 11, 1910, and the

court so ordered, that on April 11, 1910, the case was continued until June 29th, and on June 29th the case was again continued until September 19th, but there was no record entry of independent stipulation in writing providing that time of trial should be extended beyond the five-year limit, the action must be dismissed under Cal. Code Civ. Proc. § 583, declaring that an action not brought to trial within five years after answer shall be dismissed, unless extended by written stipulation of the parties. Larkin v. Superior Court (Cal.) 1917D-670.

- 8. Under such statute, a stipulation by counsel of the respective parties for an extension of the time of trial is a stipulation of the parties. Larkin v. Superior Court (Cal.) 1917D-670.
- 9. Delay in Bringing Action to Trial. Cal. Code Civ. Proc. § 583, declaring that any action shall be dismissed by the court in which it shall have been commenced, or to which it may be transferred on motion of defendant after due notice to plaintiff, unless it is brought to trial within five years after defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended, is mandatory. Larkin v. Superior Court (Cal.) 1917D-670.

#### DISOBEDIENCE.

Of servant, effect under Workmen's Compensation Act, see Master and Servant, 199, 207.

## DISORDERLY CONDUCT. See Breach of Peace.

## DISORDERLY HOUSES.

See Prostitution.

Policy on bawdy house, validity, see Fire Insurance, 1.

Injunction to abate, see Injunctions, 29.

- 1. "Blind Tiger." A disorderly "blind tiger" is a disorderly "tippling-house." Calhoun v. Bell (La.) 1916D-1165.
- 2. Illegal Sale of Intoxicants. A saloon run in violation of law is a "disorderly house," which is defined as any place where illegal practices are habitually carried on; and hence a saloon open, equipped, and ready for business is a threat to breach the peace, if not in itself a breach of the peace. State v. Reichman (Tenn.) 1918B-889.
- 3. Owners of Premises—Liability for Use for Prostitution—Tenement House Act. The N. Y, Tenement House Law, as amended by Laws 1913, c. 598, forbidding the use of any part of a tenement for purpose of prostitution, though construed to inflict a penalty independently of knowledge on the part of the owner as to the

use, is a valid act. Tenement House Department v. McDevitt (N. Y.) 1917A-455.

- 4. The knowledge of the owner of the use of a tenement is not essential to a recovery of the penalty under the N. Y. Tenement House Law, as amended by Laws 1913, c. 598, forbidding that a tenement be used for prostitution. Tenement House Department v. McDevitt (N. Y.) 1917A-455. (Annotated.)
- 5. Under N. Y. Tenement House Law (Consol. Laws, c. 61) §§ 109, 124, as amended by Laws 1913, c. 598, giving right of action for penalty if any tenement house or any part thereof shall be used for a purpose of prostitution, an act on a single day, followed by the eviction of the occupants, is insufficient to show the use forbidden by the statute. To make the owner liable, it must appear that the building has been "used" for the purpose of prostitution, and this imports, not an isolated act of vice, but some measure, even though brief, of continuity and permanence. To say that a building is used for such a purpose means, in substance, that it is kept or maintained for such a purpose. Tenement House Department v. McDevitt (N. Y.) 1917A-455.
- 6. Instructions—Definition of House of III Fame. The refusal of an instruction defining a house of ill fame as a place inhabited by more than one woman actually engaged in prostitution, and the giving of an instruction defining it as a house visited by persons of both sexes for the purpose of having unlawful indiscriminate sexual intercourse, is not error. State v. Gardner (Iowa) 1917D-239.

## Note.

Validity and construction of statute making owner of premises liable for use thereof for purpose of prostitution. 1917A-459.

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## DIVORCE.

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## 1. JURISDICTION.

1. Statute Requiring Residence. The constitutional prohibition against the impairment of obligation of contracts does not apply to divorces, which are under the not apply to divorces, which are under the control of the legislature, and the provision of Act Feb. 20, 1913 (Laws Nev. 1913, c. 10), amending section 22 of the marriage and divorce act of 1861 (Laws 1861, c. 33), as amended in 1875 (Laws 1875, c. 22), by declaring that when, at the time a cause for divorce accuracy the the time a cause for divorce accrues, the parties are not both residents, the court cannot have jurisdiction, unless either party has been a bona fide resident for not less than one year, does not impair the obligation of contracts, though it be construed as relating to a cause for divorce. Worthington v. District Court (Nev.) 1916E-1097. (Annotated.)

2. Acts Feb. 20, 1913 (Laws Nev. 1913, c. 10), amending section 22 of the marriage and divorce act of 1861 (Laws 1861, c. 33), as amended in 1875 (Laws 1875, c. 22), by declaring that when, at the time a cause for divorce accrues, the parties shall not have been bona fide residents, the court shall not grant a divorce, unless either party shall have been a bona fide resident for not less than a year, provides for a classification of nonresidents at the time of the accrual of a cause of action for divorce, and the classification is reasonable, and does not conflict with the Fourteenth Amendment to the federal constitution guaranteeing the equal protection of the laws. Worthington v. District Court (Nev.) 1916E-1097.

(Annotated.)

3. Requirement as to Residence. The provision in Act Feb. 20, 1913 (Laws Nev. 1913, c. 10), amending section 22 of the marriage and divorce act of 1861 (Laws 1861, c. 33), as amended in 1875 (Laws 1875, c. 22), by declaring that when, at the time of the accrual of a cause for divorce, the parties shall not both be bona fide residents of the state, no court shall grant divorce, unless either party shall have been a bona fide resident for not less than one year next preceding the commencement of the action, is of general uniform operation throughout the state, and applies the same in every part of the state, and to all persons under similar circumstances, and is not a local or special law within Const. art. 4, \$20, prohibiting any local or special law granting a divorce. Worthington v. District Court (Nev.) 1916E-1097. (Annotated.)

- 4. Power of Court. The courts have no inherent power to grant a divorce; but such power must be conferred by statute. Worthington v. District Court (Nev.) 1916E-1097.
- 5. Residence Essential to Jurisdiction. The courts of a state have no jurisdiction to grant a divorce, unless at least one of the parties has a domicil in the state, and the appearance of a nonresident derendant will not invest the court with jurisdiction of a suit brought by a person who has no bona fide domicil in the state. Worthington v. District Court (Nev.) 1916E-1097.
- 6. Statute Requiring Residence. A statute of a state which provides that where, at the time of the accrual of a cause for divorce, the parties shall not be both bona fide residents, no court shall grant a di-vorce, unless either party shall have been a bona fide resident for not less than one year next preceding the bringing of the action, does not violate Const. U. S. art. 4, § 2, guaranteeing to citizens of each state all privileges and immunities of citizens in the several states; there being a distinction between the citizenship and residence and the rights of citizens and residents. and the constitution guaranteeing no rights to citizens as to divorce. thington v. District Court (Nev.) 1916E-(Annotated.)
- 7. Right to Change of Venue. S. Dak. Code Civ. Proc. § 101, requiring actions to be tried in the county of defendant's residence, and section 102, authorizing the court to change the place of trial when the action is brought in the wrong county, apply to actions for divorce where the defendant resides in a different county from that of plaintiff, notwithstanding the provisions of Laws 1907, c. 132, § 1, that the plaintiff in an action for divorce must have been a resident for three months of the county where the action is commenced. Hockett v. Hockett (S. Dak.) 1917A-938. (Annotated.)

## Notes.

Change of venue in divorce action. 1917A-940.

Validity of statute requiring certain period of residence within state as pre-requisite to divorce. 1916E-1110.

#### 2. GROUNDS FOR DIVORCE.

#### a. In General.

8. Right to Divorce Statutory. The right to a divorce is not a guaranteed privilege of the citizens, and the right to divorce is limited to the causes and subject to the requirements prescribed by state statute. Worthington v. District Court (Nev.) 1916E-1097.

## b. Desertion.

- 9. Conduct of Husband's Relatives. Where husband without necessity refused to provide a separate home for his wife, or to furnish a home with her, except at the home of his parents, where she refused to live, but was willing to live with him under any other reasonable conditions, her refusal is not "desertion" sufficient to justify a divorce. Marshak v. Marshak (Ark.) 1916E-206. (Annotated.)
- 10. What Constitutes Desertion. There may be a separation of husband and wife without desertion, and desertion of a wife by her husband without separation. Tipton v. Tipton (Iowa) 1916C-360.
- 11. Separation Pursuant to Antenuptial Agreement. Abnormal conditions in the marital relation instituted by mutual agreement between husband and wife will afford neither party ground for judicial action against the other, as where the wife lived with her people apart from the husband from the time of the marriage, except for his occasional visits, but such abnormal conditions are to be considered in determining, if there existed a marital relation for the husband to sever by desertion and in determining if his conduct constituted a desertion. Tipton v. Tipton (Iowa) 1916C-360. (Annotated.)
- 12. Where the wife lived with her parents from the time of marriage, receiving visits from her husband several times weekly, and visiting occasionally at his parents' home, where he lived, there is a marital relation that might be severed by the husband by desertion. Tipton v. Tipton (Iowa) 1916C-360.
- 13. Want of Reasonable Excuse. It is not alone sufficient to justify a divorce that there was a desertion; but the desertion must have been without reasonable excuse. Tipton v. Tipton (Iowa) 1916C-360.
- 14. Desertion upon Agreement. An action for divorce for abandonment or desertion occurring after a separation agreement cannot be maintained. Canning v. Canning (Vt.) 1916C-344.

  (Annotated.)

## 3. DEFENSES.

#### a. Condonation.

- 15. What Constitutes. The wife's adultery in keeping an assignation house and offering herself therein, is completely condoned by cohabitation for ten years, when the husband knows of and assists her in operating the house. Klekamp v. Klekamp (Ill.) 1918A-663. (Annotated.)
- 16. Breach of Condition of Condonation. A wife's petition for divorce on the ground of cruelty, wherein the defense is condonation by cohabitation pending the proceeding, but where it is found that the condition of the condonation had been broken by renewed acts of cruelty, is not thereby abated, but the petitioner may rightfully proceed and obtain a divorce thereunder. Egidi v. Egidi (R. I.) 1918A—648.
- 17. "Condonation" is the forgiveness, express or implied, by one of the married parties of an offense which he knows the other has committed against the marriage, on the condition of being continually afterwards treated by the other with conjugal kindness, and that there shall be no just cause for complaint in the future resulting in the rule that, while the condition remains unbroken, there can be no divorce, but that a breach of it revives the original remedy. Egidi v. Egidi (R. I.) 1918A-648.

(Annotated.)

18. While cohabitation while a divorce proceeding is pending is ordinarily a condonation, and a bar to the relief prayed for, yet when the charge is cruelty, much less cruel treatment than would be necessary for a good ground for divorce, will suffice to avoid the defense of condonation, and the wife, owing to her helplessness, is more indulgently considered as to condonation than the husband, and if the condition of condonation in such case is broken by a renewal of the acts of crueltv. the original right to relief remains. Egidi v. Egidi (R. I.) 1918A-648.

(Annotated.)

## Note.

Condonation as defense in action for divorce. 1918A-651.

## b. Connivance.

- 19. Offer to Return After Lapse of Statutory Period. Where the right of a wife to a divorce for desertion continued for the statutory period is made out, no court has power to deny her relief, when she insists upon divorce merely because her husband promises to return to the marital relation. Tipton v. Tipton (Iowa) 1916C-360.
- 20. Where defendant husband, in a divorce suit, requested his wife, then living

with her parents, to go to housekeeping, and she wrote asking him not to think of it until spring, because of her condition, defendant's contention is unsound that this was an agreement to remain separated until spring, so that plaintiff cannot succeed in her attempt to prove a desertion begun by such separation. Tipton v. Tipton (Iowa) 1916C-360.

21. Effect of Separation Agreement. A husband's assent to his wife's separation from him exonerates her from the charge of desertion and bars his suit for divorce, founded upon such charge. McCoy v. McCoy (W. Va.) 1916C-367.

(Annotated.)

22. Adultery. The recriminatory charge of adultery cannot be urged by one who has connived at the offense. Klekamp v. Klekamp (III.) 1918A-663.

#### c. Recrimination.

- 23. The doctrine of "recrimination" in divorce cases, whereby one spouse, guilty of offenses against the married status, will be denied divorce notwithstanding an offense of the other, does not necessitate that the spouses be guilty of the same offenses, but a wife, seeking a divorce on account of the inhuman and cruel treatment of her husband, will not be denied a divorce where she was guilty of no offense against the married status, though her conduct was not, in all respects, what it should have been. Heicke v. Heicke (Wis.) 1918B-497.
- 24. A husband guilty of adultery may not obtain a divorce for his wife's desertion and abandonment, though the statutory period of desertion elapsed before the adultery, and though the wife's desertion was the inciting cause of the crime. Green v. Green (Md.) 1917A-175. (Annotated.)
- 25. Want of affection of a wife for her husband, giving rise to a dislike of him, that leads her to refuse reconciliation after a separation or desertion, or that makes such a separation or desertion practically with her consent, will excuse the husband for deserting her only when his own evil conduct has not caused the dislike. Tipton v. Tipton (Iowa) 1916C-360.
- 26. In a suit for divorce, evidence held insufficient to show that plaintiff wife was guilty of misconduct sufficient to bar her of relief and justify later misconduct of her husband, having refused to keep house with him. Tipton v. Tipton (Iowa) 1916C-360.

## Note.

Right of recrimination in divorce action as affected by comparative gravity of offenses. 1917A-177.

## d. Refusal of Reconciliation

27. Where the defendant deserted his wife, her refusal of reconciliation, due to his own evil conduct, is not a ground to deny plaintiff wife relief, nor available as defense. Tipton v. Tipton (Iowa) 1916C-360.

## e. Separation Agreement.

28. A valid separation agreement does not bar the husband's petition for divorce from bed and board on the ground of the wife's adultery unknown to him when he entered into such agreement, nor, in the absence of an express stipulation against a suit for divorce for pre-existing causes then known to the other party, prevent either party from maintaining an action for divorce, either absolute or limited, whether the cause therefor occurred before or after such agreement. Canning Vt.) 19160-344.

(Annotated,)

- 29. Separation Agreement as Bar. A separation agreement reciting that it was made because the marital relations of the parties were not pleasant, and providing that the husband should pay the wife \$6 a week during his life, and in case of his death for four years, by which the husband waived all right to the wife's property, and the wife released all her interest in her husband's real estate, and agreed to contract no bills on his credit, cannot be construed as an agreement not to sue for separation for a pre-existing cause unknown to the innocent party. Canning v. Canning (Vt.) 1916C-344.
- 30. A husband's petition for divorce, after entering into a separation agreement, is not dependent upon a rescission of such agreement, which, if valid, may, notwithstanding the divorce, be effective so far as it stipulates for the wife's support. Canning v. Canning (Vt.) 1916C-344.
- 31. Articles of separation may be taken, in connection with lapse of time and other circumstances, as evidence that a party thereto, petitioning for divorce, is not acting in good faith, so as to be entitled to the favorable consideration of the court. Canning v. Canning (Vt.) 1916C-344.

(Annotated.)

Separation agreement as bar to action for divorce. 1916C-347.

## 4. PLEADING.

## a. Answer.

32. Condonation. The defense of condonation to charges of cruelty and habitual drunkenness, to be available, should be pleaded or set up in the answer, and failure to do so warrants the court to re-

fuse to allow the defense. Klekamp v. Klekamp (Ill.) 1918A-663.

(Annotated.)

(Annotased.)

## b. Cross-bill.

33. Cross-Petition as Admission. In a divorce suit, allegations in the dismissed cross-petition of the defendant may be taken against him as admissions. Tipton v. Tipton (Iowa) 1916C-360.

#### 5. EVIDENCE.

## a. Cruelty.

- 34. Habits of Spouse. That complainant's husband was untidy in his habits, walked through the house with muddy feet, spat on the stove and occasionally indulged in a game of cards for small stakes at a place which formerly had been a saloon, is not "extreme cruelty" under the statute. Cunningham v. Cunningham (Mich.) 1918B-478. (Annotated.)
- 35. What Conduct Constitutes. That a husband was guilty of neglect and abuse which ultimately would affect his wife's health, leaving her without medical attention when in a delicate condition, and resume to speak to her for long periods of time, constitutes cruel and inhuman treatment within the statute, although the wife's health had not at the time she sought a divorce become impaired. Heicke v. Heicke (Wis.) 1918B-497.

  (Annotated.)

36. Sufficiency of Evidence. The evidence is held to sustain finding of chancellor that husband was guilty of cruel and inhuman treatment. Klekamp v. Klekamp (III.) 1918A-663.

#### Note.

Habits or course of conduct of spouse as cruelty warranting divorce. 1918B-480.

## b. Desertion.

- 37. Refusal of Recenciliation. Evidence held sufficient to show that plaintiff's refusal to live with her husband, after his desertion of her, was caused solely by his own conduct. Tipton v. Tipton (Iowa) 1916C-360.
- 38. In a suit for divorce for desertion, where plaintiff wife asked her husband to postpone going to housekeeping until spring, on account of her illness, to which he made no response, he cannot claim that between the time of the request and the spring he lived apart from his wife on agreement to resume cohabitation, and therefore there could have been no intention to desert her until after the spring. Tipton v. Tipton (Iowa) 1916C-360.
- 39. Evidence in divorce held to show that a desertion of plaintiff wife by her husband was without reasonable excuse on

his part. Tipton v. Tipton (Iowa) 1916C-360.

- 40. Conduct of Wife not Justifying. In a suit for divorce, evidence held insufficient to show that plaintiff wife was guilty of misconduct sufficient to bar her of relief and justify later misconduct of her husband, as having refused to live with him at the home of his parents. Tipton v. Tipton (Iowa) 1916C-360.
- 41. What is a desertion of one spouse by another is a question of fact. Tipton v. Tipton (Iowa) 1916C-360.
- 42. Evidence of Desertion Sufficient. Evidence held sufficient, in a suit for divorce, to show that defendant had severed the marital relation by desertion, with an intent to do so, and had continued his action for the statutory period prerequisite to the granting of divorce for such cause. Tipton v. Tipton (Iowa) 1916C-360.
- 43. Where husband and wife never lived together in the same house, to establish a desertion by the husband there must be a radical change in such peculiar marital relation as had existed between the parties. Tipton v. Tipton (Iowa) 1916C-360.

## c. Condonation.

- 44. In a suit for divorce on the ground of the husband's cruelty, defended on the ground of condonation by cohabitation pending the suit, the evidence by the wife is held to sustain the burden of showing a breach of the condition by renewed acts of cruelty. Egidi v. Egidi (R. I.) 1918A-648. (Annotated.)
- 45. The evidence is held to be insufficient to establish defense of condonation. Klekamp v. Klekamp (III.) 1918A-663.

  (Annotated.)
- 46. Proof of Condonation. The defense of condonation is affirmative, and the defendant carries the burden of establishing it by a preponderance of the evidence. Klekamp v. Klekamp (Ill.) 1918A-663.

  (Annotated.)
- 47. Knowledge of Offense. A separation agreement entered into by the husband, without knowledge of the wife's pre-existing adultery, cannot be held to have condoned the pre-existing cause for divorce, since, without knowledge, there can be no condonation. Canning v. Canning (Vt.) 1916C-344. (Annotated.)

## 6. COUNSEL FEES.

48. Whether an allowance should be made to the wife for alimony pendente lite and for solicitor's fees rests largely in the discretion of the court, but an abuse of the discretion is subject to review. Klekamp v. Klekamp (Ill.) 1918A-663.

- 49. Propriety of Allowance. Where the evidence discloses that the wife is financially more able to pay her counsel fees than the husband, she should not be allowed such fees, either in the trial court or on appeal. Klekamp v. Klekamp (Ill.) 1918A-663.
- 50. Attorneys' fees are treated as part of the expenses incident to a divorce case, and are generally allowed the wife, whether complainant or defendant, both upon the successful termination of her suit for divorce, as well as for services pendente lite. Winslow v. Winslow (Tenn.) 1917A-245.
- 51. Allowance of Attorneys' Fees. Attorneys for the wife in her successful suit for absolute divorce against her husband were entitled to a fee of \$5,000 from the husband, though they could have procured a divorce upon the ground of abandonment alone with very little trouble, but in fact charged cruel and inhuman treatment and infidelity as well. Winslow v. Winslow (Tenn.) 1917A-245.

#### 7. DECREE.

#### a. In General.

- 52. Description of Property. In allowance of property, on divorce, description of property as that "known as No. 506 H. Ave." is sufficient, though a different description is erroneously given in another part of the record; the husband admitting the address to be correct. Klekamp v. Klekamp (Ill.) 1918A-663.
- 53. From What Date—Judgment Reduced on Appeal. The allowance of interest on a decree for the division of the conjugal property from the date of a divorce decree in the wife's favor is within the discretion of the court, notwithstanding the success of the husband in reducing the amount on appeal, where that was the date at which, but for the delays of the law, the wife would have received her dues, the husband having had the use of the money in the meantime. De La Rama v. De La Rama (U. S.) 1917C-411.

  (Annotated.)

## b. Effect.

- 54. When a married woman becomes discovert by death or divorce, any restraint previously existing on her alienation of her property becomes inoperative. Lee v. Oates (N. Car.) 1917A-514.
- 55. Restoration of Property. A judgment of divorce operates to restore to the divorced parties the title to such property as either may have obtained from or through the other during marriage in continuous the return of the property is ordered by the judgment or in a subsequent proceeding, and, if no order of restoration or only

a formal order is made when the divorce is granted, any question thereafter arising as to what property shall be restored may be settled by subsequent proceedings. Administrator Schauberger v. Morel's (Ky.) 1917C-265.

Note.

Right of divorced person to bring independent action against former spouse for restoration of property. 1917A-1243.

## c. Remarriage.

- 56. Effect of Remarriage Custody of Child. Where the parents of an infant were divorced in 1905, and the mother was awarded the custody, the remarriage of the parents in 1906 annulled the judgment of divorce and restored the parents to their rights over the child as if they had never been divorced. Cain v. Garner (Ky.) 1918B-824.
- 57. Estoppel to Attack Divorce. Where the wife, knowing that her husband had obtained a divorce decree in Nevada, married another and lived with the new husband for several years, she was precluded from setting up that the Nevada decree was invalid because obtained on a fraudulent residence established in that state and from claiming marital rights against her former husband, though at the time of her remarriage she did not know of the alleged invalidity of the decree. Bruguiere v. Bruguiere (Cal.) 1917E-122. (Annotated.)

Note.

Estoppel by remarriage to attack decree of divorce. 1917E-125.

## 8. CUSTODY OF CHILDREN.

- 58. Certainty of Order. Where a divorce decree, in giving the custody of the children to the father's mother, specifies that neither the plaintiff nor the defendant shall remove them from the jurisdiction of the court "without the agreement of the parties," the parties who must agree are the parents of the children and the decree is not so uncertain as to be unenforceable. Ex parte Ellerd (Tex.) 1916D-361.
- 59. Right to Visit Children. In order that the mother may have an opportunity to see the children, the court may require them to be kept in a certain place within its jurisdiction. Ex parte Ellerd (Tex.) 1916D-361.
- 60. In such a case the court can, by its order, grant the mother of the children the right to visit them at all reasonable Ex parte Ellerd (Tex.) 1916D-361.
- 61. Award to Person Other Than Parent. Under Tex. Const. art. 5, § 8, giving the district court original jurisdiction and general control over all minors, and Tex. Rev. Civ. St. 1911, art. 4641, giving the district

court power to give the custody of the children, to either the father or mother, the court in granting a divorce has authority to award the custody of the children to the father's mother. Ex parte Ellerd (Tex.) 1916D-361.

## VACATING OR SETTING ASIDE DECREE.

- 62. Effect of Vacation. An order vacating a decree of divorce relates back to the date of the decree itself, so that the libelant, who had obtained the decree, remains a married woman, subject to the restrictions of coverture as to her property after the decree and before its vacation. Gato v. Christian (Me.) 1917A-592.
- 63. The supreme judicial court, after granting a divorce to libelant, is authorized to vacate it either of its own inherent power or on libelee's motion for a new trial made at the same term, when, by reason of libelant's death in the meantime there was no party upon whom notice could have been served, if required, and when convinced that libelee without negligence on his part, and through some oversight or mistake on the part of his attorney or the court, had not had his day in court. Gato v. Christian (Me.) 1917A-(Annotated.)
- 64. After Death of Party. An order setting aside a decree of divorce for libelant and granting a new trial, in an action involving property rights, was valid, notwithstanding the fact that libelant, the wife, had died in the meantime. Gato v. Christian (Me.) 1917A-592.

(Annotated.)

Note.

Voluntary dismissal of bill for divorce. 1917A-1197.

## 10. INDEPENDENT ACTION TO RE-COVER PROPERTY.

65. Independent Action for Restoration of Property. Where a judgment of divorce does not contain, as provided by Ky. Civ. Code Prac. § 425, an order restoring any property which either spouse obtained during marriage in consideration or by reason thereof, an independent action lies by the party seeking the restoration of the property given, granted, or conveyed in consideration of the marriage. Anheier v. De Long (Ky.) 1917A-1239.

(Annotated.)

## 11. EXTRATERRITORIAL EFFECT OF FOREIGN DIVORCE.

66. Where the husband leaves the matrimonial domicil in California and obtains a divorce decree in Nevada on substituted service only, such decree is not binding on the California courts, though he established a bona fide residence in Nevada. Bruguiere v. Bruguiere (Cal.) 1917E-122.

67. Where one spouse goes into a state other than that of the matrimonial domicil and there obtains a divorce under a residence simulated for that purpose, and not in good faith, the judgment is not binding on courts of other states and may be held void in any other state on proof of the fraudulent residence and of the fact that the divorce was obtained by substituted service only. Bruguiere v. Bruguiere (Cal.) 1917E-122.

#### DIZZINESS.

As accident within Workmen's Compensation Act, see Master and Servant, 198.

## DOCTORS.

See Physicians and Surgeons.

DOCUMENTARY EVIDENCE. See Evidence, 82-109.

#### DOGS.

Licenses, see Animals, 10. City regulation, see Municipal Corporations, 72.

#### DOING BUSINESS.

Foreign corporations within state, see Corporations, 163.

#### DOMICIL.

- 1. Nature and Acquisition of Domicil.
- 2. Change of Domicil.
- 3. Evidence of Domicil.

## 1. NATURE AND ACQUISITION OF DOMICIL.

- 1. What Constitutes-Intention as Essential. For a person to gain a residence in a town, it is essential that he go there with the intention of remaining and making it his home for some definite time. Bartlett v. New Boston (N. H.) 1917B-777.
- 2. Effect of Temporary Absence. Every person can fix his own residence, provided he makes it reasonably permanent by intending to return thereto when the temporary work is finished. Siebold v. Wahl (Wis.) 1917C-400.

## 2. CHANGE OF DOMICIL.

3. Necessity of Loss of Original. The general rule is that a man must have a habitation or domicil somewhere, and that he can have but one at the same time for one and the same purpose, and that in order to lose one he must acquire another. Siebold v. Wahl (Wis.) 1917Ĉ-400.

## 3. EVIDENCE OF DOMICIL.

4. Conclusiveness of Statement of Party. Although intention is an important element of the status of an elector, his own statement as to any such intent cannot, of itself, be controlling in respect to his residence for voting purposes. Siebold v. Wahl (Wis.) 1917C-400.

## DONATIONS.

See Gifts.

#### DOWER.

- 1. Nature of Dower, 293.
- 2. Barring and Defeating Dower, 293.
  - a. Release by Wife, 293.b. Estoppel, 294.
- c. Divorce, 294. 3. Widow's Election, 294.

Antenuptial contract releasing dower, validity, see Husband and Wife, 15.

## 1. NATURE OF DOWER.

1. Statutory Provision. Under the laws of this state the wife's statutory dower rights in her husband's property are not only superior to the husband's will, but those statutory dower rights are more liberal to the widow than were the commonlaw dower rights. Herzog v. Trust Co. (Fla.) 1917A-201.

#### BARRING AND DEFEATING DOWER.

## a. Release by Wife.

- 2. Release by Postnuptial Contract. Ill. Dower Act (Hurd's Rev. St. 1813, c. 41) § 9, providing that if before marriage, but without the wife's consent, or if after marriage, land shall be given or assured for the jointure of a wife or husband in lieu of dower such wife or husband may elect whether to take such jointure or to be endowed as provided in that act, but shall not be entitled to both, had no application to a postnuptial agreement by which the husband and wife each released his or her dower and other rights in the other's property, as there was no other property for the wife to accept in lieu of her dower rights, and nothing calling for an election, and her renunciation of the agreement had no effect. Edwards v. Edwards (Ill.) 1917A-64.
- 3. Right to Release. Under Hurd's Rev. Ill. St. 1913, c. 68, § 6, providing that contracts may be made and liabilities incurred by a wife, and that they may be enforced against her to the same extent and in the same manner as if she were unmarried, a wife, in consideration of her husband's release of his dower and other rights in her property, may by a postnuptial agreement release her rights in his property, and such an agreement, in the absence of fraud, misrepresentation, or concealment, will bar and extinguish her dower rights. Edwards v. Edwards (Ill.) 1917A-64. (Annotated.)

- 4. Agreement With Husband. Ky. St. § 2136, provides that a conveyance or devise of property by way of jointure may bar the wife's interest in the estate of her husband, but if made before marriage without her consent, or during her infancy or after marriage, she may, after her husband's death, waive the jointure by written relinquishment and demand her dower. Section 2128, subsequently enacted, provides that a married woman may take and dispose of property, and contract and sue and be sued as a single woman. Held, that the last section by implication repealed so much of section 2136 as allows a married woman to relinquish in all cases a jointure given her after marriage, and hence a contract between a married woman and her husband, whereby she agreed to receive certain property in lieu of her dower and distributive rights, if otherwise valid, cannot, at the option of the wife, be set aside on the husband's death. Redwine's Executor v. Redwine (Ky.) 1917A-(Annotated.)
- 5. Where a husband induced his wife to enter into an agreement to accept in lieu of her dower and distributive rights a small share in his estate, the amount of which the husband had understated, the jointure agreement is invalid, there being no consideration to support it, as the jointure was less than the wife's statutory share. Redwine's Executor v. Redwine (Ky.) 1917A-58. (Annotated.)
- 6. A jointure contract between a husband and wife, entered into while they were sojourning in a foreign state, is governed by the laws of their domicil, where the husband's property was located therein and it was intended by the parties that the contract should be performed in the state of their domicil upon their return. Redwine's Executor v. Redwine (Ky.) 1917A-58. (Annotated.)
- 7. To Stranger. A wife cannot convey to a stranger her inchoate right of dower in property of her living husband. Hill v. Boland (Md.) 1917A-46.
- 8. Release by Contract With Husband. At common law a wife can make no contract with her husband to bar her dower right, but a fair and reasonable contract settling the property rights, of which the wife had received the benefit, will be enforced in equity. Hill v. Boland (Md.) 1917A-46. (Annotated.)
- 9. Where an agreement between a husband and wife consisted of two parts, one for living separately and the other a contract by which the wife, for a valuable consideration, released her dower rights, the latter part can be enforced if the parties continue to live together, and is not void even if the contract for separation was against public policy. Hill v. Boland (Md.) 1917A-46. (Annotated.)

- 10. Under Md. Code Pub. Civ. Laws, art. 45, § 12, authorizing a married woman, by deed of herself and husband or by her separate deed, to release her dower right, and section 20, authorizing her to contract with her husband, a contract, executed with all the formalities required of a deed, by which a married woman, for a valuable consideration, released to her husband her dower rights, whether construed as a deed under section 12 or as a contract under section 20, is valid. Hill v. Boland (Md.) 1917A-46. (Annotated.)
- 11. Bar by Antenuptial Agreement. At common law an antenuptial agreement was not enough to bar dower; resort being had to equity for enforcement. Schnepfe v. Schnepfe (Md.) 1916D-988.

# (Annotated.)

Right of married woman to release dower by express contract with husband. 1917A-48.

## b. Estoppel.

12. That the husband's property was principally choses in action, capable of manual delivery, and that in case the wife had not accepted his proposal he would have given away the property absolutely before his death, which was imminent, does not estop the wife from attacking the jointure contract for want of consideration. Redwine's Executor v. Redwine (Ky.) 1917A-58. (Annotated.)

#### c. Divorce.

13. Divorce as Bar. A divorce granted the wife will not deprive her of dower or of her share in her husband's personalty. Schnepfe v. Schnepfe (Md.) 1916D-988.

## 3. WIDOW'S ELECTION.

14. Right to Elect Between Will and Dower. Under the direct provisions of Ky. St. § 1404, a widow may renounce the share, if any, in her husband's estate given to her by his will, and may claim her dower and distributive share. Redwine's Executor v. Redwine (Ky.) 1917A-58.

## DRAINS AND SEWERS.

- 1. Judicial Supervision.
- 2. Costs and Local Assessments.
- 3. Extension.

Special assessment for sewer, see Taxation, 117.

## 1. JUDICIAL SUPERVISION.

1. Enlargement of Sewer. In a suit by a city against an adjoining village, involving mutual duties in relation to a drainage and sewer system, a decree in favor of the city, declaring the conditions intolerable, owing to inadequate drainage

for which both were responsible and which amounted to a public nuisance, and ordering such nuisance abated by increased capacity of the jointly maintained system, is affirmed by a divided court. Detroit v. Highland Park (Mich.) 1917E-297.

(Annotated.)

Note.

Power of court to compel municipality to remove, construct or enlarge sewer. 1917E-308.

## 2. COSTS AND LOCAL ASSESSMENTS.

- 2. Local Assessments. Where officers without authority attempt to make an assessment for benefits for the construction of a sewer, a subsequent assessment made by officers duly authorized is not a reassessment. Auburn v. Paul (Me.) 1917E-136.
- 3. Notice of Assessment. Abutting property on which a sewerage assessment was made was assessed to the owner's husband. It had been carried on the tax records in his name for upwards of 13 years, and taxes paid him on bills rendered without objection or inquiry by her. In proceedings relating to the sewer he was notified with others and took part in conferences relating thereto. The owner and her husband resided together on the property assessed, and she was advised of such proceedings, and knew that he was present, and the bill for the amount of the assessment sent to him was filed with her complaint for an injunction. It is held that under the circumstances disclosed in the case, heard on bill and answer, she could not be granted relief on the ground that the assessment was not made in her name, or notice sent to her. Lyon v. Hyattsville (Md.) 1916E-765.
- 4. Time for Making Assessment. Me. Rev. St. c. 21, providing for assessments for benefits for the construction of sewers, does not fix the time within which the assessing officers must act, and the court cannot limit the time, and the officers in office when the sewer was completed have not the exclusive authority to make the assessment. Auburn v. Paul (Me.) 1917E-136. (Annotated.)
- 5. Special Assessment—Sewer Extension—Paralleling Old Sewer. It is not ground for objection to an assessment for a sewer that it is constructed parallel with an old sewer for a certain distance, where the duplicate sewer is not in front of the property assessed and does not affect it, and no attempt is made to assess property for the cost of duplication, which was necessary to get a proper grade and avoid expense of deepening the old sewer in extending the system. Lyon v. Hyattsville (Md.) 1916E-765.
- 6. Necessity of Benefit to Property Owner. It is not ground for objection to

an assessment for a sewer that the abutting property owner is not benefited by its construction. Lyon v. Hyattsville (Md.) 1916E-765.

7. Front Foot Rule. Assessment of the cost of a sewer on abutting property according to the frontage of each parcel is not a taking of property without due process of law, contrary to Const. U. S. Amend. 14. Lyon v. Hyattsville (Md.) 1916E-765. (Annotated.)

#### 3. EXTENSION.

8. Power to Extend System. Hyattsville charter (Laws Md. 1904, c. 125) authorizes construction and maintenance of a sewerage system for the town, and the amendment thereto by Laws 1908, c. 79, § 15, authorizes extension of sewers as its interest demands from time to time. Held, that the power to extend sewers thereunder applied to the system, and was not confined to extending from the point at which they ended sewers constructed under the charter of 1904. Lyon v. Hyattsville (Md.) 1916E-765.

DROIT DE DETRACTION. Meaning, see Taxation, 172.

DEUGLESS PRACTITIONERS.

Regulation of, see Physicians and Surgeons, 6, 7.

## DRUGS AND DRUGGISTS.

Use of drug to produce miscarriage, see Abortion, 1.

Regulation of opium, see Food, 20.
Distinction between medicine and intoxicating liquor, see Intoxicating Liquors, 9.

Addiction to use of drugs to impeach witness, see Witnesses, 111.

## DRUNKENNESS.

See Intoxicating Liquors.

## DUAL ALLEGIANCE.

See Aliens, 2.

## DUE PROCESS.

Constitutional guarantee of, see Constitutional Law, 37, 45-61, 111.

## DURESS.

See Chattel Mortgages, 4; Contracts, 2-5. Definition, see Contracts, 3. Sufficiency for cancellation of deed, see Rescission, Cancellation and Reformation, 17.

#### DWELLING.

Defined, see Accident Insurance, 3.
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#### DWELLING HOUSE.

Meaning, see Elections, 3.

DYING DECLARATIONS.

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#### EARNING CAPACITY.

Injury not impairing, compensation under Workmen's Compensation Act, see Master and Servant, 283.

#### EARTH CLOSETS.

City regulation, see Municipal Corporations, 74-78.

## EASEMENTS.

1. Nature and Acquisition.

2. Extinguishment.

3. Rights and Liabilities of Parties.

See Adverse Possession, 13, 28.

Party wall, see Adjoining Landowners, 2. Condemnation of, see Eminent Domain, 17, 24-26.

Right of way over homestead, conveyance, see Homestead.

Prevention of interference, see Injunctions, 7.

Creation by prescription, see Prescription, 1-4.

Of public in highway, see Streets and Highways, 26-36.

Valuation for taxation, see Taxation, 63. As subject to tax lien on servient estate, see Taxation, 87.

For wires and poles, see Telegraphs and Telephones, 6-10.

## 1. NATURE AND ACQUISITION.

- 1. Easement to Take Water from Well. An easement to take water from another's well is an incorporeal hereditament which may be created by grant or prescription. Rollins v. Blackden (Me.) 1917A-875.

  (Annotated.)
- 2. Interruption of User. Where defendant's predecessor in title, who first asserted an easement on plaintiff's property, desisted in his exercise of the privilege upon demand of plaintiff and notice by her attorney, there was an interruption of the use which prevented acquisition of an easement by prescription. Rollins v. Blackden (Me.) 1917A-875.
- 3. Extent of Easement. The right of a person to use a way established over the land of another by their common devisor extends only to the land to which the dominant estate is appurtenant. Ball v. Allen (Mass.) 1917A-1248.

(Annotated.)

## 2. EXTINGUISHMENT.

4. Nonuser. Mere nonuser and lapse of time do not constitute abandonment of an

easement, but abandonment may be inferred from circumstances or presumed from long-continued neglect, and lapse of time and nonuser are competent evidence of an intent to abandon, and entitled to great weight when considered with other circumstances. New York, etc. R. Co. v. Cella (Conn.) 1917D-591. (Annotated.)

5. In an action by a railroad company to recover possession of land condemned in 1833, the evidence is held to be sufficient, in connection with the company's long-continued neglect, to assert any claim to the party to support a finding that it had abandoned its rights. New York, etc. B. Co. v. Cella (Conn.) 1917D-591.

(Annotated.)

- 6. Tax Sale. The foreclosure of a tax lien and a sale of the premises pursuant to Greater New York Charter (Laws 1901, c. 466, §§ 1035-1039, as amended by Laws 1908, c. 490, and Laws 1911, c. 65) do not extinguish private easements of light, air, and access of adjoining owners over the land sold, which were excluded from an assessment on the land, since that would be a taking of property without due process of law. Tax Lien Co. v. Schultze (N. Y.) 1916C-636. (Annotated.)
- 7. Forfeiture for Misuser. A right of way is not forfeited by a use not contemplated by the grant, unless such use cannot be separated from that allowed by the grant; so that an obstruction thereof by owner of the easement, which could be easily separated from its lawful use while it will be enjoined, does not work a forfeiture. O'Banion v. Cunningham (Ky.) 1917A-1017. (Annotated.)
- 8. Party Walls. Where one has acquired an easement of support in a party wall, its accidental destruction determines the easement, and extinguishes all rights arising thereunder. Commercial National Bank v. Eccles (Utah) 1916C-368.

(Annotated.)

## Notes.

Termination of right to maintenance of party wall. 1916C-374.

Forfeiture of easement for misuse. 1917A-1018.

Sale of land for taxes as extinguishing private easement. 1916C-638.

Forfeiture of easement of right of way by nonuse. 1917D-595.

# 3. RIGHTS AND LIABILITIES OF PARTIES.

- 9. Burden of Proof. The party asserting an easement by prescription has the burden of proof, and he fails if the proof be left doubtful. Rollins v. Blackden (Me.) 1917-875.
- 10. Taking Water from Well. Where plaintiff's grantor conveyed to another

the right to draw water from a well located on his land, with the reservation that should the land become the property of another all rights of taking water should be subject to the rights of the owner of the land to take water for any purpose necessary for the land or buildings thereon, and the property was thereafter conveyed to plaintiff, who took with notice of the grant of the easement, plaintiff cannot complain that the grantee of the easement took water from the well, where such taking did not deprive her of any water necessary for her land or buildings thereon. Rollins v. Blackden (Me.) 1917A-875.

(Annotated.)

- 11. Evidence—Hostility of User. Where defendant's predecessor in title who first asserted the easement on plaintiff's land claimed his right through the permission of the selectmen of the town, such evidence is admissible to show that the use of the easement was adverse. Rollins v. Blackden (Me.) 1917A-875.
- 12. While a conveyance of property occupied by an adverse holder will not stop the running of limitations, a conveyance of land in which another asserted an easement, where the rights were not excepted, showed that the owner did not acquiesce in the assertion of the easement. Rollins v. Blackden (Me.) 1917A-875.
- 13. Persons Entitled to Enjoyment. That a person is the record owner in fee of only six undivided sevenths of the dominant estate does not impair her right to the use of a way established by the will of a common devisor across the servient estate; the way being appurtenant to the whole tract comprising the dominant estate and to every part into which it may be divided. Ball v. Allen (Mass.) 1917A-1248.
- 14. Obstruction of Easement. Where an owner of a servient estate forbade plaintiff, the owner of the dominant estate, to pass over a right of way shown to have been established by their common devisor, plaintiff is entitled to equitable relief. Ball v. Allen (Mass.) 1917A-1248.
- 15. Rights of Servient Owner. Where a right of way is established by a common devisor as an outlet, the owner of the servient estate may fence the sides of the way, and, when necessary for his own protection in the pasturage of cattle and the use and enjoyment of his property, may erect at his own expense gates or bars across the way at the two entrances thereof, provided they are not such as to interfere unreasonably with the privilege of passage. Ball v. Allen (Mass.) 1917A-1248.
- 16. Where an owner of a servient estate within twenty years had replaced with bars a gate maintained for more

- than the prescriptive period, thus making the use of the way more onerous than did the use of the gate, he can be compelled by the dominant owner to remove the bars and restore the gate. Ball v. Allen (Mass.) 1917A-1248.
- 17. Where an owner of a servient estate placed bars across a way established over his land and maintained the same for more than twenty consecutive years, he cannot be compelled to remove same at the suit of the owner of the dominant estate. Ball v. Allen (Mass.) 1917A-1248.
- 18. Extent of Right. Defendant, owning lands to which a passway over land to which plaintiff had legal title was appurtenant, and who had also acquired by quitclaim deed the right to use the passway, acquired a mere easement over plaintiff's land. O'Banion v. Cunningham (Ky.) 1917A-1017.
- 19. Plaintiff, by purchase, acquired an easement for the support of its building to the height of three stories in a wall five stories high, standing wholly on defendant's land. Defendant's building was thereafter entirely destroyed by fire, leaving the wall standing and furnishing the same support to plaintiff's building as it did before, but not sufficiently strong to support the kind of building which defendant intended to erect on the same site. Commercial National Bank v. Eccles (Utah) 1916C-368.
- 20. Where defendant had the right to take from a well on plaintiff's land any surplus water not needed by plaintiff, proof that plaintiff notified defendant not to take any water and that she needed it all will not establish that all of the water from the well was needed for plaintiff's land. Rollins v. Blackden (Me.) 1917A-875. (Annotated.)

Notes.

Restriction of easement to use connected with dominant estate. 1917A-

Prescriptive right of individual to take water from another's well or spring. 1917A-881.

EDUCATION.

See Schools.

EGGS.

Regulating sale of imported eggs, see Food, 18.

EIGHT-HOUR DAY.

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## EJECTION.

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Right to expel trespasser from property, see Trespass, 2, 3.

## EJECTMENT.

- 1. Who may Maintain.
- 2. Against Whom Action Lies.
- 3. Damages.
- 4. Judgment.
- 5. New Trial as Matter of Right.

Remedy for peaceable detention, see Forcible Entry and Detainer, 1.

## 1. WHO MAY MAINTAIN.

- 1. Land Claimed Under Adoption Contract. Where a party relying on a contract of adoption claims the real estate of a decedent, her remedy is by ejectment and not by an ejectment bill, which cannot be entertained in a court of equity. Benson v. Nicholas (Pa.) 1916D—1109.
- 2. Estoppel to Sue. A landowner who sees a railroad company constructing its railroad through his land, and makes no objection until it is completed, is estopped to sue in ejectment, or enjoin the operation of the road. Dulin v. Ohio River R. Co. (W. Va.) 1916D-1183.
- 3. Seizure of Property by Railroad. Ejectment lies to recover land taken by a railroad company for its railroad tracks, without the knowledge, or against the protest, of the owner. Dulin v. Ohio River R. Co. (W. Va.) 1916D-1183.

#### 3. DAMAGES.

4. Damages for Detention. A landlord can recover in ejectment against the assignee of his tenant damages for the detention of the premises pending the action, if it is delayed by the defense; and, though the rent cannot be recovered as rent, it may, in a proper case, be considered as fixing the amount of such damages. Gibbs v. Didier (Md.) 1916E-833.

## 4. JUDGMENT.

- 5. Judgment as Res Judicata. A judgment in ejectment, in which damages for the detention were claimed, is conclusive against the landlord's right to recover such damages, though the court erroneously refused to allow the claim, the landlord's remedy being by appeal to reverse the erroneous judgment. Gibbs v. Didier (Md.) 1916E-833.
- 6. Res Judicata as to Rent. Md. Code Pub. Civ. Laws, art. 75, § 73, provides that, when there is one-half year's rent in arrears and the landlord has the right to re-enter for the nonpayment, he may, without formal notice of re-entry, serve a copy of a declaration in ejectment for the recovery of the premises. Section 71 of the same article provides what a declaration in ejectment shall contain, the effect of the plea of not guilty, and that the plaintiff shall also recover as damages in that action the mesne profits and damages sustained by him and caused

by the ejectment and detention of the premises up to the time of the determination of the case. The provision allowing recovery of mesne profits was added in 1872 after the enactment of what is now section 73. Held, that the action in ejectment referred to in section 73 was the one provided for by section 71, including the right to mesne profits and damages, and a judgment in such action, awarding only nominal damages to a landlord who recovered possession of the premises from the assignee of the tenant, is res judicata as to the landlord's right to recover rent and taxes from the assignee, the nonpayment of which was alleged as damages in his declaration in ejectment. Gibbs v. Didier (Md.) 1916E-833.

# 5. NEW TRIAL AS MATTER OF RIGHT.

- 7. Default of defendants in ejectment, in not filing an undertaking and paying costs within the year provided by statute as to new trial, having occurred through the mistake of counsel in taking an order for new trial providing for such filing and payment within a time extending beyond the year, may be relieved against in the discretion of the court. Guaranteed Investment Co. v. Van Metre (Wis.) 1916E-554. (Annotated.)
- 8. The court can, even after expiration of the year given by statute for filing undertaking and paying costs for a second trial in ejectment, extend the time therefor. Guaranteed Investment Co. v. Van Metro (Wis.) 1916E-554.

(Annotated.)

- 9. Defendant in ejectment does not waive his right to a second trial by accepting a quitclaim to the tracts adjudged to him; there having been, in the negotiations leading up to it, no reference to those adjudged to plaintiff. Guaranteed Investment Co. v. Van Metre (Wis.) 1916E-554. (Annotated.)
- 10. Statutory Right in Ejectment. Statutory right to a second trial in ejectment is not waived by a stipulation at the trial, on which judgment was entered, that plaintiff's tax titles were good as to certain of the tracts and invalid as to the remainder; it being oral, and therefore, under Wis. circuit court rule 5, § 3 (108 N. W. x), not obligatory on another trial. Guaranteed Investment Co. v. Van Metre (Wis.) 1916E-554.

  (Annotated.)

Note.

Statutory right to new trial in ejectment. 1916E-556.

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## ELECTION.

Widows, election of dower, see Dower, 14. To take under will, see Wills, 251.

#### ELECTION OF REMEDIES.

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Waiver of tort, action on contract, see Conversion, 16.

Election between state and Federal Employers' Liability Act, see Master and Servant, 76-80.

Under Workmen's Compensation Act, see Master and Servant, 184-188.

Election between Workmen's Compensa-tion Act and action against third party, see Master and Servant, 208, 210.

#### ELECTIONS.

- 1. Constitutionality of Preferential System, 299.
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Judicial notice of number of voters, see Evidence, 7.

Judgment on conviction of voting twice, see Judgments, 17.

City bond issue election, see Municipal Corporations, 110.

Rights of minority candidate on failure of successful candidate to qualify, see Public Officers, 24.

For bond issue under Forest Preserve Act, see Trees and Timber, 2-12.

#### 1. CONSTITUTIONALITY OF PRE-FERENTIAL SYSTEM.

1. Preferential Voting. The preferential system of voting provided by the Duluth charter, whereby first choice, second choice and additional choice votes are permitted, and are counted in a manner therein provided, is unconstitutional as in contravention of article 7, section 1 and section 6 of the Minn. constitution. Brown v. Smallwood (Minn.) 1917C-474. (Annotated.)

Note.

Validity and construction of statute providing for preferential system of voting. 1917C-482.

## 2. QUALIFICATION OF VOTERS.

## a. In General.

- 2. Right to Vote-Nature of Right. Under N. C. Const. art. 6, § 1, providing that every male person possessing specified qualifications shall be entitled to vote at any election, a woman is not a voter, as the right to vote is not a natural right, but one conferred by law, which can be exercised only by those upon whom it is conferred. State v. Knight (N. Car.) 1917D-517.
- 3. Army Officer. An army officer living with his wife in quarters assigned to them in military barracks is an occupant of a "dwelling house" and as such entitled to vote, though his use of the premises is subject to regulation by his military superiors and his quarters are subject to change by them. Steele v. Dowling (Ore.) 1917B-480. (Annotated.) Note.

Right to vote of soldier or sailor in actual service. 1917B-485.

## b. Residence.

- 4. Student at College. Attendance at an institution of learning for the sole purpose of acquiring an education is not, of itself, sufficient to establish the student as an elector; but in such case much weight is to be laid upon the fact as to whether or not he is emancipated from his family, so far as looking to them for a home, or at least to which to return, or for means of support Siebold v. Wahl (Wis.) 1917C-400. (Annotated.)
- 5. Student at College. Under Wis. St. 1915, § 6.51, prescribing the rules for determining the qualification of electors, and providing by subsection 2 that that place shall be held to be the residence in which one's habitation is fixed without any present intention of removing therefrom and to which whenever he is absent he intends to return, by subsection 3 that one shall not lose his residence by leaving home and going into another country, etc., of the state for temporary purposes, with

an intention of returning, by subsection 4 that one shall not gain a residence in any town, etc., to which he comes for temporary purposes only, and by subsection 9 that the mere intention to acquire a new residence without removal, or removal without intention, shall avail nothing, a student of the University of Wisconsin, registered from a place in a state where his parents resided and to which he returns as opportunity, vacations, etc., permit, who is partly dependent upon his home for a support, and who after graduation does not know where he will go, that depending upon opportunities, and who does not have in mind any business opening in Madison which he intends to accept after graduation, is in Madison for a "temporary purpose" only, and has no home there, and hence no right to vote at a primary election therein. Siebold v. Wahl (Wis.) 1917C-400.

(Annotated.)

6. Residence in Ward. Where a voter in an aldermanic election has never resided in the ward, but his name had been added to the voting list upon a certificate of the board of registration, his vote is properly rejected under Me. Rev. St. c. 5, § 4, providing that a person shall vote only in the ward of the city in which he had his residence on the first day of April preceding. Murray v. Waite (Me.) 1918A-1128.

#### Note.

Residence at school or public institution as affecting right to vote. 1917C-

#### C. REGISTRATION.

- 7. As used in the Nev. election laws of 1913 (St. 1913, c. 284, subc. 3, § 18), providing that an elector shall not be entitled to vote at a primary election "unless he has heretofore designated to the registry agent his politics," the word "heretofore" relates to the time in which an elector may lawfully be registered for the primary election. State v. Keith (Nev.) 1917A-1276.
- 8. Party Affiliation. Under the Nev. election laws of 1913 (St. 1913, c. 284, subc. 3, §18), relating to primary elections, and subc. 2, §§ 4, 5, relating to registration, where an elector has registered, but has failed to indicate his politics or party designation, he may prior to the time fixed for closing registration apply to the registry agent and have an entry made on the registry of his polities or party designation so as to entitle him to vote at a primary election. State v. Keith (Nev.) 1917A-1276.
- 9. Change of Registration by Voter. Under the Nev. election laws of 1913 (St. 1913, c. 284, subc. 3, \$18), relating to primary elections, and subc. 2, §§ 4, 5, relating to registration, an elector who

has registered, so as to be entitled to vote at a primary election, by designating his political party and having same entered on the registry, cannot subsequently require the registry agent to change such designation. State v. Keith (Nev.) 1917A-1276. (Annotated.)

10. Vote by Person not Registered. The provisions of section 38 of the Duluth city charter requiring an unregistered voter desiring to vote at a municipal election to deliver an affidavit of his qualifications to the judges of election is directory; and a failure to observe such requirement does not avoid the election. Clayton v. Prince (Minn.) 1916E-407. (Annotated.)

## Notes.

Change by voter of eurollment or registration. 1917A-1278.

Effect of failure to comply with registration laws on validity of votes cast at election. 1916E-408.

## d. Payment of Poll Tax.

11. Right to Vote. Under N. C. Const. art. 6, § 4, declaring that before any person shall be entitled to vote he shall have paid his poll tax as prescribed by article f, § 1, the payment of the poll tax not exceeding \$2 prescribed by that article, entitles an elector to vote, though he may not have paid a poll tax levied by a county for a special purpose. Morse v. Board of Commissioners (N. Car.) 1917E-1183.

## 3. CONDUCT OF ELECTIONS.

- a. Secrecy of Ballot and Freedom in Voting.
- 12. Where there was no disturbance or any reason to anticipate a disturbance in so-called "closed camps" upon the property of coal companies, the denial of the right of peaceable assemblage for the purpose of influencing the election in precincts coincident with such camps is an inexcusable and corrupt violation of the natural and inalienable rights of citizens; the right of peaceable assemblage for lawful purposes being one of the attributes of citizenship under a free government. Neelley v. Farr (Colo.) 1918A-23. (Annotated.)
- 13. It is the essence of free elections that the right of suffrage be untrammeled and unfettered, and that the ballot represent and express the elector's own intelligent judgment and conscience, and there can be no "free election" unless there is freedom of opinion. An election to be free must be without coercion of any description or any deterrent from the elector's exercise of his free will by means of any intimidation or influence whatever, although there is no violence or physical

coercion. Neelley v. Farr (Colo.) 1918A-23. (Annotated.)

14. Rejection of Entire Vote. Though Ky. St. § 1596a, subsec. 12, provides that if it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery, or violence in the conduct of an election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court may adjudge that there has been no election, and though it is the disposition of courts to uphold the validity of elections where they can reasonably do so, if the record presents a state of case preventing the court from arriving at a reasonably accurate conclusion, it will declare that no election was held, even in the absence of evidence that fraud, intimidation, bribery, or violence was practiced. Johnson v. Little (Ky.) 1918A-70. (Annotated.)

## b. Officers Conducting Election.

15. Acts of De Facto Judges. Where election judges were good de facto officers, the result is not invalidated because they were not all residents of the precincts where the ballots were east. People v. Graham (III.) 1916C-391.

- 16. Appointment of Unfit Judges. Where, prior to an election relative to a change in location of a county seat, the election commissioners appointed election judges who did not possess the requisite qualifications and who were all strong partisans of a particular location, such conduct of the election commissioners, though a manifest impropriety tending to show a spirit of unfairness, will not invalidate the election. Webb v. Bowden (Ark.) 1918A-60.
- 17. Appointment and Removal. Under Kirby's Ark. Dig. §§ 2764, 2765, 2799, 2800, relative to the appointment of judges of election by the election commissioners of a county, and prescribing their qualifications, the removal of old election judges by the commissioners prior to an election relative to a change in the location of a county seat and the appointment of new judges favorable to the change is within the authority of the commissioners. Webb v. Bowden (Ark.) 1918A-60.
- 18. Election Officers Illegally Selected. If the officers of an election to elect a school district trustee who conducted the election in the schoolhouse are not legally selected, the election is void. Johnson v. Little (Ky.) 1918A-70.

## c. Time for Holding.

19. Time of Closing Polls. The provision of the statute fixing the time for opening and closing the polls at an election is directory and not mandatory. In re Chagrin Falls (Ohio) 1916E-1004.

20. Validity of Votes Received After Closing Time. An election will not be invalidated by reason of the fact that the election officers, instead of closing the polls at 5:30 P. M. as directed by statute, kept the same open until 6 o'clock P. M., where there was no fraud or collusion and where there were no illegal votes cast after the time fixed by statute for closing sufficient to change the result of the election. In re Chagrin Falls (Ohio) 1916B-1004. (Annotated.)

d. Place of Holding.

21. Election Districts in Municipality. Ill. Cities and Villages Act, art. 4, § 3 (Hurd's Rev. St. 1913, c. 24, § 50), declares that all persons entitled to vote at any general election for state officers within any city or village, having resided therein 30 days, may vote at any election for city or village officers. Section 4 (section 51) authorizes the council to divide the city into wards and provides for the election of one alderman from each ward. Section 9 (section 56) requires the council to designate the place in which elections shall be held, while section 10 (section 57) provides that the manner of conducting elections and voting thereat shall be the same as in case of the election of county officers. Ill. Const. art. 7, § 1, declares that every person having resided within the state one year, in the county 90 days, and in the election district 30 days shall be entitled to vote, while General Election Law, § 65 (Hurd's Rev. St. 1913, c. 46), follows the wording of the constitution. It is held that, as the words "precinet" and "district" are frequently used interchangeably, ward lines must be considered in forming election districts within a city, for otherwise it would be impossible to elect aldermen. People v. Graham (III.) 1916E-391.

22. Election at Single Polling Place. By ordinance it was provided that the ballot box for elections in a city divided into three wards should contain three compartments, one for each ward, and that the ballots of the voters of the several wards should be deposited in the proper compartment. The whole city was treated as one precinct, the only voting place being within the Third ward, but only across the street from the other two wards. It is held, that as the statutes and constitution, while contemplating the ward lines should be taken into consideration in fixing the boundaries of the election precincts, did not expressly provide that voters must cast their ballot in the ward or precinct in which they resided, they will be construed as directory instead of mandatory or essential, and hence the election is not void where it did not appear that any voters were prevented from exercising their rights. People v. Graham (III.) 1916C-391. (Annotated.)

Voting 23. Arrangement of Room. Where in an election contest it appeared that in violation of Pa. Act June 10, 1893 (P. L. 428) § 19, two separate rooms were employed for holding the election, one being occupied by the election board and containing the ballot box and the other containing the booths, and that, instead of a guard rail, a rope was employed which did not exclude from the space reserved for voters all but the election board and the persons actually engaged in voting, and that votes cast for an office other than that contested had been purchased, the court should have declared that all votes cast under such circumstances were invalid, though no actual fraud was shown as to the vote for the office in contest. Cramer's Election Case (Pa.) 1916E-914. (Annotated.)

24. The provisions of Pa. Act June 10, 1893 (P. L. 428) § 19, relating to the arrangement of the rooms in which elections are held, being mandatory, a disregard of same without excuse invalidates the ballots cast and requires that the returns from wards wherein such violations occurred be excluded in the general count. Cramer's Election Case (Pa.) 1916E-914. (Annotated.)

25. Failure to Provide Polling Places. Where in an election to decide the creation of a new county, under S. Car. Const. 1895, art. 7, §§ 1, 2, the portions of all the townships to be included, except one, have no polling places, the exclusion of the qualified voter therein from voting is illegal, Callison v. Peeples (S. Car.) 1917E-469.

#### Note.

Effect on election of failure to comply with statute as to arrangement of voting rooms or booths. 1916E-917.

#### e. Ballots.

26. Unnecessary Words on Paster. an election for town selectman for three years and other town officers for one year, where votes were cast for a person not named on the ballot for selectman by means of pasters, the words "three years" on the paster after his name correctly state the term of office required by the official ballot, and of themselves do not disclose the voter's identity. Ray v. Registrars (Mass.) 1918A-1158.

27. Form of Ballot. Vallejo City Charter, § 15, subd. 17, provides that on the ballot the offices to be filled "shall be arranged in separate columns in the following order: . . . For commissioner (if any) vote for (giving number)." Subdivision 21 of that section provides that, in case there are two or more persons to be elected to any office, as that of commissioner, the candidates equal in number to the number to be elected receiving the highest number of votes for such office shall be declared elected. Section 6, subd. 1, makes the law of the state applicable to the elections of the city and to the canvass of the returns. Cal. Pol. Code, § 1211, subd. 2, declares that in canvassing the votes, if it is impossible to determine the voters' choice for any office to be filled, the ballot shall not be counted for such office, and section 1197, subd. 8, provides that, if any two or more officers are to be elected for the same office for different terms, the term for which each candidate for such office is nominated shall be printed on the ballot. At a special election held on petition for the recall of two commissioners whose terms expired at different times, the names of the two commissioners and of the two opposing candidates were printed on the ballot without any designation as to the term for which any of them were nominated. Held, that the state law should govern in such a case; since otherwise it was impossible to tell which commissioner the voters desired to have removed or for how long they desired to have the opposing candidates serve, and the ballots were void for uncertainty and could not be counted. Wilson v. Blake (Cal.) 1916D-(Annotated.)

28. The various revisions of the election laws impliedly recognize the use of pas-Ray v. Registrars (Mass.) 1918A-1158.

## f. Counting and Canvassing Vote.

(1) Officers and Duties,

29. Canvassing Board Confined to Return. Under sec. 94e, Wis. Stats. 1913, the state board of canvassers must make its decision from the county returns mentioned in sub. 1, sec. 87, and from such returns only. The statute contemplates but one return and that to be an entirety. State v. Board of State Canvassers (Wis.) 1916D-159.

30. Time for Return. The statute requiring the state canvassing board to complete its work within a specified time is directory, to the extent that it may continue to a finality after expiration of the time, but it has no discretion to delay by adjournments or for anything but proceedings to compel transmission of the county returns, and, in case of delays otherwise, it may be coerced by the mandamus remedy. State v. Board of State Can-State v. Board of State Canvassers (Wis.) 1916D-159.

31. Form of Return. The statute requires the entire result of the county canvass to be covered by a single decision and the result, as to the state officers, to be included in a single return. State v. Board of State Canvassers (Wis.) 1916D-159.

32. Time to Complete Canvass and Declare Result. Such legislative plan contemplates a fixed limit of time for a county clerk to complete the canvass of election district returns, to decide upon the result, to issue certificates of election to county officers found elected, and to make returns of the result of the election as to state officers to the secretary of state. State v. Board of State Canvassers (Wis.) 1916D-159.

- 33. Validity of Statute. If the legislative purpose was as indicated in sec. 86 Wis. Stats. 1913, in its letter so far as it, if executed, would prevent a county canvass and the state canvass from being completed within the time fixed by statute, it is unconstitutional. State v. Board of State Canvassers (Wis.) 1916D-159.
- 34. Time of Return. Sec. 86, Stats. Wis. 1913, cannot be given such effect as to prevent making the county canvasses and state canvass within the time required by law, as that would be liable to prevent newly elected officers from taking their respective offices on the first Monday of the political year. State v. Board of State Canvassers (Wis.) 1916D-159.
- 35. Scope of Statute Requiring Return. Sec. 86, Stats. Wis. 1913, cannot be restrained so as to affect some officers and not others; it includes all so plainly as to preclude any different meaning being adopted by construction. State v. Board of State Canvassers (Wis.) 1916D-159.
- 36. Time for Return. The statute requires the secretary of state and state canvassing board to obtain possession of the county results by the time fixed by statute for commencement of continuous work of making the state canvass, to complete it, file the decision and issue certificates of election in the time limited by statute. State v. Board of State Canvassers (Wis.) 1916D-159.
  - (2) What Ballots Should be Counted.
- 37. Use of Pasters. Mass. St. 1913, c. 835, § 292, as amended by St. 1914, c. 435, provides that the voter shall prepare his ballot by making a cross in the square at the right of the name of each candidate for whom he intends to vote, or by inserting the name of such candidate in the space provided therefor and making a cross in the square at the right. Section 259 provides that a blank space shall be left at the end of the list of candidates for each different office, in which the voter "may" insert the name of any person not printed on the ballot for whom he desires to vote. A number of votes were cast for a person whose name did not appear on the ballot by means of pasters, and in some cases the pasters, instead of being placed in the blank space at the end of the list of candidates, were placed over the name of another candi-

date for the office; a cross being made in the square opposite the paster. It is held that the ballots, though irregular, were properly counted; the paster not in itself being a "distinguishing mark," and the statute not expressly prohibiting the voter from placing the paster over the name of another candidate. Ray v. Registrars (Mass.) 1918A-1158.

- 38. Place of Mark. That a cross-mark was placed to the left of a blank space on a ballot does not prevent the counting of the ballot for a candidate before whose name a cross mark was properly placed, where it does not appear that the ballot was so marked for the fraudulent and corrupt purposes of distinguishing it. Thompson v. Redington (Ohio) 1918A-1161.
- 39. Marking of Ballot. Under Ohio Gen. Code, § 5070, par. 9, providing that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice, the fact that the word, "Yes," instead of the proper mark, appeared in the space to the left of a name, did not require that the ballot be rejected, where there was no question as to the intention of the voter or evidence of any fraudulent or corrupt purpose to distinguish the ballot. Thompson v. Redington (Ohio) 1918A-1161.
- 40. Form of Cross. Under Mo. Laws 1911, c. 71, providing that no ballot shall be rejected as defective because of marks other than those authorized by law having been placed upon it by the voter, unless with a fraudulent intent, and that no ballot shall be rejected because of any irregularity in the form of the cross in the square at the head of the party column, unless such irregularity is intentional and fraudulent, such fraudulent intent must appear affirmatively. Murray v. Waite
- 41. Use of Stickers. A ballot, in an aldermanic election, having a cross in the party square, but on which the sticker for alderman is not placed over the candidate's name so that both names plainly appear, is void. Murray v. Waite (Me.) 1918A-1128.

(Me.) 1918A-1128.

- 42. A ballot in an aldermanic election, having a cross in the party square, and below, a small cross beneath the residence of the mayor and a mark resembling a Topposite the name of the candidate for ward clerk, is not invalid as bearing a distinguishing mark. Murray v. Waite (Me.) 1918A-1128. (Annotated.)
- 43. Mark in Addition to Cross. A ballot in an aldermanic election, the party square of which contains a cross around which is drawn a circle, is void. Murray v. Waite (Me.) 1918A-1128.

(Annotated.)

(Annotated.)

44. A ballot having a cross in the party square, the lines of which are broad and dull, is properly counted. Murray v. Waite (Me.) 1918A-1128.

(Annotated.)

- 45. Form of Cross. A ballot in an aldermanic election, the cross in the party square of which is composed of practically parallel lines with the ends closed, is properly counted, under Me. Laws 1911, c. 71, providing that no ballot shall be rejected because of any irregularity in the form of the cross in the square, unless such irregularity is intentional and fraudulent. Murray v. Waite (Me.) 1918A-1128. (Annotated.)
- 46. Mutilated Ballot—What Constitutes. A ballot, in an aldermanic election, having a cross with an extra line entering into it and a break in the paper caused by an attempted erasure, is not a "mutilated ballot," which is one where the name of the candidate is cut out. Murray v. Waite (Me.) 1918A-1128.
- 47. Distinguishing Marks. A ballot in an aldermanic election, having a cross in the party square and another beneath it across the party designation, is not void as bearing a distinguishing mark. Murray v. Waite (Me.) 1918A-1128.

  (Annotated.)
- 48. Use of Stickers. A ballot in an aldermanic election, which has a cross in the party square and two stickers with the same name placed nearly over the name of the same candidate for alderman, is not invalid. Murray v. Waite (Me.) 1918A-1128.
- 49. A ballot, in an aldermanic election, having a cross in the party square and below the cross in the same square a sticker bearing the name of that party candidate for mayor, is not invalid as bearing a "distinguishing mark." Murray v. Waite (Me.) 1918A-1128.

(Annotated.)

- 50. Sufficiency of Mark. A ballot which has a cross in the party square, and then a pencil mark drawn vertically through every name in the party column beneath, must be rejected, since the voter's intention cannot be determined. Murray v. Waite (Me.) 1918A-1128.
  - (Annotated.)
- 51. Form of Paster. Mass. St. 1913, c. 835, § 261, provides as to official ballots that the names of all candidates other than candidates for presidential electors shall be in capital letters of a certain size. Section 280 provides that pasters on the official ballot shall be subject to all of the restrictions imposed by section 261 as to the size of the type. Section 292 requires the voter to make a cross in the square at the right of the name of each candidate voted for, or to insert the name of

- the candidate voted for in the space provided therefor. It is held that the fact that pasters did not conform to section 261 as to the size of the type did not render the ballots illegal; the statute being directory, especially as, had the voter written or printed the name of the candidate, instead of using a paster, the ballot would have been counted, though the size of the letters used did not conform-to the statute. Ray v. Registrars (Mass.) 1918A-1158.
- 52. Effect of Irregularities in Kind of Mark. If the intention of a voter can be fairly determined from his ballot, effect should be given to that intent, and the vote counted in accordance therewith, and ballots which fairly and unmistakably express the voter's purpose are to be counted, although the marking thereof is irregular, if it is not prohibited by statute. Ray v. Registrars (Mass.) 1918A—1158. (Annotated.)
- 53. Where a voter places a cross in a party circle and three crosses opposite the name of a candidate for representative, the ballot should be counted; it being the voter's evident intention to cumulate his vote for that representative, and not to identify the ballot. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 54. Where a voter puts a cross in the square for representative and a figure 1 outside of the square, the ballot should not be rejected; he evidently intending to show that he intended to cast only one vote for that representative. Hodgson v. Knoblauch (III.) 1917E-653.
- 55. Attempt to Cumulate Votes. Where a voter makes a cross in the square for each of two candidates for representative and an additional cross outside the square for one of them, the ballot should not be rejected, as the voter was apparently trying to cast two votes for one of the candidates. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 56. Unauthorized Marks. Where a voter, in apparently making an erasure, makes a hole in the paper in the square opposite a candidate's name, and thereupon extends the top and bottom lines of the square, making three sides of a square, and makes a cross in that space, the ballot is properly counted; there being no distinguishing mark nor anything but an honest attempt to vote for that candidate. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 57. A ballot marked with a pen, on which there are ink blots in the squares in front of the names of two opposing candidates, is properly not counted for either candidate; there being nothing resembling a cross in either square. Hodgson v. Knoblauch (Ill.) 1917E-653.

- 58. A ballot on which are two parallel marks opposite the name of the candidate for a particular office should be counted; such marks apparently being an ineffectual attempt to vote for that candidate and not distinguishing marks. Hodgson v. Knoblauch (III.) 1917E-653.
- 59. Ballots on which are diagonal marks in certain squares, indicating that the voters commenced to make crosses in such squares but changed their minds, should be counted for candidates otherwise indicated as the voters' choice; such marks not constituting "distinguishing marks." Hodgson v. Knoblauch (Ill.) 1917E-653.
- 60. A ballot on which is a cross in the Republican circle, and no other mark, except a hole in the square opposite the name of a candidate on the Democratic ticket, should be counted for such candidate's opponent on the Republican ticket. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 61. Where lines in the squares opposite the names of certain candidates are brought \*together practically at right angles, so that they intersect, but one line does not cross the other, the ballot is properly counted for such candidates. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 62. Effect of Mark Opposite Blank Line. Where there is no candidate for the office of county treasurer on the Progressive ticket, a cross in the square opposite the blank space in that column does not neutralize a cross in the square opposite the name of a candidate for that office in another column, and the ballot is properly counted for such candidate. Hodgson v. Knoblauch (Ill.) 1917E-653.

(Annotated.)

- 63. Sufficiency of Mark. A ballot, none of the marks on which bear any resemblance to a cross, is properly rejected. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 64. A ballot upon which a voter has written something looking like a figure 3 after the name of one of the candidates for representative is properly counted; the voter evidently intending to cumulate his vote, and not to make a distinguishing mark. Hodgson v. Knoblauch (III.) 1917E-653.
- 65. Attempt to Cumulate Votes. A ballot having a cross in the square opposite the name of the candidate for county clerk, followed by the figure 3, is properly rejected; it not coming within the rule as to the writing of such a figure by a voter under the mistaken belief that he can cumulate his vote. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 66. Torn Ballot. Though a voter may tear off a part of the ballot in such a way

- as to identify it, where the tearing off of a corner of the ballot is apparently accidental and can identify the ballot only by a careful matching of the piece torn off, the ballot is properly counted. Hodgson v. Knoblauch (III.) 1917E-653.
- 67. Void Ballot. A ballot having a cross in each of the squares in one party column and numerous vertical lines drawn through the squares and names of candidates in other columns is properly rejected; the marks being effective in identifying the ballot and not being made by the voter in an attempt to indicate his choice. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 68. Where there appears on a ballot a cross in the square before the name of a Progressive candidate and something in the nature of a square which has been made in the Republican circle and rubbed out, the ballot is properly rejected in recounting the votes for a Republican candidate. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 69. Where, in the square opposite the name of a candidate for representative, there was a horizontal mark from which three vertical marks extended downward, the ballot is properly rejected; it not being probable, though possible, that the voter was attempting to cumulate his vote. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 70. Effect of Mark Outside Voting Square. That a cross opposite the name of a candidate was outside the square opposite his name merely nullifies the ballot as to him; it not being a "distinguishing mark." Hodgson v. Knoblauch (Ill.) 1917E-653. (Annotated.)
- 71. While any one of an infinite variety of marks may constitute a distinguishing mark, marks which are so connected with an apparently honest effort of the voter to indicate his choice of candidates that they are evidently not made for the purpose of identifying the ballot should not be regarded as distinguishing marks and do not require that the ballot be rejected. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 72. Distinguishing Marks on Ballot. Ballots bearing any distinguishing mark cannot be counted. Hodgson v. Knoblauch (Ill.) 1917E-653.
- 73. Necessity of Compliance With Statute. Ballots cannot be counted unless the mandatory requirements of the law are complied with by voters in indicating their choice of candidates. Hodgson v. Knoblauch (III.) 1917E-653.

### Notes.

Validity of ballot with respect to place of mark for candidate. 1917E-657.

Validity of ballot with respect to kind of mark for candidate. 1918A-1131.

## (3) Conclusiveness of Returns.

74. Canvass of Vote—Review of Finding of Canvassers. A finding of fact by the state board of canvassers is not conclusive where there is no evidence to support the finding, or it is against the necessary inference from the facts, since the statute making the findings of the board conclusive presupposes that they must be supported by some evidence. Callison v. Peeples (S. Car.) 1917E-469.

## (4) Tie Vote.

75. Right of Candidate Receiving Certificate of Election. Where two candidates for alderman received an equal number of votes and one of them has received a certificate of election, the other candidate cannot maintain a proceeding to oust the one awarded such certificate. Murray v. Waite (Me.) 1918A-1128.

# (5) Effect of Irregularities in Election or Ballots.

76. Irregularities in Conduct of Election—Rejection of Entire Vote. Where there were irregularities on the part of the election officers, resulting in illegal votes, but the conduct of the officers did not evidence a wilful and deliberate fraud upon the ballot, the returns will be purged, but the election will not be invalidated. Webb v. Bowden (Ark.) 1918A-60.

(Annotated.)

77. Rejection of Entire Vote. companies connived with certain county officers, including the board of county commissioners, to secure the creation of election precincts bounded so as to include their private property only, and with lines marked by their own fences or guarded by their own armed men, which had been known as "closed camps," within which were only their own employees, and excluded the public from entrance to such election precincts, labeled them as private property, and warned the public that entrance constituted trespass, denied the right of free public assemblage within such precincts, the right of free and open discussion of public questions, and the right to circulate election literature or to distribute cards of candidates within such precincts. They secured the election of their own employees exclusively as judges and clerks of election, made the registration list from their own pay rolls, and kept them in their private places of business and in charge of their employees, and prohibited all public investigation within such precincts as to the qualifications of the persons so registered as electors of the precincts. Through their employees as election officers, they assisted non-English speaking persons to vote by marking their ballot for them in violation of law, and

provided such persons with a fraudulent device to enable them to vote without being able to read either the name of the candidate or the party ticket, and in some instances forced and intimidated their employees. On the day of the election they forced a contestor's watchers and challengers for one precinct to secure a detail of federal soldiers to escort them into the precinct and to the polls, and by such location of precincts required many voters to go eighteen or twenty miles to vote. The returned votes from such precincts gave the contestees a majority, while the votes in the entire county, outside of those of such precincts, gave the contestors a majority. It is held that the conduct of the election in such precinct was such as to invalidate the entire poll therein or in a sufficient number of them to change the result of the election in the entire county. Neelley v. Farr (Colo.) 1918A-23. (Annotated.)

78. There is a distinction in the nature of things between particular illegal votes which may be proven and exactly computed and which ought to be excluded wherever cast, and the effects of fraudulent combinations, coercion, and intimidation; and, where fraud and irregularities occur in the conduct of an election to such an extent that it is impossible for the contest tribunal to separate with reasonable certainty the legal from the illegal votes, the precincts wherein the fraud occurs should be excluded even though such exclusion changes the result of the election in the entire county. Neelley v. Farr (Colo.) 1918A-23. (Annotated.)

79. In such case, where it appeared that the state and federal troops had brought order out of strike conditions, and that there was no reasonable apprehension of further disorder, and that the success of the contestees was considered by the coal companies vital to their interest, it is held that the defense of industrial necessity did not justify the conduct of the coal companies during the election, since, after the camps on its private property had been dedicated to a public use by the establishment of voting precincts, they abandoned the private or exclusive control to which they might otherwise have been entitled. Neelley v. Farr (Colo.) 1918A-23. (Annotated.)

80. Where a number of voters were illegally prevented from voting, and it is not known how they would have voted, but there are enough votes to have changed the result had they voted against it, the election will be vacated, since, where the irregularity or illegality of an election is such as to place it in doubt, the election must be set aside. Callison v. Peeples (S. Car.) 1917E-469.

(Annotated.)

81. Wrongful Exclusion of Votes. The fact that certain persons have been illegally prevented from voting will not vitiate the election, if by counting such votes as having been cast against the result obtained there still remains a sufficient majority to establish such result. Callison v. Peeples (S. Car.) 1917E-469.

(Annotated.)

#### Notes.

Effect on election of wrongfully depriving electors of right to vote. 1917E-475.

Rejection of entire vote of election district for irregularity affecting indeterminable number of votes. 1918A-41.

#### 4. ELECTION CONTESTS.

## a. Jurisdiction.

82. Legislative Power. Under the provisions of section 21 of article 2 of the Ohio constitution, the general assembly has the power to determine before what authority and in what manner a trial of contested elections shall be conducted. In the exercise of this power it may in its discretion confer jurisdiction upon any of the courts of this state to hear and determine election contests. Thompson v. Redington (Ohio) 1918A-1161.

## b. Pleading.

- 83. Petition on Contest. Where the petition in an election contest specifically sets forth the several grounds of contest and alleges that contestor was duly and legally elected to the office in controversy, and from the facts alleged it necessarily followed that contestor claimed that the irregularities complained of prevented a fair count of the ballots and caused a wrong result to be declared, it is not defective for failure to allege that such irregularities changed the result of the election, or that but for such irregularities, the canvass of the vote would have shown the election of contestor. Thompson v. Redington (Ohio) 1918A-1161.
- 84. Amendment of Pleadings. In an election contest, where the circuit court permitted amended answer to be filed more than twenty days after the service of the summons, setting up not a counter contest, but only perfecting a ground alleged in time, but defectively, there was no violation of the rule forbidding the filing of amendments setting up new grounds of contest or counter contest after the time provided for the filing of such pleadings. Johnson v. Little (Ky.) 1918A-70.

### c. Evidence.

85. Contestants are not relieved of the burden of proving the allegations of their petition that the election returns were fraudulent and void, though the proof connects contestees, election commission-

- ers, with a theft of the poll books. Webb v. Cowden (Ark.) 1918A-60.
- 86. Though election commissioners of a county were parties to a theft by which the loss of poll books of a county seat election was brought about, the fact does not justify the circuit court, in suit to contest the election, in ignoring the official returns made by the judges of election. Webb v. Bowden (Ark.) 1918A-60.
- 87. Loss of Poll Books. On the contest of a county seat election, the evidence is held to be insufficient to warrant a finding that the election commissioners were responsible for the loss of the poll books of the election. Webb v. Bowden (Ark.) 1918A-60.
- 88. Sufficiency of Evidence. The contestants' affirmative evidence is held to be sufficient to impeach the integrity of the official returns from a township, where more votes were cast for the removal of the county seat than were shown on the printed list of those who had paid their poll taxes and were entitled to vote. Webb v. Bowden (Ark.) 1918A-60.
- 89. Judicial Notice. It is a matter of common knowledge that at general elections, where there are candidates of opposing parties, and especially in presidential years, the interest of the electorate is stirred, so that they are usually brought to the polls in full voting strength. Webb v. Bowden (Ark.) 1918A-60.
- 90. Presumption that Voter was Qualified. Where it appears that a person registered, or that his vote was accepted by the election officer, there is a presumption, in the absence of proof to the contrary, that such person was a qualified voter. Webb v. Bowden (Ark.) 1918A-60.
- 91. Burden of Proof. On the contest of a county seat election, where more votes were cast in a township for removal of the county seat than were shown on the printed list of those who had paid their poll taxes and were entitled to vote, the contestants adducing proof making it probable that the excessive votes did not occur in any legitimate way, the contestees, election commissioners, have the burden to show that the excessive votes were those of qualified electors, since the presumption of the regularity and correctness of the official action of the election officers is overcome when there is direct and undisputed proof of facts tending to impeach the returns and to show that prima facie evidence of correctness is not true. Webb v. Bowden (Ark.) 1918A-60.

### (Annotated.)

#### d. Findings.

92. Whether by some prearrangement or understanding words written on the ballot were intended to disclose the voter's iden-

tity was a question of fact, upon which the finding of a single justice in a mandamus proceeding is conclusive. Ray v. Registrars (Mass.) 1918A-1158.

### 5. CORRUPT PRACTICES ACTS.

- 93. Procedure. The statute (Comp. Laws N. Dak. § 942) providing the form of procedure in proceedings to contest the right of a person declared to be nominated or elected to office is applicable to proceedings to deprive a person of office under the corrupt practice act, and the latter act is therefore not invalid because it prescribes no procedure. Diehl v. Totten (N. Dak.) 1918A-884.
- 94. Illegal Voting. Adoption or rejection of a street car franchise is a "public proposition," within Mo. Rev. St. 1909, §§ 6155, 6177, making it a crime to vote more than once at an election in a city to pass on such a proposition. In re Siegel (Mo.) 1917C-684.

## ELECTRIC RAILWAYS.

See Street Railways.

### ELECTRICITY.

- 1. Regulation of Electric Companies.
- 2. Liability of Electric Companies for Injuries.
  - a. Care Required in General.
  - b. Injury to Children.
  - c. Actions for Injuries.
    - (1) Amissibility of Evidence.
    - (2) Questions for Jury.(3) Instructions.
- 3. Control of Public Service Commission.

Municipal electric lighting plant, Municipal Corporations, 38, 171. City regulation of electricians, see Munici-

pal Corporations, 80, 81. Separation of telegraph and traction wires, see Railroads, 31-35.

#### 1. REGULATION OF ELECTRIC COM-PANIES.

- 1. Power of Public Service Commission to Regulate. A public service commissioner may require a street railway company to prevent an escape of electricity from its rails whereby water pipes are injured by electrolysis. Winnipeg Electric R. Co. v. Winnipeg (Man.) 1916E-181. (Annotated.)
- 2. The power to require a street railway company to prevent the escape of electricity from its rails is not affected by the fact that it has charter authority to break the surface of the street and lay its rails or by the fact that it is free from negligence. Winnipeg Electric R. Co. v. Winnipeg (Man.) 1916E-181. (Annotated.)
- 3. Poles and Wires in Street. The city of Pittsburgh has power to compel the re-

moval of poles and overhead wires from its streets, provided the power is exercised in a reasonable manner. Duquesne Light Co. v. Pittsburgh (Pa.) 1917E-534. (Annotated.)

- 4. Where the overhead wires of defendant carry electricity of such high voltage as to be dangerous to any one coming in contact with them, and they amount to an obstruction and constitute a source of additional danger in fighting fires, both to the firemen and to the public, an ordinance requiring them to be removed and placed in underground conduits is within the power of the city. Duquesne Light Co. v. Pittsburgh (Pa.) 1917E-534.
- (Annotated.) 5. In a suit to enjoin enforcement of a municipal ordinance requiring public service corporations to remove poles and overhead wires from certain streets, the refusal of findings as to the annual income of plaintiff from subscribers in the territory served by plaintiff's lines on the streets named is not error where the court makes a finding that the annual income from the subscribers in the territory involved, taken in connection with the income from the city for arc lamps, will be sufficient to reimburse plaintiff for the annual cost of maintenance of an underground system and give a profit to plaintiff. Duquesne Light Co. v. Pittsburgh (Pa.) 1917E-534. (Annotated.)
- 6. In a suit to restrain enforcement of an ordinance requiring removal of poles and overhead wires from certain streets, an instruction that plaintiff had a vested right to construct and maintain its poles and wires on the streets of the city, not including any statement that the right was subject to reasonable control by the city authorities, is properly refused. quesne Light Co. v. Pittsburgh (Pa.) 1917E-534. (Annotated.)
- 7. In a suit to enjoin enforcement of an ordinance requiring poles and overhead wires to be removed and placed under-ground, the refusal of a request for the statement of a conclusion of law that the city had no right to require plaintiff to place its wires underground is not error where there was no suggestion that plaintiff intended to discontinue business in the section of the city named in the ordinance. Duquesne Light Co. v. Pittsburgh (Pa.) 1917E-534. (Annotated.)
- 8. An ordinance requiring public service corporations furnishing electric light, heat, or power or operating telegraph or telephone lines to construct conduits and complete the same before the completion of improvements on certain streets and to remove overhead poles or wires and place the same underground, and providing that where the city had any of its lines on such poles the companies owning the poles

should first remove their own wires and place them underground, and when that was done the city should remove its lines or wires, is not limited in its operation to poles which were used by the city for carrying its wires, but applies to all poles and overhead wires on the streets named. Duquesne Light Co. v. Pittsburgh (Pa.) 1917 E-534. (Annotated.)

9. Revocation of Rights in Streets. Ordinance 161 of the city of Vandalia, Ill., requiring removal of poles and wires from streets and not authorizing placing them underground or elsewhere, is, as against a telegraph company operating a line of poles and wires in such streets under previous accepted ordinance, invalid, because unreasonable. Vandalia v. Postal Telegraph-Cable Co. (Ill.) 1917E-523.

(Annotated.)

#### Note.

Revocation or expiration of right of electric company to maintain poles and wires in street. 1917E-525.

## 2. LIABILITY OF ELECTRIC COM-PANIES FOR INJURIES.

- a. Care Required in General.
- 10. Liability for Introducing Excessive Current. Though the inside wiring and appliances of a user of an electric current were defective, the company is liable for sending into the building a dangerous current which would have worked injury notwithstanding the defects. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A—1164.
- 11. Liability as to Condition of Inside Wiring. Where an electric light company did not know of defects in the wires and apparatus within the building of one of its patrons, it was under no duty to inspect for such defects. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A—1164. (Annotated.)
- 12. While an electric light company is not an insurer of the safety of its patrons, nor of people, who come in contact with its wires and apparatus, it is bound to exercise the highest degree of care and skill in the installation, construction, and operation of its plant, as well as in the inspection of its wires and other apparatus, and must use the necessary devices to control its current and prevent the passing of dangerous currents of electricity into the houses of its patrons. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.

### Notes.

Liability of electric light company for injuries resulting from condition of inside wiring or apparatus. 1917A-1175.

State or municipal regulation of electricians. 1916E-694.

## b. Injury to Children.

13. Duty as to Wires. Defendant permitted children and others living in the neighborhood of its car barns to pursue a path over its premises leading past a pole sustaining its electric wires. Its servant in charge of the premises had been warned that electricity was escaping from the wires into the pole, but with such knowledge took no steps either to prevent such escape or prevent people from using the path. Plaintiff, a child of ten, while using the path, came in contact with certain hay wire charged with electricity from the pole, and was injured by an electric shock. Held, that defendant's negligence was such as could be found to be wanton and reckless, so as to justify a recovery by plaintiff as a licensee. Romana v. Boston Elevated R. Co. (Mass.) 1917A-893.

(Annotated.)

Duty and liability of one maintaining electric wires in reference to children. 1917A-895.

- c. Actions for Injuries.
- (1) Admissibility of Evidence.
- 14. Competency of Expert. An embalmer who had seen the bodies of two persons who had been electrocuted is not competent to testify as an expert that deceased met his death from electrocution. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 15. Where plaintiff's intestate, who was a patron of defendant electric company, received a fatal shock through an electric light wire, testimony that shortly after the accident the witness saw a man climb the electric light pole in front of the store where deceased met his death is inadmissible; the witness being unable to identify positively the person as connected with defendant. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 16. A witness who shows himself to be familiar with electricity, and who attempted to pull plaintiff's intestate away from the electric light cord where deceased received the fatal shock, may testify that he also received a shock of from 110 to 250 volts; it appearing that the current passed through deceased and into the witness. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 17. In such case the witness may testify that after deceased had been removed, the cord, which reached the floor, ignited it. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 18. Injury from Inside Wiring. Where plaintiff's intestate received a fatal shock from an electric light cord, the question whether there would have been any trouble had the cord been tied instead of sus-

pended from the ceiling is not, where the witness had been testifying he was unable to pull deceased away from the cord, inadmissible. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.

- 19. Expert Evidence. It was plaintiff's claim that a defect in a transformer allowed an unusual current into the building, and that in using electric lights deceased met his death. The transformer was tested by an expert. Held, that other experts could testify whether the test administered showed that the transformer was not defective. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 20. Subsequent Tests of Apparatus. In an action for death by electrocution, where plaintiff contended that the transformer was defective, evidence of tests made by an expert some months after the accident is admissible; there being a showing that the transformer had not been repaired, and that any defect therein would not be righted of itself. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A—1164.
- 21. Opinion Evidence. In such action the testimony of decedent's former employer that decedent had installed transformers and worked on electrical apparatus, and that he knew that the secondary side of the transformers was a 2,250 volt system, and that the primary side was of a higher voltage, because he had known of deceased's installing transformers and connecting of same, which were marked to show the voltage for which they were to be connected up, is necessarily the result of reasoning, and inadmissible as being merely the opinion of the witness. McCarthy's Admr. v. Northfield (Vt.) 1918A-943. (Annotated.)

#### (2) Questions for Jury.

- 22. Conducting Excessive Current into Building-Defective Wiring-Presumption of Negligence. Where it appears that a high tension wire was in close proximity to a low tension wire used for the lighting of buildings, that the transformer by which the current was stepped down was not grounded, and that the buildings were not equipped with cut-offs, the fact that a high tension current is carried into a building by a branch of a tree blowing over the wires, causing the destruction of the building, makes a case for the jury as to the liability of the electric company. Vandry v. Quebec R., etc. Co. (Can.) 1917C-843. (Annotated.)
- 23. Failure to Inspect. In an action for electrocution of plaintiff's intestate, the question whether the defendant company was negligent in not inspecting the wiring or in failing to turn off its current from the building, held for the jury.

Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.

#### (3) Instructions.

24. Definition of Negligence. In an action for the electrocution of plaintiff's intestate, an instruction, defining negligence and ordinary care as applied to the contributory negligence of the intestate, is not error, where the jury was charged that defendant was bound to exercise the highest degree of care. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.

# 3. CONTROL OF PUBLIC SERVICE COMMISSION.

- 25. Vt. Acts 1908, No. 116, § 13, providing that whenever it is necessary to meet the service requirements of a public service corporation, such as a lighting company, that it should cross another's land with wires, etc., and it cannot agree with the owner as to questions of necessity or compensation, it may petition the Public Service Commission, which shall, upon due notice to all parties in interest, determine such questions and render a judgment, which shall be final, except as an appeal is allowed to the supreme court, is not unconstitutional for empowering the com-mission to render "judgment" on the ground that it is an administrative body; the word being used in a comprehensive sense which will include the findings and determination of such a body. George v. Consolidated Lighting Co. (Vt.) 1916C-416. (Annotated.)
- 26. Certificate of Necessity-Extension of Electrical Plant. It is provided by section 48a of said Idaho Laws 1913, c. 61, that no electrical corporation shall "henceforth" begin the construction of an electrical plant, etc., without having first obtained a certificate of convenience and necessity from the commission; and a public utility corporation cannot slip in between the passage and approval of such act and its going into effect and procure an ordinance that would deprive the state of its right to regulate it in its operations under the police power of the state, especially where such corporation had not begun actual construction work, and was not prosecuting such work in good faith and uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, as provided by section 48b of said act; for under the facts of this case the plaintiffs had not begun actual construction work on their system on either of said cities. Idaho Power etc. Co. v. Blomquist (Idaho) 1916E-282.
- 27. It was not the intention of the legislature, under the provisions of section 48b, Idaho Laws 1913, c. 61, to permit such corporations to extend their lines into terri-

tory already occupied by a similar utility corporation, without first securing a certificate of convenience and necessity from said commission. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

28. The last proviso of section 48a, Idaho Laws 1913, c. 61, provides that power companies may, without such certificate, increase the capacity of existing plants, or develop new generating plants and market the product thereof. That proviso must not be so construed as to nullify the clear object and purpose of said act. If construed to give such corporations the power to establish new plants and lines and enter into new fields for the sale of their products, then the main object and purpose of said act would be nullified and defeated; and if that proviso be construed in that way, it must be held as nugatory, and be disregarded. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

29. The contract right given to a public utility corporation by ordinance of a city does not come within the contract clause of the constitution of the United States, in that it can in no manner be affected by the police power of the state; and when a corporation acquires a franchise for the purpose of carrying on a corporate pusiness within a city, it is accepted subject to the police power. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

30. Under the law, the standard by which rates, service, etc., must be fixed clearly contemplates reasonable rates, service, etc., which is a legislative matter, and cannot be delegated; but the authority to determine what is a reasonable rate is purely administrative, and can be delegated and was delegated to the commission in our public utilities act (Idaho Laws 1913, c. 61), and the several acts authorized to be performed by the commission may be reviewed by this court on a writ of certiorari or review, as provided by section 63a of said act, and under the provisions of that section all orders made by the commission may be reviewed by this court, and this court has the authority to determine whether such orders are unlawful. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

31. Necessity for Extension of Public Utility—Power of Public Service Commission. Under the state's police power, the legislature has authority to authorize said utilities commission to determine whether a duplication of an electrical plant is required in a town or city for the convenience and necessity of the inhabitants. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282. (Annotated.)

#### Note.

Power of public service commission to prevent maintenance of electric wires in close proximity. 1918B-847.

#### ELEVATORS.

Elevator not a vehicle, see Master and Servant, 173. Injury by fall into shaft, see Negligence,

- 1. Change of Ownership. Change in ownership of an office building, at least where practically nominal, as from individuals to a corporation in which they are the principal stockholders, between the time a passenger elevator was installed therein and the time it broke, cannot affect the question of liability of the owner at the time of the accident to a passenger injured, for negligence of the manufacturer in not making a proper test of the part which broke. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924.
- 2. Owner as Carrier of Passengers. The owner of an elevator in an office building is, to all intents and purposes, a common carrier, and his liability to those rightfully using it is that of common carrier to passengers. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924.
- 3. Possibility of Discovery. Evidence in a passenger's action for injury from fall of an elevator, held sufficient for a finding that application of a known test for tensile strength would have disclosed a latent defect in a bolt, breaking of which caused the accident. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924.
- 4. Appliance Purchased from Manufacturer. A carrier, the owner of an elevator in an office building, is responsible to a passenger, injured by fall of the elevator because of a latent defect, for negligence of the manufacturer in not making a proper test therefor, which would have disclosed it. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924.
- (Annotated.)
  5. That an elevator in an office building had been in use 20 years before it broke, injuring a passenger, through a latent defect existing when it was installed, does not affect the question of negligence, and liability of the elevator owner therefor, of the manufacturer in not making a test which would have disclosed it. Dibbert v. Metropolitan Investment Co. (Wis.) 1916E-924. (Annotated.)

## ELOIGNMENT.

Of encumbered goods, see Liens, 3, 5.

#### EMANCIPATION.

See Parent and Child, 4.

## EMBEZZLEMENT.

- Definition and Elements of Offense.
   Trial.
- a. Indictment and Information.
  - b. Evidence.
    - (1) Admissibility.
    - (2) Sufficiency.
- 3. Effect of Restoration.

Fine or compensation, see Sentence and Punishment, 6.

Form of verdict, see Verdicts, 8.

## 1. DEFINITION AND ELEMENTS OF OFFENSE.

- 1. The crime of embezzlement may be committed by a fraudulent failure to account for funds, as well as by physical confiscation. State v. Bickford (N. Dak.) 1916D-140.
- 2. It is the design and policy of section 12876, Ohio General Code and kindred statutes to prevent public officers and agents from using public funds in their possession or under their control, in any manner or for any purpose not expressly authorized by law. State v. Baxter (Ohio) 1916C-60. (Annotated.)

#### 2. TRIAL.

#### a. Indictment and Information.

- 3. Section 9205, N. Dak. Rev. Codes 1905, describes but one general crime of embezzlement, which may be committed in different ways, and the same may be charged in different counts alleging the various ways by which the same was accomplished. State v. Bickford (N. Dak.) 1916D-140.
- 4. Duplicity. An indictment charging defendant, the eashier of a bank, with embezzling money belonging to the bank, at divers times, "beginning with the said —— day of July, 1909," stating the aggregate amount of such various sums, charges but a single act of embezzlement, and does not contravene section 5, c. 158, W. Va. Code 1913. State v. Wetzel (W. Va.) 1918A-1074.
- 5. By Executor. An indictment charging that defendant, acting as an executor of a person named, and having in his possession certain moneys belonging to the estate, feloniously withheld and appropriated them to his own use, is sufficient. People v. Gibson (N. Y.) 1918B-509.

#### b. Evidence.

## (1) Admissibility.

6. Other Crimes. In a trial for embezzlement, it is proper to admit evidence tending to prove that defendant, the cashier of a bank, forged certain notes for the purpose of falsifying the bank's accounts.

Such evidence is admissible on the question of intent to embezzle. State v. Wetzel (W. Va.) 1918A-1074.

7. By Executor—Revocation of Letters. In a prosecution for larceny of estate moneys by the executor, the papers on which his letters were revoked should not have been received over his objection. People v. Gibson (N. Y.) 1918B-509.

## (2) Sufficiency.

- 8. Variance as to Amount. It is not necessary that the exact sum embezzled should be alleged, nor is it necessary to prove the exact sum as charged. State v. Bickford (N. Dak.) 1916D-140.
- 9. Aggregation of Items. Where the evidence shows a cumulation of peculations, the aggregate misappropriation may be treated as one crime, and all the peculations as parts of the one offense, and the aggregate shortage proven may be more or less than the sum stated in the information. State v. Bickford (N. Dak.) 1916D-140.
- 10. Evidence Sufficient. Evidence examined and held sufficient to justify a conviction of the crime of embezzlement, under sections 9204, 9205, N. Dak. Rev. Codes 1905. State v. Bickford (N. Dak.) 1916D-140.

## 3. EFFECT OF RESTORATION.

- 11. Effect of Restoration. The crime of embezzlement by a public officer does not merely consist in failing to turn over all moneys to the state at the time of the relinquishment of his office, but in having fraudulently converted money or securities while in that office. The mere fact, therefore, that a friend may come to one's rescue, and furnish money sufficient to make good a shortage on a final accounting, does not in any way negative the fact that, prior to such final accounting, money has been fraudulently converted,—that is to say, embezzled. State v. Bickford (N. Dak.) 1916D-140.
- 12. Restoration as Defense. The accused was state superintendent of banks. He took \$37,000, of the funds that came into his custody by virtue of his office, to New York City, and used the money there to redeem his collateral securities which he had pledged for his private debt. Some weeks later, before he was called to account for the money and before he was indicted for its unlawful conversion to his own use, he negotiated the securities which he had thus obtained, for money with which he restored to the funds the \$37,000, with which he paid his debt in New York. Held, this was embezzlement, in violation of section 12876, Ohio General Code. State v. Baxter (Ohio) 1916C-60. (Annotated.)

13. The fact that he returned money of equal amount to the trust fund, before his secret appropriation of it became known, was no defense. State v. Baxter (Ohio) 1916C-60. (Annotated.)

Note.

Restoration of property or settlement cr offer to settle with owner as defense to prosecution for embezzlement or larceny. 1916C-66.

#### EMINENT DOMAIN.

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Claim for improvements on land abandoned by condemnor, see Improvements, 1.

Proceeds of award as covered by mortgage of land, see Mortgages and Deeds of Trust, 15.

## IN GENERAL.

1. Nature of Right. "Eminent domain" is a right inherent in all sovereignties: it is the right of a nation or the state, or of those to whom the power has been fully delegated, to condemn private property for public use and to appropriate the ownership or possession of such property for such use upon paying due compensation to be ascertained according to law. Western Union Tel. Co. v. Louisville, etc. R. Co. (III.) 1917B–670.

- 2. Where it is provided in the constitution in express terms for what purposes the right of eminent domain may be exercised, and public uses are defined therein. such provision is the expression of the sovereign will, and grants the right as effectually as if expressed in a legislative act, and can be enforced when such grant is supplemented by an act of the legislature providing the procedure for the exercise of such right. Backwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.
- 3. Relation of Parties. "Condemnation" is an enforced sale, and the condemnor stands toward the owner as buyer toward seller. Jackson v. State (N. Y.) 1916C-779.

#### Note.

Conditional condemnation of property. 1917C-631.

#### 2. WHO MAY EXERCISE POWER.

#### a. De Facto Corporation.

4. That a telegraph company has been organized in an unlawful manner or for an unlawful purpose cannot be considered in a proceeding by it to condemn land for a right of way. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.

#### FOR WHICH 3. USES PROPERTY MAY BE TAKEN.

#### a. In General.

- 5. Origin and Scope of Power. only application of the doctrine of eminent domain at common law was the exercise by the sovereign of the prerogative right to take and enter upon lands in the defense of the realm. George v. Consolidated Lighting Co. (Vt.) 1916C-416.
- 6. Effect of Constitutional Declaration of Purposes. Section 14 of article 1 of the Idaho state constitution declares for what purposes the power of eminent domain may be exercised, and the legislature cannot make the provisions of that section any more effective by enacting them into statute law. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.
- 7. Development of Resources of State. Under the provisions of said art. 1, Idaho Const. section 14, the right of eminent domain is permitted on the theory of a public use for the "complete development of the material resources of the state," even where the public may have no direct interest in the exercise of the right of eminent domain, and the main end of which is private gain, and where the benefit to the people at large could result indirectly and incidentally only from the in-

crease of wealth and the development of those material resources. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189

## b. Water Supply.

8. Power to Condemn Water. A rail-road company, chartered under the general railroad laws of the state, cannot, in the exercise of its right of eminent domain, condemn for corporate purposes the waters of a stream over which it has constructed its roadbed on a right of way acquired by condemnation; such right not being conferred, either by Pa. Act Feb. 19, 1849 (P. L. 79), or by Act April 9, 1856 (P. L. 288.) Connellsville, etc. R. Co. v. Markleton Hotel Co. (Pa.) 1916E-1213.

(Annotated.)

## c. Temporary Highway.

9. Temporary Logging Road. It is held that, where a temporary logging road is necessary to the complete development of the material resources of the state, the necessary use of land for a right of way is a "public use," and may be acquired as provided by the statute. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189. (Annotated.)

#### d. New Public Use.

- 10. Conflicting Locations. In condemnation proceedings where a telegraph company and a railway company sought to locate a line over the same ground, the one who first located the line had the preference. Western Union Tel. Co. v. Louisville, etc. R. Co. (III.) 1917B-670.
- 11. Prior Public Use. In a proceeding by a telegraph company to condemn an easement for its lines along the right of way of a railroad company, under Hurd's Ill. Rev. St. 1913, c. 134, conferring the right of eminent domain upon telegraph companies, the railroad company cannot contend that petitioner is seeking to condemn property already occupied and subjected to the same use, where the only prior use for telegraph purposes consisted of a single wire strung on poles not owned by the railroad company and supplied by current not furnished by it; the space occupied by the wire not being involved. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.
- 12. Condemnation by Telegraph Company—Taking of Railroad Right of Way—Inconsistency of Use. Under Burns' Ind. Ann. St. 1914, § 929, regulating the matters of entry, survey, effort to purchase, and title taken in the exercise of the power of eminent domain, and section 5770 providing that telegraph companies may acquire such rights of way as may be necessary for their purposes under the writ of assessment of damages, the right of a telegraph company to condemn by

writ of assessment a right of way for poles and wires along defendant railroad's right of way depends upon the degree of interference which such poles and wires will cause in the railroad use, since, although lands once condemned to public use cannot be subsequently condemned for a second public use inconsistent with the former, which would destroy it, unless there is a statute expressly conferring such right, nevertheless, under a right to condemn conferred by general statute, a second appropriation of land already devoted to public use may be had where the subsequent use will not be too inconsistent with the former, so that the interference therewith may be compensated in damages. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ind.) 1917B-705.

(Annotated.)

- 13. Ala. Code 1907, \$ 3867, providing that property already devoted to public use shall not be taken for a different character of use, unless an actual necessity for the specific land or portion thereof shall be alleged and proven, does not authorize a telegraph company to condemn an easement for its lines along the unused portion of a railroad right of way, merely because it is more convenient to do so, or because the easement can be secured at less cost, since "actual," as used in the statute, means real, as distinguished from apparent, constructive, or imputed, and "specific" means tending to specify, or to make particular, definite, limited or precise. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696.
- (Annotated.)

  14. Ala. Const. 1901, \$ 23, providing that the exercise of the right of eminent domain shall never be abridged or so construed as to prevent the legislature from taking the property of corporations and subjecting them to public use in the same manner as the property of individuals, does not prevent the legislature from exempting property already devoted to public use from condemnation except in cases of actual necessity, as it did by Ala. Code 1907, \$ 3867. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696. (Annotated.)
- 15. Ala. Code 1907, \$ 5817, which granted rights of way for telegraph lines along the margins of public highways, does not, in connection with Ala. Const. 1901, \$ 242, declaring railroads not constructed and used exclusively for private purposes to be public highways, give a telegraph company an easement along a railroad right of way, since the constitutional section was only intended to make railroads highways in a limited sense and subject them to state and federal control, not to deprive them of their private ownership of their rights of way. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696. (Annotated.)

16. Taking Railroad Right of Way. Ala. Code 1896, §§ 1244, 1246, which gave any telegraph company the right to construct its lines along a railroad right of way, and authorized it to condemn an easement for that purpose, were omitted from the Code of 1907 and thereby repealed. An act approved in 1903 (Laws 1903, p. 374), now codified in part as Code 1907, § 3867, provided that, if the property sought to be condemned had already been devoted to public use, it should not be taken for another and different character of public use, unless an actual necessity for the specific land shall be shown, and unless it be shown that the different use will not materially interfere with the public use to which such property is already devoted. It is held that these changes in the statutes indicated an intention to limit the right of a telegraph company to condemn an easement along a railroad right of way to the cases provided for by Code 1907, § 3867. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696. (Annotated.)

# 4. PROPERTY WHICH MAY BE TAKEN, AND TITLE ACQUIRED.

- 17. In a proceeding by a telegraph company to condemn an easement for its lines over the right of way of a railway company after the termination of a lease therefor, a finding that one of the wires strung during the life of the lease was the property of the railway company, and that therefore the railway operated a line in the identical place sought to be condemned, was erroneous, where under a contract between the telegraph company and the railway company the former strung the wire and the latter paid a certain price for its use. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.
- 18. Where a railway company has thus by condemnation become vested with an estate in fee simple absolute in the land taken for public purposes, a citizen, though an abutting and former owner, has no right to interfere or oppose such railway company in the exercise of any rights acquired in condemnation. Hays v. Walnut Creek Oil Co. (W. Va.) 1918A-802. (Annotated.)
- 19. Whether the granting of such an estate in fee simple absolute to a railway company or other public service corporation is good public policy, is a legislative, not a judicial, question, and one with which the courts have nothing to do. Hays v. Walnut Creek Oil Co. (W. Va.) 1918A-802. (Annotated.)
- 20. By plain terms of the statute, sections 18 and 22, c. 42, W. Va. Code 1891, and construed in the light of correct legal principles and the weight and authority of adjudged cases; a railway company

- in this state, by condemnation and compliance with all the provisions of the law, takes an estate in fee simple absolute in the land taken, including the oil and gas and other minerals in and under the same. Hays v. Walnut Creek Oil Co. (W. Va.) 1918A-802. (Annotated.)
- 21. Nature of Interest Acquired. In the exercise of its power of eminent domain the state, through its legislature, except as limited by the constitution, may take or authorize a public service corporation to take, for public purposes, any estate in land dictated by its sovereign will. Hays v. Walnut Creek Oil Co. (W. Va.) 1918A-802. (Annotated.)
- 22. Electric Lighting Plant. Under the Wis. public utilities statute (St. 1915, § 1797m1, subd. 5, and sections 1797m76 to 1797m85), as to acquisition by a municipality of a public utility, etc., providing that a public utility by acceptance of an "indeterminate permit" shall be deemed to have consented to a future "purchase" of its property by the municipality in which its property is, for the compensation and under the terms and conditions determined by the commission, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, a proceeding under section 1797m79, subd. 4, by a municipality to acquire the property of an electric light company operating under an indeterminate permit, although termed a "purchase," is in the nature of a condemnation proceeding, since the acceptance by the utility of an indeterminate permit amounts only to a waiver by it of a verdict of necessity and a consent that its property may be acquired as provided by the act, but is not a contractual act. nell v. Kaukauna (Wis.) 1918A-247. (Annotated.)
- 23. When Title Passes. Until the report of the examiners in condemnation by county commissioners under Md. Acts 1904, c. 583, of land for widening a road, is ratified by the commissioners, as thereby required, they do not acquire title to or interest in the land, and therefore in constructing the road on it are wrongdoers. Pettit v. County Commissioners (Md.) 1916C-35.
- 24. Taking Easement in Right of Way. Act Cong. July 24, 1866, c. 230, §§ 1, 4, 14 Stat. 221 (7 Fed. St. Ann. 205), giving telegraph companies a right to construct lines over the public domain and across navigable streams upon filing their written acceptance of the act with the postmaster general, does not constitute such an assumption by Congress of all power over telegraph lines engaged in interstate commerce as to prevent condemnation under state law by a telegraph company of an easement for its lines over the right of way of a railroad company.

Western Union Tel. Co. v. Louisville, etc. R. Co. (III.) 1917B-670. (Annotated.)

25. A telegraph company lawfully organized within the state is not prevented from condemning an easement for its lines over a right of way of a railroad company organized within the state, leased to another railroad company engaged in interstate commerce, by Const. U. S. art. 1, § 8 (8 Fed. St. Ann. 363), giving Congress power to regulate commerce among the states. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670. (Annotated.)

26. A petition for condemnation filed by a telegraph company to condemn an easement for its lines along the right of way of a railway company under Hurd's Ill. Rev. St. 1913, c. 134, §§ 1-3 (Rev. St. 1874, c. 134, §§ 1-3), conferring the right of eminent domain upon telegraph companies, is not in violation of Const. U. S. Amend. 14, \$1 (9 Fed. St. Ann. 416) and amendment 5 (9 Fed. St. Ann. 305), or to Const art. 2, § 2, prohibiting the taking or damaging of private property without just compensation, since the object of the condemnation proceedings was to ascertain legally the compensation to which the railroad company would be entitled. Western Union Tel. Co. v. Louisville, etc. R. Co. (III.) 1917B-670. (Annotated.)

27. Effect on Public Service Corporation. Under Const. N. Y. art. 1, § 6, declaring that private property shall not be taken for public use without just compensation, rights based on restrictive building covenants are property rights which cannot be taken for a public use without just compensation, and which make direct and compensational damages which otherwise would be consequential and noncompensational. Flynn v. New York, etc. R. Co. (N. Y.) 1918B-588. (Annotated.)

## Notes.

Power of telegraph or telephone company to condemn railroad right of way under state statute. 1917B-689.

Right of railroad company to condemn water over which right of way is constructed. 1916E-1215.

Interest in land acquired by condemnation as easement or fee. 1918A-806.

## 5. WHAT CONSTITUTES TAKING OF PROPERTY.

28. The exercise of such sovereign power as the laying waste of one's own country to compel the retreat of a public enemy or the taking of land for fortifications, etc., is not an application of the power of eminent domain, but is referable rather to the war power. George v. Consolidated Lighting Co. (Vt.) 1916C-416.

## 6. COMPENSATION.

#### a. In General.

29. Necessity of Paying Compensation. The constitution and statute provide that full compensation shall be paid for all lands taken for a public use. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.

## b. Measure and Elements of Compensa-

### (1) In General.

30. That landowners' injuries resulting from the erection of a bridge were not of a kind for which a common-law action would lie, and no constitutional provision entitled them to compensation, does not preclude the state from awarding compensation. Brackett v. Commonwealth (Mass.) 1918B-863.

31. Where a strip through the middle of a farm was taken to secure land for the storage of a city water supply, an offer by the city to grant the owner and his successors the perpetual right to water their stock in the stream flowing through the land taken is not available to reduce damages; the continuance of the privilege being precarious under Md. Acts 1914, c. 810, vesting power in the state board of health to prevent the pollution of waters to protect the public health. Brack v. Baltimore (Md.) 1916E-880.

32. Measure of Compensation. In proceedings to condemn land, the measure of compensation is the value of the land condemned, together with a due allowance of consequential damages as to the remainder; the amount allowed for the property taken being based on its actual market value, which is estimated with reference to all uses for which the land is adapted, such as suitability for a reservoir, etc. Brack v. Baltimore (Md.) 1916E-880.

33. Injury to Land not Taken. Where a right of way for the erection and maintenance of towers, poles, and wires for the transmission of electricity is condemned, the owner may recover compensation for actual depreciation in the value of his remaining land, caused by the presence of the right of way; but mere fears of people from the presence of the right of way cannot be made a basis on which to predicate such depreciation or affect the amount of the recovery. Alabama Power Co. v. Keystone Lime Co. (Ala.) 1917C-878.

34. Compensation for Value of Mineral Rights. Where a power company condemned a right of way for the erection and maintenance of instrumentalities for the transmission of electricity, acquired only the surface, and any mineral inter-

ests remained in the owner, the owner can only recover the value of the surface taken, unaffected by the value of mineral interests. Alabama Power Co. v. Keystone Lime Co. (Ala.) 1917C-878.

35. Taking of Land. Where land is taken under the right of eminent domain, the owner is entitled to actual value of the land taken and to the direct and certain damages resulting to his other land. Alabama Power Co. v. Keystone Lime Co. (Ala.) 1917C-878.

## (2) Where Land is Taken for Railroad.

36. Taking of Part of Tract. The measure of damages for property taken or injured under eminent domain, where part of the tract is taken, is the fair market value of the part taken, considering it in relation to the entire tract, together with such other direct damages as result to the remainder of the tract by reason of the situation in which it is left by the taking of the part in question, and by reason of such improvements, fencing, etc., as may be rendered necessary by the taking of the part, in the establishment of new means of egress and ingress, and otherwise necessary for the reasonable enjoyment of the remainder of the tract; but such direct damages shall not exceed the difference between the fair market value of the whole tract immediately before the taking and the fair market value of the remainder immediately after the taking. Music v. Big Sandy, etc. R. Co. (Ky.) 1916E-689.

## (3) Improvements by Condemnor.

37. It is not error to refuse to make the petitioner on a second condemnation proceeding pay the added value of the land due to the improvements placed thereon by it after a judgment confirming the commissioners' award of damages, and after its payment of damages and entry, and before that judgment had been reviewed and reversed on writ of error. New River, etc. R. Co. v. Honaker (Va.) 1917C-132. (Annotated.)

38. Where the judgment confirming the commissioners' award, and under which the railroad paid damages, entered and made improvements, was not void, but voidable merely pending a writ of error and reversal, the action of the court below in refusing to, on the filing of a second condemnation proceeding, make the railroad pay the added value of the land due to the improvements does not deprive the owners of their property without due process of law, in violation of Const. U. S. art. 14, § 1. New River, etc. Co. v. Honaker (Va.) 1917C-132. (Annotated.)

#### Note.

Right to compensation in condemnation proceedings for improvements placed on

land by condemnor with authority or color thereof. 1917C-141.

## (4) Benefits.

39. Indirect Damages and Benefits. In arriving at the damages from taking land by a railroad indirect or consequential benefits may not be deducted from the direct damages, but if they exceed the indirect or incidental damages resulting from a prudent construction and operation of the railroad, they do not affect the amount of the recovery, but if the indirect or incidental damages resulting from a prudent construction and operation of the railroad do exceed the consequential benefits, there may be included in the recovery such excess of incidental damages over consequential benefits. Music v. Big Sandy, etc. R. Co. (Ky.) 1916E-689.

40. Setting Off Benefits. Where, in condemnation proceedings, the owner of the land taken demands recovery for injuries to his remaining land, the jury must set off the value of any benefit that may accrue to the remaining land against any resulting damages. Alabama Power Co. v. Keystone Lime Co. (Ala.) 1917C-878.

## (5) Fixtures.

41. Compensation for Fixtures. The state condemning a warehouse for the use of a barge canal may not reject the machinery therein attached as fixtures in computing compensation, where there was nothing in the notice of appropriation excepting such fixtures. Jackson v. State (N. Y.) 1916C-779. (Annotated.)

#### Note.

Value of fixtures as element of damages sustained by appropriation of property in eminent domain proceeding. 1916C-780.

## (6) Damages to Personalty.

42. Items of Recovery-Cost of Removing Personalty. A lessee for years of a parcel of land condemned for a public use is not entitled to recover for loss of profits in its business during removal of its stock of goods, nor for the expense of the removal of the goods and personal property as distinguished from fixtures, from the location, condemned, to a new location. nor for the depreciation in value of such personal property and stock caused by removal and reinstallation, and is entitled to be paid the reasonable market value of its fixtures affixed to the premises condemned; but where the party condemning does not want the fixtures, and the lessee elects to take them, the damages which the party condemning must pay as such value should be reduced to the extent of the reasonable market value of the fixtures as they stood on the premises condemned diminished by the necessity of immediate removal and reinstallation elsewhere. St. Louis v. St. Louis, etc. R. Co. (Mo.) 1918B-881. (Annotated.)

#### Note.

Recovery of damages in condemnation proceedings for injury to personal property or expense of removing it from premises. 1918B-886.

## (7) Loss of Profits.

43. In assessing damages to a leasehold interest from the building of a bridge near by, the profits of a lessee from his business conducted on the demised premises are immaterial. Brackett v. Commonwealth (Mass.) 1918B-863.

(Annotated.)

#### Note.

Loss of profits or injury to business as element of damages in eminent domain proceedings. 1918B-869.

- c. Who Entitled to Compensation.
- 44. Holders of Lien Against Property. Upon the making of an award in condemnation proceedings each bondholder under a trust deed of the property acquired becomes entitled to receive his pro rata share of the award. Connell v. Kaukauna (Wis.) 1918A-247.
- 45. Estoppel to Object to Application of Award. Where an award in condemnation proceedings was paid to the trustee under a trust deed of the condemned property some months prior to the maturity of the bonds and without actual notice to or authority from the bondholders, the bondholders are not bound to accept such unauthorized payment to the trustee as payment to them, because thereafter the municipality spent a large amount in betterments after the bondholders had notice of the facts by reason of default in payment of interest on their bonds. Connell v. Kaukauna (Wis.) 1918A-247.

## d. Action for Compensation.

- 46. Instructions. In an action for compensation for property condemned by a water company, charge that the jury should simply go on the land to view the ground and the location so that they might intelligently understand the evidence which would be introduced in court, and not for the purpose of deciding the case from what they saw there, or from what they might hear, and that they should not use what they saw in the shape of substantive evidence from which they should find the damages, but in order to understand the evidence, is proper. Water Co. (Pa.) 1917E-1099.
- 47. Effect of Purchase of Property. In an action for compensation for land condemned by a water company as author-

- ized by section 34 of Pa. Act April 29, 1874 (P. L. 73), contemplating that the company must try to agree with the owner upon the purchase price before resorting to condemnation proceedings, purchases from an owner must be considered in subsequent legal proceedings for lands needed for the same public improvement, as though made in due course of the exercise of the right of eminent domain, and not as separate private transactions. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099.
- 48. Elements of Value. In an action for compensation for land condemned by a water company for a public improvement, expert witnesses in estimating the market value of such land may consider, as an element, its adaptability for the particular use for which it is being appropriated. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099.
- 49. Price Paid by Condemnor to Others. Expert witnesses may not take into account the general rise or fall common to all property consequent upon the coming of the improvement as suggested by the prices which the company has been obliged to pay to secure other lands. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099. (Annotated.)
- 50. Market Price as Criterion. The compensation to which an owner is entitled is what the property immediately prior to the taking would have produced to him in the open market, and not what it might be worth to the company taking it. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099.
- 51. Sales by Defendant. Where expert witnesses testified for plaintiff as to the value of the land taken, defendant's objection to their consideration of "any sales that were made to the defendant company" is properly overruled, where there is no notice or intimation that the sales in question were in fact purchases by the defendant after the location of its reservoir or subsequent to or in the course of actual condemnation proceedings. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099.
- 52. Peculiar Adaptability of Property. Where the only evidence in an owner's action against a water company for land condemned by it, including that of defendant's engineer, showed that the land was

(Annotated.)

especially adapted for dam purposes, it is not error to permit the jury to consider that fact in determining its value prior to the taking. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099.

- e. Waiver of Compensation.
- 53. Waiver of Rights as to Award. A trustee under a trust deed in de-

manding the balance of a condemnation award for the property covered by the trust deed, which balance remained after satisfying a first lien from part of the award retained for that purpose, does not thereby elect a remedy or waive any other rights which he might assert as representative of the bondholders whose claim had not been satisfied; he being entitled as trustee to such balance in any event. Connell v. Kaukauna (Wis.) 1918A-247.

54. Estoppel to Assert Damage. In such case, as the value was fixed by the assessors and not the corporation, neither payment of taxes nor failure to claim an abatement estopped the corporation from asserting damage. Brackett v. Commonwealth (Mass.) 1918B-863.

55. That a corporation after a bridge was built near its realty paid the same taxes as before, is not an admission that the building of the bridge did not damage its property. Brackett v. Commonwealth (Mass.) 1918B-863.

## 7. CONDEMNATION PROCEEDINGS.

## a. In General.

56. Requisites of Proceeding. The questions of necessity for condemning land and due compensation must ultimately be determined by an impartial tribunal proceeding on due notice to interested parties and hearing before deciding, but not acting unreasonably or arbitrarily. George v. Consolidated Lighting Co. (Vt.) 1916C-416.

57. Delegation to Commission. question of the necessity for taking property by eminent domain is a judicial question which must be determined by a court or some quasi judicial tribunal designated by statute, and Vt. Acts 1908, No. 116, § 13, providing that whenever it is necessary, to meet the reasonable requirements of service to the public, that any company, such as a lighting company, should cross another's lands with poles and wires, and it cannot agree with the owner as to the matter of necessity or of compensation, it may petition the Public Service Commission, which shall then, upon due notice to all parties in interest determine the question of necessity and compensation, and render a judgment which shall be final except as an appeal to the Supreme Court is allowed, is not unconstitutional for authorizing the commission to determine the questions of necessity and compensation. George v. Consolidated Lighting Co. (Vt.) 1916C-(Annotated.) 416.

58. Failure to Agree on Compensation—Showing Sufficient. In a proceeding by a telegraph company to condemn an easement for its lines over a railway right of way, an offer by the telegraph company for the use of the right of way and its

refusal by the railway company was a sufficient showing of the failure to agree on the compensation. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.

#### b. Notice to Owner.

59. In such case the consent of the owner that its property be taken, evidenced by the acceptance of an indeterminate permit, is equivalent to notice to the owner and the taking is valid within Wis. Const. art. 11, § 2, providing that "no municipal corporation shall take private property for public use against the consent of the owner without the necessity thereof being first established by the verdict of a jury. Connell v. Kaukauna (Wis.) 1918A-247.

60. The public utilities statute (Wis. St 1915, § 1797m1, subd. 5, and sections 1797m76 to 1797m85), as to taking by a municipal corporation of property of a public utility operating under an indeterminate permit, is valid, although at the time no notice was thereby required to be given to lienholders. Connell v. Kaukauna (Wis.) 1918A-247.

61. Notice to Lienholders. Nor is such proceeding the less a proceeding in the nature of a condemnation proceeding because there is no provision requiring that notice shall be given to lienholders, and no such notice is given, since such notice is unnecessary the proceeding being one in rem. Connell v. Kaukauna (Wis.) 1918A-247.

62. Where in a proceeding by a municipality to acquire a public utility under the public utilities statute (Wis. St. 1915, § 1797m1, subd. 5, and sections 1797m76 to 1797m85), formal notice was given to the public utilities company, but not to the trustee under the trust deed of the plant, the trustee must be deemed to have had actual notice where the president and managing officer of the trust company, which was trustee and who was also the owner or in control of practically all the stock of the public utilities company, directed prosecution of appeal from the commission's order in the proceeding. Connell v. Kaukauna (Wis.) 1918A-247.

63. Notice to the trustee under a trust deed binds the secured bondholders as to an award in condemnation proceedings affecting the corpus of the trust. Connell v. Kaukauna (Wis.) 1918A-247.

### c. Report of Commissioners.

64. Report of Commissioners—To What Court Made. Mass. St. 1911, c. 439, providing for proceedings in the supreme judicial court for the assessment of damages from the building of a bridge, authorizes the fling of a petition in the supreme judicial court and the appointment of commission-

ers to assess damages. It is held that such commissioners are required by imperative inference to make their report to the supreme judicial court which appointed them, and are officers of such court subject to its orders. Brackett v. Commonwealth (Mass.) 1918B-863.

65. Where court commissioners appointed to assess damages resulting from a public work, exercised the authority conferred upon them, their report will not be recommitted for errors, unless substantial justice requires that course and some appreciable change would be made. Brackett v. Commonwealth (Mass.)1918B-863.

66. Form of Award—Separate Statement of Items. A lessee being entitled to occupy permanent structures on the land, as sheds, automatic railways, etc., such property constituting a part of the land and not fixtures, commissioners in assessing damages unnecessarily separated the damages to "leasehold interest" and "loss of fixtures." Brackett v. Commonwealth (Mass.) 1918B-863.

67. Commissioners appointed to assess the damage to realty from the building of a bridge estimated the damage to the owner which had leased the premises separately from the damages of the lessee; the report showing the two estimates. gave the common-The commissioners wealth's nineteenth request for a ruling, providing that the report of the commissioners should show the value of the entire tract of land immediately before and immediately after the building of the bridge, and the value of the leasehold interest before and after that event. It is held that though the report did not show separate estimates of the value of the leasehold interest and of the reversion, it was not subject to objection on the ground that all damages were included in the assessment in favor of the lessor, and that there was a duplication by assessing damages to the lessee, the separate statement of the damages showing that each party's interest and damage was separately and definitely determined. Brackett v. Commonwealth (Mass.) 1918B-863.

## d. Pleading.

68. In condemnation proceedings to take land for storage of a city's water supply, where the petition, over the owner's objection, was amended to extend to him certain privileges and reservations to reduce damages, a motion ne recipiatur, denying the right of the city to so modify the petition, assigning that the amendment was too vague and uncertain, was inconsistent with the petition, was offered too late, and was not germane to the issue, was sufficiently comprehensive to raise the question for review on appeal. Brack v. Baltimore (Md.) 1916E-880.

- 69. Offer of Privilege to Reduce Damages. In proceedings to condemn land to store water for a city, where a strip running through the farm was condemned, which would be flooded, thus dividing the land in halves, an amendment to the petition obligating the city to construct a road and bridge across the flooded area, and to give the owner the right perpetually to maintain the same, the object being to reduce damages, is improper over objection by the owner; since, in awarding compensation, the jury cannot in place of money require a property owner to accept privileges. Brack v. Baltimore (Md.) 1916E-880.
- 70. Bad Faith in Bringing Proceeding. Where a railroad company instituted a condemnation proceeding for the purpose in good faith of constructing its line across the lands in question to supply a public necessity, bad faith is not shown by the fact that the petition, without expressly alleging defendant's title to the property in question, alleged a dispute between plaintiff and defendant as to such title, and an adjudication by another court that defendant had acquired title by possession under color of title and by registration of his title, though an objection sustaining an attack on the petition for failure to allege defendant's title was sustained by the court, as the railroad company had a right to institute the proceeding, and the exercise of such legal right could not be a legal wrong to defendant, and its motive, in the absence of any legal wrong, was immaterial. Den-ver, etc. R. Co. v. Mills (Colo.) 1916E-
- 71. Conditional Condemnation. The complaint in proceedings to condemn a right of way for a telegraph line along a railroad right of way is held not to be an application for an unqualified and unconditional appropriation, at all events. subject to certain rights to be excepted and left unaffected thereby, but to evince a purpose to assert a right to condemn only on stated conditions and terms, and therefore to be bad. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ind.) 1917C-628. (Annotated.)
- 72. Complaint Sustained. It is held that the complaint in a proceeding to condemn property for a logging load states a cause of action, and the court did not err in overruling the demurrer. Blackwell Lumber Co. v. Empire Mill Co. (Idaho) 1918A-189.
- 73. Sufficiency to Give Jurisdiction. The defendant's plea, putting in issue the allegation of the petition that the company was desirous of acquiring the fessimple estate in and the title to the strip sought to be condemned, vests the court with power to hear the evidence and decide such issue; "jurisdiction" being the

power to hear and determine a cause. New River, etc. R. Co. v. Honaker (Va.) 1917C-132.

- 74. Amendment of Petition. A petition by a telegraph company for the condemnation of an easement for its lines over the right of way of a railway company may properly be amended by a stipulation that the telegraph company will not incommode the railway company in the operation of its line. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.
- 75. Sufficiency of Petition. A telegraph company's petition to condemn an easement for its lines over a railway right of way is sufficient although each pole is not located by individual description. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.

## e. Evidence.

- 76. Irrelevant Evidence—Effect. In such case, if incompetent evidence touching that point is injected in the case, by the petitioner, the commonwealth should move to have it stricken out and not meet it by a further inquiry into irrelevant matters. Brackett v. Commonwealth (Mass.) 1918B-863.
- 77. Evidence Admissible to Show Value—Tax Returns. Under Mass. St. 1903, c. 437, § 48, continued in St. 1909, c. 490, part 3, § 40; and St. 1914, c. 196, § 6, declaring that tax returns shall only be open to inspection of the tax commissioner and his assistant and such officers of the commonwealth as may have occasion to inspect them to collect taxes, tax returns are not admissible in a proceeding to assess the damages suffered by a landowner from the building of a bridge in the vicinity of his lands. Brackett v. Commonwealth (Mass.) 1918B—863.
- 78. Certificate of Incorporation. Certificates of condition filed by a corporation with the secretary of the commonwealth containing statements as to value of its real estate which it contended was damaged by the erection of a bridge, while not conclusive admissions as to value, are admissible in determining that question. Brackett v. Commonwealth (Mass.) 1918B-863.
- 79. Admissions as to Value. Such certificates are not admissions binding on a lessee of the corporation, as to injury to his leasehold. Brackett v. Commonwealth (Mass.) 1918B-863.
- 80. Statements by one who was the director, clerk, and auditor of a corporation and by another who was its vice-president and managing director to a tax assessor as to the value of corporate real estate, are not admissible to show value in a proceeding by the corporation to recover

- damages to its real estate resulting from the building of a bridge; it not being shown that such officers were authorized to speak for the corporation on that matter. Brackett v. Commonwealth (Mass.) 1918B-863.
- 81. Adaptability to Particular Use. In proceedings to condemn land for storage of a city water supply, it was alleged that plaintiff's land, through which a strip was condemned, was specially adapted for reservoir purposes. The court excluded evidence of special adaptability to such use, on the ground that, since the owner had no right to impound the waters of the stream flowing through the land without consent of the city, as lower riparian proprietor, there was no actual increase in the value of the land by its abstract adaptability for reservoir purposes. Held that, in the absence of affirmative showing in the record that the use of the land for reservoir purposes would necessarily involve an invasion of the riparian rights of the city, and the offer of proof being distinctly to show that the land had an independent availability for reservoir purposes, evidence as to its value for such use was improperly excluded. Brack v. Baltimore (Md.) 1916E-880.

(Annotated.)

- 82. Meander Line as Boundary. In proceedings to condemn land bordering on a navigable stream, evidence of the government surveyor's field notes showing the meander line of the river in the vicinity of the land in question is inadmissible; meander lines not being considered legal boundaries. Hubbell v. Des Moines (Iowa) 1916E-592.
- 83. Photograph of Other Property. In proceedings to condemn land bordering on a river, photographs and levels taken with reference to a tract nearly a mile above the land in question, and of another tract eight or ten blocks below the land sought to be condemned, are properly excluded for remoteness. Hubbell v. Des Moines (Iowa) 1916E-592.
- 84. Value of Adjacent Lands. Where land sought to be condemned for railroad right of way lay along a creek, and the entire tract comprised nearly 400 acres of which but about 25 acres was bottom land, and the railroad ran through in approximately the same direction as the creek, testimony concerning the value of lands in that community is relevant, and also testimony as to the relative value of the bottom lands apart from the remainder of the tract. Music v. Big Sandy, etc. R. Co. (Ky.) 1916 E-689.
- 85. Proof of Offer to Buy Remaining Land. Where, in proceeding to condemn part of a tract of land, the owner testified that the market value of the tract before the taking was \$21,000, and that the value

- of the remainder after the taking was \$10,500, an offer, made by a witness for the railroad company while on the witness stand, to pay the owner \$21,000 for the land, is incompetent. Music v. Big Sandy, etc. B. Co. (Ky.) 1916E-689.
- 86. Photograph of Property Taken. In proceedings to condemn land bordering on a river, photographs taken of the property at the time of a flood in the river are admissible, when offered merely to produce the conditions and surroundings at or about the time of the condemnation. Hubbell v. Des Moines (Iowa) 1916E-592.
- 87. Price Realized for Similar Property. Evidence of sales of other property of the same character similarly located, made in the market a short time after the proceedings in question were instituted, is inadmissible as substantive independent proof of the value of the property in controversy. Hubbell v. Des Moines (Iowa) 1916E-592. (Annotated.)
- 88. Taking Railroad Right of Way. In a proceeding by a telegraph company to condemn an easement for its lines over a railway right of way, the evidence is held not to show that the construction and operation of the telegraph lines would interfere with the public use of the railroad. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670. (Annotated.)

#### Note.

Admissibility in eminent domain proceeding of evidence of price paid by another than condemnor for similar property. 1916E-598.

#### f. Instructions.

- 89. An instruction on damages for taking and injuring land should lay down a definite rule to guide the jury in estimating the damages. Pettit v. County Commissioners (Md.) 1916C-35.
- 90. Ascertainment of Value. In proceedings to condemn land, an instruction that the term "reasonable market value" means the fair and reasonable value of the property at the time in question, and may be determined from the evidence of facts, which the owner will properly and necessarily press on the attention of a buyer with whom he is negotiating a sale, and which would naturally influence or deter a person of ordinary prudence desiring to purchase, the jury being entitled to consider evidence of facts then existing, and which enter into the value of the premises in public and general estimation, and which may tend to influence the minds of sellers and buyers in determining the reasonable value of the property at the time, is proper. Hubbell v. Des Moines (Iowa) 1916E-592.
- 91. An instruction that certain evidence had been admitted as to the price at

which properties other than that in question are sold, and the location and character thereof, that such evidence was admitted only as bearing on the value of the opinions of various witnesses in regard to the property in controversy, and that the same should be limited by the jury to such subject, is proper. Hubbell v. Des Moines (Iowa) 1916E-592.

## g. Discontinuance of Proceedings.

- 92. Allowance to Landowner. On the dismissal of a condemnation proceeding, even though the court had power to allow to defendant attorney's fees, traveling expenses, and other expenses incurred in preparing to defend the proceeding, it is error to make such allowance, in the absence of proof as to the amount expended or incurred for such expenses or fees, other than that the total was in excess of the amount of the deposit. Denver, etc. R. Co. v. Mills (Colo.) 1916E-985. (Annotated.)
- 93. There being no special statutory authorization for an allowance of costs in condemnation proceedings, though the court may allow court costs, it cannot allow attorney's fees and other expenses incurred by defendant. Denver, etc. R. Co. v. Mills (Colo.) 1916E-985. (Annotated.)
- 94. Allowance Out of Deposit on Dismissal. Under Colo. Rev. St. 1908, § 2420, providing, relative to condemnation proceedings, that the court shall appoint a commission to ascertain and determine the necessity for taking the land, and to appraise and determine the damages and compensation to be allowed, and that the judge or court shall determine the amount the petitioner shall be required to pay or deposit pending any such ascertainment, and section 2456, providing that immediately upon the filing of the petition, accompanied by the deposit of the amount which the court or judge shall determine to be compensation proper to be made, the court or judge shall authorize the peti-tioner to take or keep possession of the property during the pendency of the proceeding, the deposit is required for the sole purpose of making secure the award of compensation for the land taken, and the court has no authority to require a deposit to be applied on costs accrued or to accrue. Denver, etc. R. Co. v. Mills (Colo.) 1916E-985.
- 95. Jurisdiction to Award Damages. The jurisdiction of the Exchequer Court in expropriation proceedings extends to the award of damages to a landowner for injury by proceedings which have been wholly abandoned. Gibb v. Rex (Can.) 1916D-709.
- 96. Right of Landowner to Damages. On the total abandonment of a proceeding.

to expropriate land under the National Transcontinental Railway Act, the land-owner is entitled to recover the damages sustained by the prosecution of the proceeding. Gibb v. Rex (Can.) 1916D-709.

(Annotated.)

#### Note.

Right of landowner to damages upon voluntary discontinuance of eminent domain proceedings. 1916D-723.

#### h. Costs.

97. Costs on Appeal. In view of Cal. Const. art. 1, \$14, providing "that private property shall not be taken or damaged for public use without just compensation," the owner whose property is sought to be taken cannot be required to pay any portion of his reasonable costs necessarily incidental to the trial of the issues on his part, or any part of the costs of the condemning party, since to require him to do so would reduce the just compensation awarded by the jury. Oakland v. Pacific Coast Lumber, etc. (Co. (Cal.) 1917E-259. (Annotated.)

98. Cal. Const. art. 1, § 14, provides that private property shall not be taken or damaged for public use without just compensation. Code Civ. Proc. § 1255, applying specially to eminent domain proceedings, provides that costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. It is held that the Code section is limited in its effect by the constitutional provision, and that the property owner cannot be required to pay the costs of the condemning party on appeal by the latter. Oakland v. Pacific Coast Lumber, etc. Co. (Cal.) 1917E-259.

(Annotated.)

99. The discretion of the court to assess costs in eminent domain proceedings granted by Cal. Code Civ. Proc. § 1255, and the provision of section 1027 that the prevailing party on appeal shall be entitled to his costs in the absence of modification of the judgment, is not limited, in condemnation proceedings where the appeal is by the property owner and he is totally unsuccessful, by Const. art. 1, § 14, requiring just compensation for the taking of private property for public use, so that costs of the condemning party on appeal by the property owner may be assessed against the owner. Oakland v. Pacific Coast Lumber, etc. Co. (Cal.) 1917E—259. (Annotated.)

100. Ky. St. \$ 840, provides that if the landowner appeals and fails to increase the recovery beyond the amount "awarded in the county court," he shall pay the costs of the appeal, but if he increases recovery the condemnor pays the costs and makes similar provision as to appeal by the con-

demnor. Section 839 provides that when a railroad company seeks to condemn lands and either party appeals "from the county court," the company, on payment of the damages assessed and all costs, may take possession of the land. Held, that as no provision was made as to costs in the county court, the circuit court, on appeal to it from the county court, properly imposed costs in the county court on the condemnor, following the rule that in the absence of statute the condemnor should pay costs. Music v. Big Sandy, etc. R. Co. (Ky.) 1916E-689.

Note.

(Annotated.)

Liability of landowner for costs on appeal in eminent domain proceeding. 1917E-262.

## i. Judgment on Award.

101. Collateral Attack on Proceedings. County commissioners having had jurisdiction in condemning land for the widening of a road, the question of disqualification of one of the examiners, or a mere irregularity in that statutory provisions were not strictly followed, may not be inquired into collaterally; direct appeal from the action of the commissioners being the remedy. Pettit v. County Commissioners (Md.) 1916C-35.

(Annotated.)

#### Note.

Collateral attack on eminent domain proceeding. 1916C-40.

#### j. Enforcement of Award.

102. Proceeding to Enforce Award—Jurisdiction. As Mass. St. 1911, c. 439, relating to compensation for damages from the construction of a bridge provided a remedy in the supreme judicial court, the superior court has no jurisdiction over a proceeding to collect the award of commissioners appointed by the supreme judicial court. Brackett v. Commonwealth (Mass.) 1918B-863.

## · k. Review of Proceedings.

103. Where commissioners appointed by a court to estimate the damage resulting from a public work intended to proceed and decide according to law, their report may be reviewed to correct errors of law as could an award of arbitrators or referees under similar circumstances. Brackett v. Commonwealth (Mass.) 1918B-863.

104. A court appointing commissioners to estimate damages from a public work has power to examine their report and review it as to any errors of law apparent on its face. Brackett v. Commonwealth (Mass.) 1918B-863.

105. Review of Decision of Commissioners. As Mass. St. 1911, c. 439, § 2, pro-

viding that the decision of commissioners appointed to estimate the damage resulting from the erection of a bridge should be final as to the amount of damages and as to questions of fact involved, the commissioners' decision is not final as to other matters; the statute implying that ordinary court procedure should be pursued in other respects and the commissioners not constituting a board of referees or arbitrators to whom all issues both of law and fact were submitted irrevocably. Brackett v. Commonwealth (Mass.) 1918B-863.

106. That commissioners appointed to assess damage resulting from the building of a bridge improperly classified as fixtures permanent structures on the premises which were leased, and made separate awards for injuries to land and injuries to fixtures, does not require reversal. Brackett v. Commonwealth (Mass.) 1918B-863

107. Prejudice from Exclusion of Evidence. In condemnation proceedings, where the evidence as to damages is conflicting, but some of the estimates exceed the sum ascertained by the verdict, the reviewing court cannot rule, as matter of law, that the allowance is so obviously excessive as to render nonprejudicial erroneous rulings below excluding evidence as to the special adaptability of the land for reservoir purposes as bearing on the measure of damages. Brack v. Baltimore (Md.) 1916E-880.

108. Finality of Order. The order is not a conditional order, the dismissal of the proceeding not being upon the condition that the deposit should be paid to defendant, and the order for the payment of the money to defendant not being conditional upon the dismissal of the proceedings, as the court definitely reached its conclusion as to the right to a dismissal before determining the disposition of the deposit. Denver, etc. R. Co. v. Mills (Colo.) 1916E-985.

109. Where, in a condemnation proceeding, the court made an order granting the petitioner's motion for leave to dismiss, but reserving for further consideration its motion for the return of a deposit made to obtain possession of the property, and subsequently an order was made granting the right to disdenying the application for a refund of the deposit, and ordering the payment of the deposit to the defendant, the order with respect to the deposit is not one relating merely to costs, and for that reason not appealable, as the disposition of the deposit is essential to a final disposition of a condemnation pro-ceeding, and until it was disposed of the rights of the parties were not fully determined. Denver, etc. R. Co. v. Mills (Colo.) 1916E-985.

110. Waiver of Right to Appeal. Where, in a proceeding to condemn land,

the landowner asserts that the award of the commissioners of estimate and appraisal is insufficient, he does not, by accepting the amount awarded, the report being confirmed, lose his right to appeal on the ground of deficiency, but such acceptance merely limits the grounds on which reversal may be sought. Matter of City of New York (Court House) (N. Y.) 1917D-157. (Annotated.)

111. Appeal from Order of Confirmation. Where a landowner appealed from an order confirming the report of the commissioners of estimate and appraisal in a condemnation suit and the appellate division dismissed the appeal, the dismissal virtually made the order of confirmation absolute, and as the proceeding terminated in the final order, an appeal will lie to the court of appeals, as an intermediate court cannot deprive that court of jurisdiction by dismissing an appeal leaving a judgment or final order in full force. Matter of City of New York (Court House) (N. Y.) 1917D-157.

112. Condemnation of Railroad Right of Way for Telegraph Line. The evidence on the issue whether the use for a telegraph line for which a right of way along a railroad right is sought to be condemned will materially and substantially interfere with the use of the right of way for railway purposes, to which it is already devoted, being conflicting and of such a character that reasonable minds may draw opposite inferences as to the ultimate facts to be determined therefrom, the decision thereon of the trier, whether court or jury, cannot be reviewed on appeal. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ind.) 1917C-628.

113. Review of Facts. While in condemnation proceedings the weight of the evidence may be in favor of the defeated party, if there is any evidence to support the verdict, it will not be disturbed unless flagrantly against the weight of the evidence, and disparity in the number of witnesses will not justify a finding that it is flagrantly against the weight. Music v. Big Sandy, etc. R. Co. (Ky.) 1916E-689.

114. Entertainment of Commissioners by Party. In a proceeding to condemn land for a railroad right of way where the commissioners to assess damages, were entertained by one of the successful parties during their investigation their award will be set aside, without regard to any actual influence on their award. New River, etc. R. Co. v. Honaker (Va.) 1917C-132.

115. Effect of Appeal from Judgment. In a proceeding to condemn a railroad right of way, where the company had proceeded in conformity with the statute (Va. Acts 1902-04, c. 608; Code 1904, \$1105f, subsecs. 4-13), as far as jurisdictional matters were involved, the judg-

ment confirming the comissioners' assessment of damages, pending a writ of error and before the judgment was reviewed and reversed by the court of appeals, was not void, but was voidable only, so that the entry after payment of damages is an entry as of legal right, and not an entry by a trespasser. New River, etc. R. Co. v. Honaker (Va.) 1917C-132.

116. Question not Raised Below. On appeal from a decree in condemnation proceedings, the supreme court is a court of review and can be expected to pass only on questions raised in the court below. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696.

117. Divided Court. The court is equally divided as to the adequacy of the allowance to a landowner for damage by an expropriation proceeding subsequently dismissed, and the appeal is accordingly dismissed. Gibb v. Rex (Can.) 1916D-709.

## 8. REVERSION OF CONDEMNED LAND.

118. Right of Condemnor to Return of Condemnation Money. Under Iowa Code 1897, § 2015, declaring that where a rail-road company, having begun work, abandons it for eight years, the right of way shall revert to the owner, in case of such abandonment the owner need not return the compensation before suing to quiet his title. Vandewater v. Chicago, etc. R. Co. (Iowa) 1917C-1132. (Annotated.)

119. Where a railroad company began the construction of a proposed line, but actual work did not reach plaintiff's land, which had been condemned, before the abandonment, there was an actual construction within Code 1897, § 2015, declaring that an abandonment for eight years shall work a forfeiture. Vandewater v. Chicago, etc. R. Co. (Iowa) 1917C-1132.

120. Abandonment of Occupation by Condemnor. Iowa Code 1897, § 1995, gives to railway corporations the right to take and hold real estate necessary for the construction and convenient use of its railway. Section 2015 declares that where a railway, constructed in whole or in part, has ceased to be operated for more than five years, or where the construction has commenced, and the work ceased and has not been resumed for more than five years, or where any portion has not been operated for four consecutive years, and the rails and rolling stock have been removed, it shall be treated as abandoned, and that if a railway shall not be used or operated for eight years or its construction has been commenced and work thereon has ceased and has not in good faith been resumed in that time, the right of way shall revert to the owner of the land from whom it was taken. Section 2016 provides that, in case of abandonment, any other corporation my enter upon the abandoned work and acquire the right of way, but parties who have previously received compensation for the right of way which has not been refunded shall not recover a second time. It is held that as the right of a railroad company to condemn private property rests upon the fact that the taking is for a public use, the land taken will, if and devoted for public use, revert to the owner within eight years after construction having been commenced, shall have ceased, or the operation of the road shall have ceased. Vandewater v. Chicago, etc. R. Co. (Iowa) 1917C-1132.

#### Note.

Necessity that landowner return condemnation money on abandonment of occupation by condemnor. 1917C-1136.

# 9. PROCEEDINGS BEFORE PUBLIC SERVICE COMMISSIONS.

121. Review of Order of Commission—Scope of Review. Cal. Const. art. 6, § 4, gives the supreme court power to issue writs of certiorari. (Cal. Code Civ. Proc. \$1068, provides that the writ of review may be granted when an inferior board, etc., has exceeded its jurisdiction, and there is no appeal or any adequate remedy. Cal. Public Utilities Act, § 47, as amended in 1913, gives the railroad commission judicial powers in fixing compensation in eminent domain proceedings, and excetion 67 provides that the review shall extend only to the question whether the commission has legally pursued its authority, and excludes from review questions of fact. It is held that, when a finding or conclusion of fact is based on uncontradicted evidence, its accuracy is usually a mere question of law reviewable if it goes to the jurisdiction. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114.

122. In such proceeding the railroad commission, after such witness was examined and cross-examined as to his knowledge on the subject, he having viewed and examined all the property carefully and made exhaustive inquiries regarding the previous sales of similar property in the vicinity, and of the different uses to which the properties in question were adapted, does not exceed its authority in considering his testimony, together with other evidence bearing on the question of use and value. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114.

123. Witnesses as to Vainc of Property Condemned—Requiring Separate Statement of Elements. In such proceeding, where it appeared that the land belonging to the public utility from which water might be obtained was so situated that the annual rainfall thereon might be con-

1916C-1918B.

veniently collected, stored on the land, and thence distributed to consumers, and there was evidence as to the average rainfall upon such lands, the quantity which could be annually collected and stored, and the selling price, a witness' method of valuing the land without giving the advantage of water storage a separate value, but merely adding it to the land value and reporting it all as one item, where the commission gave additional value to the land on such ground, the refusal to require the witness to state its separate value, while erroneous, did not deprive the commission of jurisdiction or make its award invalid. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114.

124. Elements of Value—Availability for Reservoir Purposes. In such proceeding the claim that by means of additional dams the amount of water stored on the land annually could be greatly increased, that such possibilities increased the value of the property, and that the commission allowed nothing therefor is not sustained by a record showing that, while the commission refused to make a separate statement of the value of such possibilities, it did allow a value for the potential storage of storm water on the land by giving the land a present additional value because of such fact. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114.

125. Weight of Evidence — Witness Called by Commission. In such proceeding the valuation of the property by the commission, corresponding with the values fixed by a certain witness called by the commission, who had been examined and cross-examined by the parties, is proper, as the commission was not bound to limit itself to the testimony of witnesses offered by the parties, but might take the other evidence produced at the hearing. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C—114.

126. Findings by Commission—Failure to Find Value of Parcels Separately— Effect. Under Cal. Public Utilities Act, § 47, as amended in 1913, requiring the railroad commission to fix the compensation to be paid for property of a public utility in accordance with section 70, which provides that it shall file its findings of fact upon all matters as to which evidence was introduced which in its judgment had any bearing on the value of the property, the commission's failure to find separately the value of each separate parcel of the property, while an irregularity, does not cause a loss of jurisdiction or make the proceeding void, as, when a court of limited jurisdiction has acquired jurisdiction of the parties and the subjectmatter, the same presumptions as to subsequent proceedings apply as with respect to courts of general jurisdiction, and subsequent irregularities do not make its judgments void. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114.

127. Powers of Commission—Calling Witness of Own Motion. In a proceeding under Cal. Public Utilities Act, § 47, as amended in 1913, to have the railroad commission fix the compensation of lands, rights, etc., of a public utility intended to be acquired by eminent domain by a public water district, the commission, as a judicial tribunal, has power to call and examine witnesses in furtherance of justice and against the will of either party. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114.

128. Nature of Powers of Commission-In Eminent Domain Proceeding. Under Cal. Public Utilities Act, § 47, as amended in 1913, authorizing the railroad commission to fix compensation to be paid owners of public utility property condemned by a municipal water district, etc., the commission is given judicial powers as its de-termination in eminent domain proceed-ings establishes the right to the owners to receive and the obligation of the public corporation to pay some fixed compensation for the property taken; "judicial power" being the power to determine what shall be adjudged or decreed between the parties and with whom is the right of the case; determination of the rights of the individual under the existing laws; the ascertainment of existing rights; the determination of controversies between parties; the power to investigate, declare, and enforce liabilities as they stand on present or past facts and under the laws supposed already to exist. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-115.

129. Effect of Statute Giving Jurisdiction—Proceeding Begun before Constitutional Amendment Validating Statute. Cal. Public Utilities Act, § 47 (as amended in 1913, valid after Const. art. 12, § 23a (adopted November 3, 1914), gave the railroad commission power to fix the compensation payable to the owner of any public utility property taken by a municipal water district, etc., in eminent domain proceedings, and section 70 provided that, if the owner whose property is sought to be taken does not file an acceptance of the compensation fixed by the commission, the corporation seeking to condemn must commence an eminent domain proceeding, in which the compensation so fixed shall be conclusive. On a proceeding in certiorari or review instituted under section 47 as amended it appeared that the evidence had been taken before the constitution had confirmed the amendment to that section, and that the matter had been submitted and the commission's decision made after such confirmation, and that the petitioner had waived any objection which might have been urged before such

amendment. It is held that the court would consider the case on the theory that the commission, from the beginning, was authorized to entertain the proceeding. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114.

130. Grant of Jurisdiction in Eminent Domain Proceedings—Validity. Cal. Const. art. 12, § 23, gives the railroad commission such jurisdiction to regulate public utilities, etc., as shall be conferred by the legislature, and declares the legislative power to confer jurisdiction on the commission plenary. Section 22 declares the authority of the legislature to give the commission such powers to be unlimited by any provision of the constitution. Section 14, art. 1, provides that, when private property is taken for public use, the owner's compensation shall be fixed by a jury, unless a jury is waived. Article 12, § 23a (adopted November 3, 1914), declares the commission to have such power to fix the compensation to be paid for property of any public utility acquired by certain public corporations as the legislature may confer upon it, and that the legislative power shall be plenary. It is held that public utilities act (St. 1911, Ex. sess. p. 18), § 47, as amended (St. 1913, p. 684), empowering the commission on petition of any water district intending to take by eminent domain the property of any existing public utility to fix the com-pensation, is valid. Marin Water, etc. Co. v. Railroad Commission (Cal.) 1917C-114. (Annotated.)

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## 1. EQUITABLE JURISDICTION.

## a. In General.

1. Jurisdiction - Construction of Antenuptial Agreement. In the absence of

- statute, the court of equity, and not a court of probate, is the proper forum for the determination of questions arising under antenuptial agreements, unless involving matters properly cognizable by courts of probate. Schnepfe v. Schnepfe (Md.) 1916D-988.
- 2. Enforcement of Beneficial Interest in Bond. Equity has jurisdiction to enforce . the bond of a defaulting cashier according to its real intent and purpose, where the bond names a bank's officers as obligees instead of the bank; equity being the only sufficient source of relief in such case. Clark v. Nickell (W. Va.) 1917A-1286.
- 3. Bill in Equity as Remedy. doubtful if a bill in equity lies to test the validity of an election of corporation officers. Longyear v. Hardmann (Mass.) 1916D-1200.

#### b. Form and Extent of Relief.

- 4. Nature of Relief. Upon a bill stating facts warranting general but not special relief, though praying both, the court may, upon proof deemed sufficient, grant only the general relief, provided it be not inconsistent with that specifically prayed. Grant v. Swank (W. Va.) 1917C-286.
- 5. Power to Nullify Statute. A court of equity has no jurisdiction to declare void a legislative act which does not contravene either state or federal constitution. Durand v. Dyson (III.) 1917D-

## c. Marshaling Assets.

- 6. Necessity of Common Debtor-Injury to Third Persons. Equity will not marshal securities except as against a common debtor, and will never do so where it will work injustice to an innocent third person. Hite v. Reynolds (Ky.) 1917B-619.
- 2. GENERAL PRINCIPLES OF PLEAD-ING AND PRACTICE.

#### a. Bill.

7. Decree for Distribution of Trust Estate—Vacation for Fraud-Sufficiency of Pleading. Since it is incumbent on a trustee, in proceedings to terminate the trust, to fully advise the court as to all material facts affecting the distribution of the estate upon the determination of the trust and to satisfy himself beyond doubt of the persons legally and equitably entitled to the fund, a bill to set aside a decree terminating the trust and distributing the property, alleging that complainant, the husband of the beneficiary for life, was entitled to the trust fund, but that, by fraudulent concealment of the fact that the beneficiary died leaving a husband, he was not made a party to the bill, and it was made to appear to the court that the wife's heirs were the only parties in interest, and for this reason the property was ordered distributed to them, sufficiently charged fraud in procuring the original decree to state a cause of action for equitable relief. Quinn v. Hall (R. I.) 1917C-373.

- 8. Exhibits. In a suit in equity the court may look to the exhibits to ascertain the nature of the cause of action. Stuckey v. Stephens (Ark.) 1917A-133.
- 9. Variance Between Bill and Proof. The allegations of a bill and the proofs must correspond, and a complainant, to recover at all, must do so on the case made by his bill, and will not be permitted to state one case therein and make a different case by his proof; and, even though the evidence may make a meritorious case, if it is variant from the case made by the bill, the bill should be dismissed. Houlihan v. Morrissey (Ill.) 1917A-364.
- 10. Upon a bill for partition of real estate and for other relief, which, after an answer denying complainants' interest in the land, was amended to allege that after the filing of the original bill complainants found the record of a quitclaim deed, purporting to be signed by them, conveying all their interest to the answering defendant, that complainants had not knowingly executed such deed, and that no consideration was given therefor, but that they signed it upon the fraudulent representation that it was necessary to enable the answering defendant to be appointed administratrix of the estate and to claim that the three complainants each owned an undivided one-eighth of the premises, that the answering defendant owned an undivided five-eighths, with a prayer that the deed be set aside and for partition—decree en-tered on a master's report, finding that complainants signed the deed under the belief that it was necessary to enable the answering defendant to administer the estate, and that, notwithstanding it and because of the fiduciary relations existing between grantors and grantee, the grantors were entitled to a one-eighth share in all of the real estate, will be reversed, because it rested upon a different state of facts than that alleged in the bill. Houlihan v. Morrissey (III.) 1917A-364.
- 11. Necessity of Filing Exhibits. Under general equity rule No. 4, providing that no order or process shall be made or issued upon any bill until it, together with all the exhibits referred to as parts thereof, is actually filed with the clerk, the will of the deceased, referred to in a paragraph of a bill to charge his estate, was a necessary part thereof, and should have been filed with the bill. Henderson v. Harper (Md.) 1917C-93.
- 12. Multifariousness. In testing a bill for multifariousness, the whole bill must

- be considered; each case depending on its own merits. Webb v. Butler (Ala.) 1916D-815.
- 13. The trial court has considerable discretion in determining whether a bill is multifarious. Webb v. Butler (Ala.) 1916D-815.
- 14. Ala. Code 1907, \$ 3095, declares that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject-matter, or founded on the same transaction, or relating to the same property between the parties. Before becoming a partner in a banking venture, one of defendants transferred land to his daughter. The partnership became insolvent, and such defendant thereafter executed a second deed to his daughter; the first being defective. Held that, in a suit to compel such defendant to pay his pro rata share of the firm debts, the daughter could not be joined as a party and the conveyance to her questioned, for, while multiplicity of suits should be avoided, that would make the bill multifarious as to the daughter; multifariousness being where a defendant is brought in upon a record, a large portion of which he has no connection with, or where plaintiff demands several different matters of different natures of different defendants by the same bill. Webb v. Butler (Ala.) 1916D-815.

#### b. Cross-bill.

- 15. Necessity of Cross-bill. Defendants can ask for affirmative relief only by a cross-bill, and not by an amended answer, on plaintiff amending the bill to meet the requirement that decree for him conform to the frame and prayer of the bill. Hanscom v. Malden etc. Gaslight Co. (Mass.) 1917A-145.
- 16. Disregarding Erroneous Designation. Though a bill be styled a cross-bill, it will be treated for what it really is, and if it contains proper matter calling for the relief prayed for it will be treated as an original bill. Mankin v. Dickinson (W. Va.) 1917D-120.

## c. Amendments.

- 17. If, to meet the requirement that decree for plaintiff must conform to the frame and prayer of the bill, plaintiff considers it necessary to set out further matter on the record, he should ask leave to amend the substance and prayers of the bill. Hanscom v. Malden, etc. Gaslight Co. (Mass.) 1917A-145.
- 18. Right to Answer or Demur. To an amendment of the bill to meet the requirement that decree for plaintiff must conform to the frame and prayer of the bill defendants may file a demurrer or amended answer. Hanscom v. Malden, etc. Gaslight Co. (Mass.) 1917A-145.

19. Bill for Wrong Relief. A bill to enjoin the foreclosure of a mortgage, seeking merely a permanent injunction, which would not furnish adequate relief nor fully work out the equitable rights of the parties, will be held in order that, by proper amendments and the bringing in of all parties in interest, a redemption might be had. Gato v. Christian (Me.) 19174-592.

#### d. Demurrer.

20. Waiver of Objection. Where defendent fails to demur for lack of equitable jurisdiction of the subject-matter to a complaint to protect an easement, and also joins in an application for equitable relief, any objection on that ground is waived. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.

#### e. Dismissal of Bill.

21. Effect as Admitting Allegations of Bill. A motion to dissolve a temporary injunction and dismiss a bill may be treated as a demurrer, admitting all the facts in the bill well pleaded. Durand v. Dyson (Ill.) 1917D-84.

22. Right of Complainant in Equity to Dismiss. Under Mich. Comp. Laws 1897, \$1026\$, providing that the court may amend any pleading, in form or substance, in furtherance of justice, on such terms as shall be just, at any time before judgment, a complainant may not dismiss his complaint where the dismissal would prejudice the defendant in some way other than the prospect of being harassed by future litigation, and where, in a suit to redeem from a usurious mortgage, the defendant incorporated in his answer a cross-bill for its enforcement, and thereafter sought leave to dismiss such bill, the request was properly denied, as defendant would have been prejudiced thereby, since, after dismissal of the cross-bill, he would have been entitled to recover the debt and the legal statutory rate of five per cent interest, while, with the answer unamended, no interest was recoverable. Leach v. Dolese (Mich.) 1917A-1182.

(Annotated.)

23. An order dismissing a bill on motion of complainant before the entry of a final decree after a demurrer to the bill was sustained, is not a bar to a bill subsequently filed alleging the same facts and seeking the same relief, since complainant has the right either to ask leave to amend the bill or to dismiss it in order that he may thereafter file a new bill. Fischheimer v. Kupersmith (Ill.) 1917A-1195. (Annotated.)

24. The rule with reference to allowing the dismissal of an equity cause by complainant without prejudice, announced

in Tilghman Cypress Co. v. John R. Young Co., 60 Fla. 382, 53 So. 939, reaffirmed and applied. Mayfield v. Wernicke Chemical Co. (Fla.) 1917A-1193. (Annotated.)

25. Dismissal by Court. Under Ore. L. O. L. § 411, providing that, whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed, or any part thereof, a decree shall be given dismissing the suit, a motion to dismiss a suit in equity is proper, where the plaintiffs have the burden of proof and fail to make a prima facie case. Haney v. Parkison (Ore.) 1916D-1035.

#### Note.

Right to voluntary dismissal of bill in equity. 1917A-1185.

## f. Submission on Bill and Answer.

26. Where a case is submitted on bill and answer, the answer must be taken as true so far as responsive to the bill. Lyon v. Hyattsville (Md.) 1916E-765.

27. Time for Taking Testimony. No abuse of judicial discretion is shown by a circuit judge in refusing to enlarge the time for taking testimony in a chancery case, when the application to enlarge was made six weeks after the cause had been properly set down for hearing on bill, answer and replication, and no sufficient explanation is made of the delay in making the application. Mayfield v. Wernicke Chemical Co. (Fla.) 1917A-1193.

28. Effect of Want of Replication. In the absence of a replication, the answer of a defendant in an equity suit is taken as true for the purposes of the case, if the defendant has not taken depositions as if one had been filed and thus submitted the case upon its merits. McCoy v. McCoy (W. Va.) 1916C-367.

#### g. Finding of Court.

29. Materiality of Finding — Action to Enjoin Deed After Foreclosure. Where, in an action to enjoin the execution and delivery of a sheriff's deed to the holder of a certificate of sale under a decree of foreclosure, it appeared that plaintiff had no right in the premises as against the mortgagees or their assigns, a finding as to the rights of one to whom the certificate of sale had been transferred is immaterial so far as plaintiff is concerned. Coe v. Wormell (Wash.) 1917C-679.

## h. Advisory Verdict.

30. The chancellor may submit to a jury an issue of fact in a case of purely equitable cognizance, but the verdict is not binding on him. Anheier v. De Long (Ky.) 1917A-1239.

- i. Decree, Form and Contents.
- 31. Scope of Bill. If a decree is justified under any of the prayers of a bill, it is good. Schnepfe v. Schnepfe (Md.) 1916D-988.
- 32. Equity Practice Formulation of Decree. Proceeding for final decree is by setting down the case for final hearing thereon; the prevailing party preparing and submitting a draft in the form desired. Hanscom v. Malden, etc. Gaslight Co. (Mass.) 1917A-145.
- 33. Conformity to Bill. Decree for plaintiff must conform to the frame and prayer of the bill. Hanscom v. Malden, etc. Gaslight Co. (Mass.) 1917A-145.
- 34. Relief Granted. Relief may be adapted to the facts and law existing at the time of entry of final decree. Hanscom v. Malden, etc. Gaslight Co. (Mass.) 1917A-145.

## 3. BILLS OF REVIEW.

#### What is Bill of Review.

35. Bill in Nature of Bill of Review. Where a bill by a third person to set aside a decree for alleged fraud in failing to make complainant a party to the suit stated a cause of action appropriate to a bill in the nature of a bill of review and not to a strict bill of review, the use of the word "review" in the prayer of the bill, and the fact that complainant applied to a justice for leave to file the bill, does not require the court to consider the bill a strict bill of review. Quinn v. Hall (R. I.) 1917C-373.

## b. Who may Maintain.

36. Aggrieved Person Other Than Party. A strict bill of review can be filed only by a party to the original cause or by one in privity with such party; other persons aggrieved by the decree sought to be reviewed being required to proceed by original bill in the nature of a bill of review. Quinn v. Hall (R. I.) 1917C-373.

### c. Venue.

37. Vacation of Decree for Distribution -Venue of Proceeding to Vacate. Court & Practice Act 1905, § 4 (R. I. Gen. Laws 1909, c. 273, § 1), provides that there shall be a superior court which shall consist of a presiding justice and five associate justices. Other sections require the holding of sessions of the court by a single justice in one or more places at the same time and at stated times in the different counties of the state for convenience of litigants; the various sessions in the several counties being held by the same justices. It is held that, where complainant, in a suit in the nature of a bill of review to set aside a decree terminating a trust and distributing the property, was a nonvesident, and the trustee was a resident of N. county, the bill was properly filed in that county, as provided by Gen. Laws 1909, c. 253, § 2, regardless of the fact that the decree attacked was rendered and of record in P. county; the court having full jurisdiction in the suit in N. county to nullify such decree and to show such nullification by a certified copy of the decree rendered, filed in P. county. Quinn v. Hall (R. I.) 1917C-373.

#### d. Grounds.

- 38. To Review Interlocutory Decree. In a suit to foreclose trust deeds, a decree that it was intended that the deeds should include the grantor's homestead, reforming the description, finding the amount due, priority as between the deeds, and appointing a master to ascertain the amount due on the second deed, is interlocutory only, and a bill of review for newly discovered evidence will not lie; an application in the suit for leave to introduce further evidence being the proper remedy. Davis v. Hale (Ark.) 1916D-701.
- 39. In a suit to foreclose a deed of trust on a homestead, evidence that the wife of the mortgagor has not acknowledged the deed is not newly discovered matter sufficient to support a bill of review. Davis v. Hale (Ark.) 1916D-701.

## EQUITY OF REDEMPTION.

See Mortgages and Deeds of Trust, 23.

#### ERASURE.

See Alteration of Instruments, 12.

#### ERROR.

See Appeal and Error.

### ERROR OF JUDGMENT.

Physician not liable for, see Physicians and Surgeons, 26.

## ERRORS OF LAW.

Not considered on motion for new trial, see New Trial, 4.

### ESCROW.

- 1. "Second Delivery." The legal delivery by the depositary of a deed placed in escrow is technically known as the "second delivery." Thornhill v. Olson (N. Dak.) 1917E-427.
- 2. Unauthorized Delivery by Escrow Holder. One Havlicheck and wife entered into a written contract of sale of 400 acres of land, near Minot, to plaintiffs. Eighty acres of Illinois land was to be ac-

cepted in part payment. The contract provided for inspection of the Illinois land. It was reported to be satisfactory. H. and wife then executed to Thornhill their warranty deed to the 400 acres and a bill of sale of the personal property thereon, pursuant to the contract. Plaintiffs executed their deed to the Illinois land. All deeds, bill of sale, and the preliminary contract of sale, accompanied by a written escrow agreement, were deposited in the Second National Bank of Minot. This bank received as depositary in escrow all of the deeds to be delivered according to the conditions of the written escrow agreement, which provided that the deeds were "to be delivered to the parties who are entitled to same upon performance of the agreements set forth" in the preliminary agreement of purchase and sale of the land. The original sale agreement stipulated for an initial payment of \$1, made and received; that certain mortgages should be assumed by the purchaser; and the further payment of \$3,000 in cash should be made by Thornhill to H., but with no definite time fixed for payment. Abstracts of title to all land here and in Illinois were also to be furnished. No stipulation was made for inspection of them. These papers were so deposited in escrow on April 15, 1912. Four days later H. and wife executed and delivered their warranty deeds, immediately placed of record, to the 400 acres to defendant, Olson, as grantee, who, under the findings of the jury, it must be assumed, bought with notice of the escrow arrangement and the previous deposit of the papers thereunder with the bank. On April 23d plaintiffs procured title to the Illinois tract, which before that time they did not own, although they had attempted to deed same by the invalid deed in which the wife of one of said grantors had not joined, and which deed had been one of the instruments deposited the instruments deposited in escrow. May 11th a second and valid deed to the Illinois tract was deposited with the bank to replace the invalid one, or to cure any defect of title thereunder, and on that day plaintiff served notice on H. and wife to appear at the bank at a certain hour that day to close up the escrow matter. They did not appear. On April 19th Thornhill served Olson with a written notice of the escrow arrangement, stating that "all interest, right, or title you acquire in said premises you take subject to the equities of the undersigned under and by virtue of said contract for deed." On May 11th plaintiffs, acting by their agent, the Brush-McWilliams Company, deposited with said bank a check drawn by plaintiffs on an Illinois bank and indorsed by the Brush-McWilliam Company, which check was payable to said bank, as payee, for the sum of \$3,000. The bank thereupon treated the check as cash, but

retained it, and it never has been cashed. On deposit with it of said check, the bank delivered on May 11th the deed of H. and wife, held by it in escrow, to plaintiffs. Neither H. and wife nor Olson has ever participated in the escrow proceedings after April 15th, nor done any act to recognize the same, or toward performance of the original contract of sale, after the deposit in escrow made April 15th; but on the contrary have disregarded the same. Olson having claimed at all times to have been a good faith purchaser, without notice of the escrow proceedings. He has paid H. and wife part, if not all, of the consideration for his deed. The action, though in equity to quiet title, is based upon title arising under a valid delivery by the bank to plaintiffs of the deed in escrow. It was tried as a law action to a jury, which found for plaintiffs for possession and \$750 damages for detention thereof. Findings and conclusions were also made in accordance with and supplemental to the verdict. Defendant appeals as in an action at law on specifications of error, and not as on a trial de novo, and the case is submitted on appeal as a law case on an appeal from both an order denying a new trial and from the judgment. It is held that the delivery of the deed by the bank to plaintiffs was unauthorized, and was in disregard of the escrow agreement in that it was delivered without a cash payment made by plaintiffs of \$3,000 to said depositary, as was stipulated for by the escrow agreement before a valid second delivery of the deed could be made. Thornhill v. Olson (N. Dak.) 1917E-427.

- 3. Under the escrow agreement said depositary was without authority to accept a check as and in lieu of a cash payment, and the doctrine of substantial performance does not apply to a second delivery of deeds under a written escrow agreement. Thornhill v. Olson (N. Dak.) 1917E-427.
- 4. Effect of Unauthorized Delivery by Escrow Holder. The conditions stipulated for in an escrow agreement in writing, upon which the second delivery of the deed shall be made, are conditions precedent to its valid second delivery, and the consent of the grantor to its second delivery is deemed to be withheld until full compliance has been had with the escrow agreement. As a deed delivered without consent of the grantor passes no title, consent being essential to its validity, a deed delivered by the depositary in violation of the escrow agreement is no delivery and passes no title. Thornhill v. Olson (N. Dak.) 1917E-427. (Annotated.)
- 5. The depositary is the agent of both parties, but neither for one more than the other, and is empowered to aid neither, and is merely a conduit used in passing

title for convenience and safety. A delivery by the depositary in excess of its powers is a nullity. Thornhill v. Olson (N. Dak.) 1917E-427. (Annotated.)

- 6. The reception by the bank of the check in lieu of money did not amount to a loan of money by the bank to the plaintiffs, and will not be treated as such. Thornhill v. Olson (N. Dak.) 1917E-427.

  (Annotated.)
- 7. The act of the depositary in accepting the check as cash was not the act of the grantors, but was void as in excess of authority conferred by them upon the bank. Thornhill v. Olson (N. Dak.) 1917E-427. (Annotated.)
- 8. The question involved is one of performance of the escrow agreement—not of the ability of the plaintiffs to perform that agreement—as such ability, without full performance, cannot amount to compliance. Thornhill v. Olson (N. Dak.) 1917E-427. (Annotated.)
- 9. Unauthorized Delivery. The evidence is held to be sufficient to sustain the findings of the jury that the note was delivered to the managing officer of both the payee and plaintiff corporations, and under an escrow agreement, and that the delivery to the payee by the holder in escrow was made in disregard of and contrary to and without compliance with the terms of the escrow agreement. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.
- 10. Under such findings the instrument never was delivered and is void ab initio, and evidence offered by defendant to establish the escrow agreement is admissible. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447. (Annotated.)
- 11. A delivery so made constitutes in law no delivery of the instrument. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447. (Annotated.)
- 12. The maker of a note deposited in escrow is held not to have waived the conditions of the escrow agreement, nor estopped himself from abserting it as a defense. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447. (Annotated.)

#### Note.

Effect on rights of parties of unauthorized delivery by escrow holder. 1917E-435.

## ESPIONAGE ACT.

See War, 19-25. Nonmailable matter, see Postoffice, 2.

## ESTABLISHMENT OF GRADE.

See Streets and Highways. 5-7.

#### ESTATE.

Meaning; see Executors and Administrators, 1.

#### ESTATES.

See Curtesy; Dower; Easements; Homestead; Joint Tenants; Life Estates; Remainders and Reversions; Tenants in Common.

Deed of estate in future, see Deeds, 27.
Deed of expectancy, see Deeds, 28, 29.
Assignment of prospective inheritance, see
Descent and Distribution, 10-14.

Estates of lunatics, see Insanity, 17, 18. When option creates a vested estate and when a contingent one, see Perpetuities, 3.

- 1. Abolition of Estates Tail. Ill. Conveyance Act (Hurd's Rev. St. 1913, c. 30) § 6, providing that where by the common law any person might become seised in fee tail he shall be deemed to become seised for life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would on the first grantee's death, pass, abolishes estates in fee tail, and the only use made of the rule concerning such estates is to determine whether a grantee would have become seised in fee tail at common law, and, where a deed purporting to grant a present estate in possession to a grantee named and the heirs of his body did not in terms purport to grant a future estate, the question is whether it granted to the grantee an estate limited to a particular class of heirs which would have been a fee tail at the common law and which the statute has converted into an estate for life with remainder to bodily heirs contingent on birth of issue. Duffield v. Duffield (III.) 1916D-859.
- 2. Contingent Estate. Under a deed to one and her heirs, and if she dies without issue in the lifetime of her father then to her mother, the grantee's estate becomes absolute by her surviving her father. Lee v. Oates (N. Car.) 1917A-514.
- 3. Merger of Estates. Where testatrix bequeathed the income of the remainder of her estate to her husband, and after his death to her son in trust, to share the income equally between them during their joint lives, the survivor to have the whole income during his life, and, after the death of the survivor, the property to be divided among testatrix's nephews and nieces, the fact that the legal title vested in the husband, and on his death, leaving the son surviving, in the son as trustee, and also the equitable estate for life, does not create a merger in equity, since to do so would bar the interests of the remainderman. Sherlock v. Thompson (Iowa) 1917A-1216. (Annotated.)
- 4. Such payment did not as a matter of law work a merger of the interests of the mortgagees and the owner—merger under the circumstances being

1916C-1918B.

optional with the owner. New v. Smith (Kan.) 1917B-362.

- 5. Where a trust for life with remainder by way of shifting use or conditional limitation becomes executed as to the life estate uniting the equitable and legal estate in the life tenant, and both the life estate and remainders are conveyed to one person, the entire legal and equitable estates are merged in him. Lee v. Oates (N. Car.) 1917A-514.
- 6. Execution by Statute of Uses Merger of Estates. Where a trust for the separate use and maintenance of a married woman becomes passive by the death of her husband, the statute executes the use and unites the legal and equitable estate in her. Lee v. Oates (N. Car.) 1917A-514.

#### Notes.

Estate created by grant or devise of life estate with absolute power of disposition. 1916D-400.

Merger of estates where life tenant is also trustee of property. 1917A-1221.

#### ESTATES TAIL.

Abolition of, see Estates, 1.

### ESTOPPEL.

1. In General, 334.

- 2. Equitable Estoppel or Estoppel in Pais, 334.
  - a. In General, 334.
  - b. Estoppel by Silence, 335.
  - c. Assuming Inconsistent Positions,

    - (1) In General, 335.(2) In Judicial Proceedings, 335.

Acquiescence in execution of party wall, see Adjoining Landowners, 3.

Agency by holding out, see Agency, 14, 18. To object to alteration of contract, see Alteration of Instruments, 10-12

To raise point on appeal, see Appeal and Error, 434-442.

To set off tort claim against judgment, see Bankruptcy, 11.

To set up ultra vires, see Banks and Banking, 2.

To urge forgery, see Bills and Notes, 53,

Conditions precedent to establishment of boundary by estoppel, see Boundaries.

To assail unconstitutionality, see Constitutional Law, 114, 115.

To deny dedication, see Dedication, 1-3,

To sue, by acquiescence, see Ejectment, 2. To attack executor's sale, see Executors and Administrators, 45.

To deny lessor's title, see Landlord and Tenant, 53.

To claim lien, see Mechanics' Liens, 32,

Estoppel to object to nuisance, see Nuiŝances, 17.

Pleading estoppel, see Pleading, 96.

Invocation in aid of Sunday contract, see Sundays and Holidays, 5, 6.

By obligee to object to joint form of bond, see Suretyship, 3.

Of taxpayer in recovery back of illegal taxes, see Taxation, 110.

To set up usury, see Usury, 20. Of purchaser to deny vendor's title, see Vendor and Purchaser, 8.

To probate later will by assent to previous probate, see Wills, 142.

#### 1. IN GENERAL.

- As Establishing Ownership of Line Hedge. The doctrine of estoppel cannot be invoked to settle the ownership of a hedge fence when the issues of fact raised by the parties are so determined by the evidence and the findings of the court as to preclude the operation of estoppel. Wideman v. Faivre (Kan.) 1918B-1168.
  - 2. EQUITABLE ESTOPPEL OR ES-TOPPEL IN PAIS.

#### In General.

- 2. Delivery of Mortgage by Owner to Person of Same Name. A mortgagee deposited for safe-keeping the mortgage and bond secured thereby with a nephew, who bore the same name as the mortgagee, and who executed in his own handwriting an assignment of the mortgage and bond, and obtained from the assignee a loan, payment of which was guaranteed by a third person. The bond and mortgage were delivered to the assignee together with the assignment. The mortgagee had no knowledge of the transaction. The assignee and the third person acted in good faith. Held, though an owner who intends to put the title in the name of another, rather than in his own name, may lose ownership by estoppel, the mortgagee was not estopped by any representation from insisting on his ownership of the mortgage and bond. People's Trust Co. v. Smith (N. Y.) 1917A-560. (Annotated.)
- 3. A mortgagee deposited for safe-keeping the mortgage and bond secured thereby with a nephew bearing the same name as the mortgagee. The bond and mortgage were not accompanied by any blank form of transfer signed by the mortgagee. There was nothing to indicate that any transfer was contemplated. The nephew executed in his own handwriting an assignment of the bond and mortgage, and delivered the assignment, bond, and mortgage to the assignee, who made a loan to him. Held, that the mortgagee was not estopped by negligence from insisting on his ownership of the bond and mortgage, since the nephew's act was a forgery, un-der Penal Law (N. Y. Consol. Laws, c. 40), § 883, against which the mortgagee was

not at fault for failing to protect himself or the public; for to make out an estoppel on the ground of negligence it must be shown that the owner was careless as to some duty owing to the person relying on the estoppel or the public. People's Trust Co. v. Smith (N. Y.) 1917A-560. (Annotated.)

- 4. A blank indorsement of a stock certificate signifies that some person may fill in the blank, and the owner intrusting to another a stock certificate so indorsed, thereby gives currency to an instrument indicating a contemplated transfer. and he must bear the loss of any dishonesty of the agent in wrongfully filling in the blank, but this doctrine does not apply to a mortgagee delivering for safe-keeping only the mortgage and bond secured thereby unaccompanied by any blank form of transfer signed by him, and a loss occasioned by a forged transfer of the mort-gage and bond does not fall on the mortgagee by reason of this principle. People's Trust Co. v. Smith (N. Y.) 1917A-560.
- (Annotated.) 5. Defense to Action at Law. Under the federal practice, facts which might raise an equitable estoppel do not constitute a defense to an action at law for the recovery of real estate. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443.
- 6. Inducing Belief in Consent. party by conduct has intimated that he consents to an act which has been done or will offer no opposition thereto, though it could not have been lawfully done with-out his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the action to the prejudice of those who have acted on the fair inference to be drawn from his conduct. Divide Canal, etc. Co. v. Tenney (Colo.) 1917D-346.

#### Note.

Delivering papers or documents to person of same name as working estoppel against owner. 1917A-562.

## b. Estoppel by Silence.

- 7. Misleading Silence. One who by wilful or culpable silence leads another to believe in the existence of a state of facts in reliance upon which he acts to his prejudice is estopped by silence later to deny the existence of the state of facts. Eltinge v. Santos (Cal.) 1917A-1143.
  - c. Assuming Inconsistent Positions.

## (1) In General.

8. By Partition Agreement. Where C., one of the children of an owner of land, conveyed to E., another child, all of his interest in the real estate of his mother, and after the mother's death all of the children executed a partition agreement

allotting to each of the other children a parcel of land and allotting a parcel to C. and E. together, though E. was estopped by the partition agreement from claiming any interest in the parcels allotted to the other children, she is not estopped from claiming all of the tract allotted to her and C., and the partition agreement did not reinvest C. with the title which passed, when acquired, under his deed. Blackwell v. Harrelson (S. Car.) 1916E-1263.

## (2) In Judicial Proceedings.

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## 1. JUDICIAL NOTICE.

#### a. General Principles.

- 1. Notoriety. The limits of "judicial notice" cannot be prescribed with exactness, but notoriety is, generally speaking, the ultimate test of facts sought to be brought within the realm of judicial notice; in general, it covers matters so notorious that a production of evidence would be unnecessary, matters which the judicial function supposes the judge to be acquainted with actually or theoretically, and matters not strictly included under either of such heads. Gottstein v. Lister (Wash.) 1917D-1008.
- 2. Stipulations and Admissions. Neither the stipulations nor admissions of counsel can bring facts within the sphere of judicial notice which in law did not belong there. Gottstein v. Lister (Wash.) 1917D-1008. (Annotated.)

#### b. Legislation.

- 3. Judicial notice will be taken of journals of the legislature before they are published. Heiskell v. Knox County (Tenn.) 1916E-1281. (Annotated.)
- 4. Judicial notice of legislative journals, showing the proper enactment of a statute, may be taken on demurrer to a bill, charging that a statute was not regularly en-

acted; a demurrer not admitting allegations contrary to facts judicially known to the court. Heiskell v. Knox County (Tenn.) 1916E-1281. (Annotated.)

5. Legislative Journals. The court takes judicial notice of the journals of the legislature, showing the steps taken in the enactment of statutes. Heiskell v. Knox County (Tenn.) 1916E-1281.

(Annotated.)

6. Federal Statutes. State courts take judicial notice of acts of Congress. Rowlands v. Chicago, etc. R. Co. (Wis.) 1916E-

#### Note.

Judicial notice of contents of legislative journals on issue as to enactment of statute. 1916E-1284.

#### c. Elections.

- 7. Number of Voters in State. The court judicially knows, as matter of common knowledge, that there are not 900,000 electors in the state of Washington. stein v. Lister (Wash.) 1917D-1008.
- 8. Procedure for Adoption of Constitutional Amendment. Wash. Const. art. 23, relating to amendments, provides that the legislature shall cause amendments to be submitted to the people, to be published at least three months next preceding the election in some weekly newspaper in every county where a newspaper is published throughout the state. In an action to enjoin the governor and state and county officers from enforcing initiative measure No. 3 (Laws Wash. 1915, p. 2), it was contended that the seventh amendment to the constitution had not been lawfully submitted, in that publication was defective because not published in several counties for the required period "next preceding" the election thereon. It is held that, so far as officially recorded facts were concerned, the court judicially knew only that the legislature of 1911 proposed the seventh amendment; that such proposal was duly evidenced by proper entries on the senate and house journals; that the act provided for publication of the amendment prior to the election, as required by the constitution; that, on a canvass showing its adoption, the governor proclaimed the amendment to have been adopted and to have become part of the constitution; that it could not judicially notice facts touching the sufficiency of its publication prior to its adoption; and that, as all the facts within its knowledge showed its lawful adoption, it could not say that publication was defective, or that : it had not been duly submitted to the; people. Gottstein v. Lister (Wash.) 1917D-1008. (Annotated.)

#### Note.

Judicial notice of proceedings for adoption of amendment to constitution. 1917D-1031.

#### d. Customs.

9. Business Methods. The court can take judicial notice of the general purpose and method of doing business of building and loan associations. Union Savings, etc. Co. v. District Court (Utah) 1917A-821.

## e. Navigability of Stream.

- 10. Navigable Character of Stream. The court will take judicial notice that the Connecticut river is a public highway used for transporting property in boats and floating logs. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.
- 11. Whether a state supreme court in a mandamus proceeding should take judicial notice that the principal river of the state is navigable at the capital of the state is a question of state law, and the federal supreme court cannot pronounce its action in taking judicial notice thereof erroneous; there being no constitutional right to a trial by jury. Wear v. Kansas (U. S.) 1918B-586.

## f. Matters Pertaining to Public Service Corporations.

12. Charter of Public Service Corporation. The court will not take judicial notice of the provisions of the charter of a public service corporation. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841.

#### g. Population.

13. Federal Census. It is a matter sufficiently notorious to charge the court with judicial knowledge that according to the federal census of 1910 approximately one-third of the productive population is engaged in agriculture. Hill v. Rae (Mont.) 1917E-210.

## h. Mortality Tables.

14. Mortality Tables. It is not error to admit, without foundation, a standard table of life expectancy, in an action for the wrongful death of a street car passenger, since courts will take judicial notice of such a table. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-488.

(Annotated.)

Note.

Judicial notice of mortality tables. 1918B-415.

## i. Physical Results.

- 15. Properties of Gasoline. The court will take judicial notice of the dangerous character and explosive qualities of gasoline. Whittemore v. Baxter Laundry Co. (Mich.) 1916C-818.
- 16. Inflammable Nature of Gas. In an employee's action for injuries from the explosion of a gas stove, the court will take judicial notice that gas used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an

explosion, if present in any considerable volume. Holmberg v. Jacobs (Ore.) 1917D-496.

## j. Governmental Affairs.

17. Public Fiscal Affairs. The court judicially knows that the organized militia of the state, when traveling on orders from the governor, travels at the expense of the state. State v. Missouri, etc. R. Co. (Mo.) 1916E-949.

## k. Matters not Judicially Noticed.

- 18. While the court will take judicial notice that the White river is one of the large rivers of the state and is nontidal, the question whether it is a "boatable stream" (that is, one of common passage as a highway) is one of fact. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.
- 19. Practicability of Labeling Seed. The courts do not judicially know that in the ordinary conduct of business the requirement of a statute that agricultural seeds be labeled with the locality where the seed is grown is an impracticable one. State v. McKay (Tenn.) 1917E-158.

## 2. RELEVANCY AND ADMISSIBIL-ITY IN GENERAL.

#### a. In General.

- 20. Ruling on Evidence Approved. It is held that the court did not err in refusing to admit certain evidence. Ruble v. Busby. (Idaho) 1917D-665.
- 21. Certain rulings of the trial court on the admission of evidence held not erro neous. Viita v. Fleming (Minn.) 1917E-678.
- 22. The court did not err in its rulings excluding certain evidence. Norton v. Duluth Transfer R. Co. (Minn.) 1916E-760.
- 23. Liberal Tendency as to Admissibility of Evidence. The modern nation of the admissibility of evidence is that it is more important to get the truth than to quibble over impractical distinctions between facts and conclusions. First National Bank v. Robinson (Kan.) 1916D-286.
- 24. Subsequent Conditions. Evidence of condition of places and ways a few days after the accident is admissible in connection with a showing that the situation has remained unchanged. Marks v. Columbia County Lumber Co. (Ore.) 1917A-306.
- 25. Where evidence is elicited on cross-examination from which an inference of a fact favorable to accused may be drawn, subsequent evidence of other facts showing that the inference is not warranted is competent and material. People v. Cassidy (N. Y.) 1916C-1009.

- 26. Irrelevant Testimony. Testimony which does not illustrate any issue made by the pleadings should be repelled. Peagler v. Davis (Ga.) 1917A-232.
- 27. What Evidence is Relevant. Under common-law principles, whatever tends to prove any material fact is relevant and competent. People v. Roach (N. Y.) 1917A-410.
- 28. Disregard of Technicalities. Rules of evidence are established for the purpose of enabling the court and jury to ascertain the true facts concerning the maters in controversy, and not for the purpose of hindering and delaying justice, by the enforcement of technical abstract phrases defining the rules for the admissibility of evidence. Rogers v. O. K. Bus, etc. Co. (Okla.) 1917B-581.

#### Note.

Admissibility in civil case of evidence showing that witness had previously claimed privilege in criminal case. 1917E-879.

## b. Proving Value.

29. The same principles apply to the proof offered of the value of certain household goods, clothing, pictures, and other personal articles which were in the factory when it burmed. Hollinger v. Missouri, etc. R. Co. (Kan.) 1916D-802.

(Annotated.)

- 30. Cost. The case is the common one in which the property destroyed was not bought and sold on the market, had no market value, and consequently could not be valued by that standard. In such cases the real value is to be ascertained from such data as may be available. Cost is an element of such value, and a person having knowledge of the elements involved may testify to them and give his estimate of value. Hollinger v. Missouri, etc. R. Co. (Kan.) 1916D-802. (Annotated.)
- 31. Price Paid. Proof of what was paid for an article recently in the open market or when sold at auction, etc., is some evidence of the actual or reasonable value of such article. Carnego v. Crescent Coal Co. (Iowa) 1916D-794. (Annotated.)
- 32. Detailed Value of Property Valued as Whole. Where it appears that the value of the business, the property, and the good will has been agreed upon by the contracting parties and stipulated in a written contract, and no other consideration than that fixed in the contract is shown, and where it further appears that the written contract was admitted to be the contract entered into between the parties in which the consideration for such business, property, and good will as a whole was fixed, the trial court does not orr in striking out the testimony of appellant attempting to fix the value of each

- article of personal property and the real estate separately. Harshbarger v. Eby (Idaho) 1917C-753.
- 33. Proof of Value. The value of property cannot be established by the amount at which it is listed by a real estate broker for sale. Peagler v. Davis (Ga.) 1917A-232.
- 34. Value of Land. In an action for a certain per cent of the value of land as an attorney's fee, evidence that the land was available for city lot purposes is competent to establish its market value at the time the debt accrued, though it was not then being used for such purposes. Myers v. Bender (Mont.) 1916E-245.

#### Note.

Price paid for personalty or services as evidence of value thereof. 1916D-797.

- c. Proof of Nonexistence of Debt.
- 35. Rebutting Inference. Where there is testimony justifying an inference that a portion of the amount subsequently borrowed by W. was used by him to discharge the note, evidence of the payment of the note by W.'s brother, limited to contradict the inference, is admissible. People v. Cassidy (N. Y.) 1916C-1009.

#### d. Identity of Person.

36. Person Referred to not Identified. In an action for the death of a hackman, claimed to have been caused by the negligent construction of a highway, where liquor was found in the vehicle, testimony by a woman that she was carried to her home in that vicinity about an hour and a half before by a hackman, whom she did not know, but judged was sober, is immaterial, there being nothing to show that the two were the same. Richardson v. Sioux City (Iowa) 1918A-618.

#### 3. HEARSAY EVIDENCE.

## a. In General.

- 37. In an action by the assignee of a lease against the lessor, it is proper to refuse to permit plaintiff to testify as to statements made by his assignor concerning the lease; such being hearsay and not binding on the lessor. Streit v. Wilkerson (Ala.) 1917E-378.
- 38. In an action against a decedent's esstate for board furnished him, a question to a witness as to what decedent had said to him when he purchased certain goods at a store was properly excluded as hearsay. McCurry v. Purgason (N. Car.) 1918A-907.
- 39. Ancient Transaction. In an action by a railroad company to recover possession of land condemned by it in 1833, in

which defendant claimed that the company had abandoned its easement therein, conveyances of the land and distributions of it as a part of the estates of deceased owners, most of which were made more than thirty years prior to the trial, and none of which recognized any title in the railroad company, are admissible to prove possession by those claiming under the former owner, since a party will be required, and within the limits of sound reasoning permitted, to present the best and fullest case within his power to offer, and where the fact in question comes from a time beyond living memory placed at thirty years, there is an exception to the rule rejecting hearsay evidence allowed in cases of ancient possession and in favor of the admission of ancient documents in support thereof. New York, etc. R. Co. v. Cella (Conn.) 1917D-591.

40. Hearsay. In general, hearsay testimony is inadmissible. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.

## b. Pedigree.

41. As to Race to Which Person Belongs. A witness, who has not testified to general reputation as to the parentage of a person, whose race is in question, cannot testify as to who was said to be such person's parent. Medlin v. County Board of Education (N. Car.) 1916E-300.

(Annotated.)

# e. Testimony on Former Trial. Note.

Admissibility of evidence given at former trial concerning transaction with person since deceased. 1917B-366.

## 4. CHARACTER OR REPUTATION.

42. Evidence of Reputation. In a civil action for the recovery of a penalty, evidence of general reputation of the defendants as law-abiding citizens was inadmissible, and the court properly excluded such evidence. Hammett v. State (Okla.) 1916D-1148.

Note.

Admissibility of evidence of character or reputation of defendant in action to recover penalty. 1916D-1151.

## 5. BEST AND SECONDARY EVI-DENCE.

#### a. In General.

43. Contents of Lost Letters. Where a suit was on a contract embodied in letters which were shown to have been lost, it is proper to introduce copies in evidence. Josephs v. Briant (Ark.) 1916E-741.

#### b. Executed Sale of Land.

44. Sale in Bankruptcy Proceeding. Where on the trial of a claim case the

wife of the defendant in fi. fa., whose trustee in bankruptcy was the claimant, was permitted to testify, over objection, that a certain lot of land (on which she claimed that she had borrowed money and that her money had been used in buying the stock of goods levied on) had recently been sold by the trustee in bankruptcy, the admissibility of such testimony was not open to the sole objection that there was better evidence of the sale. Brown v. Caylor (Ga.) 1916D-745.

45. Maps. Under Ore. L. O. L. § 712, providing that there shall be no evidence of the contents of a writing, other than the writing itself, except when the original is in the possession of the party against whom the evidence is offered, and he withholds it upon notice to produce, and when the original cannot be produced by the party by whom the evidence is offered in a reasonable time with proper diligence, and its absence is not owing to his neglect or default, in a suit to determine an adverse interest in realty, where the width of streets was in question, the point being whether the owner of land, selling it, had represented, by exhibiting a printed map, that streets were of a certain width, two duplicates of the printed map exhibited to the purchaser of the original plat of the district are admissible in evidence for plaintiff, though he offered no testimony to explain his failure or inability to produce the original from which the copies were made, since copies of printed duplicates are admissible. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.

#### c. Letters.

46. Mailing of Letter. Where a United States postmaster testified that a person mailed a registered letter to a certain address, if the witness was testifying from personal knowledge, and not from the records, which the postoffice regulations forbade his taking from the postoffice, the evidence is admissible. Josephs v. Briant (Ark.) 1916E-741.

47. Hearing Letter Read. A witness who heard a letter read may testify as to its contents, the letter being lost and the person who read it being dead; the obligation to the source of his knowledge of the contents going to the weight only of his testimony. Chalvet v. Huston (D. C.) 1916C-1180. (Annotated.)

## d. Title to Realty.

48. When the title to real estate is directly in issue, the best evidence of title consists in the muniments of title such as deeds, mortgages, patents, wills, etc. Littlefield v. Bowen (Wash.) 1918B-177.

- e. Laying Foundation for Secondary Evidence.
- 49. Necessity of Demand for Document. Since the defendant in a criminal prosecu-

. F: tion cannot be compelled to testify against himself, or produce incriminating documents, the state may introduce secondary evidence as to the contents of such documents without previous notice to produce the original. People v. Gibson (N. Y.) 1918B-509.

50. Secondary Evidence of Document. The admission in evidence of copies of invoices which the party offering the copies claims he sent to the adverse party is erroneous, where notice to produce the originals was not served on the adverse party, and where there was no examination of the adverse party as to their existence. Herman & Ben Marks v. Haas (Iowa) 1917D-543.

## 6. EXPERT AND OPINION EVIDENCE.

- a. Opinion of Witnesses in General.
- 51. Scope of Patent—Evidence of Surveyor. On the issue whether a part of a tract was embraced in a patent prior to that under which the plaintiff claimed, the statement of one of the surveyors that it was his opinion that it was so embraced, but that he had not made any survey of the other patent and knew nothing of its lines, except that some one had informed him of the location of one of the corners, does not constitute any evidence as to where the lines of the patent, made sixty years previously, would be marked when surveyed, and hence is insufficient to require a submission to the jury. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

## b. Expert Evidence.

## (1) In General.

- 52. Theory of Admission. Experts are allowed to testify by way of opinion because they are presumed to have acquired more skill and knowledge and to be more capable of forming a correct opinion as to the subject-matter of the question under discussion. American Bauxite Co. v. Dunn (Ark.) 1917C-625.
- 53. Weight. There are degrees of expertness and witnesses who by experience, study and observation know more about the subject in question than persons who have had no experience or especial knowledge touching such subject are competent to testify as experts, the weight of their testimony being for the jury. Denver v. Atchison, etc. R. Co. (Kan.) 1917A-1007.
- 54. Testimony by a handwriting expert as to the genuineness of a disputed signature is the expression of an opinion and not binding on the jury, and its weight depends very largely on the cogency of the reasons given by him for his opinion. Palmer v. Blanchard (Me.) 1917A-809.

## (2) Qualifications of Experts.

- 55. In an action against a railroad for death of a switchman in service, the qualification of the fireman of the switching crew, to testify as a railroad expert as to whether it was the switchman's duty to throw a certain switch about the time he was killed, rests largely in the discretion of the trial judge. Devine v. Delano (Ill.) 1918A-689.
- 56. Duty of Railroad Employee. In an action against a railroad for death of its switchman in service, the fireman of the switching crew is qualified to testify that from his knowledge of railroading he would say it was the switchman's duty to have thrown a switch about the time he was killed. Devine v. Delano (III.) 1918A-689.

## (3) Subjects of Expert Testimony.

- 57. Correspondence of Logs With Stumps. It is not error to receive as evidence the opinions of qualified witnesses as to whether logs found in defendant's possession came from stumps on the land of the complaining witnesses. State v. Ward (Minn.) 1916C-674.
- 58. Weight of Expert Testimony. The opinions of experts are admitted to aid the jury to understand questions which inexperienced persons are not likely to decide correctly without aid, but it is for the jury to determine what weight the opinion of an expert is entitled to under the circumstances of a given case. American Bauxite Co. v. Dunn (Ark.) 1917C-625.
- 59. As to Handwriting. Opinion evidence in relation to handwriting is generally viewed with caution by the courts. Baber v. Caples (Ore.) 1916C-1025.
- 60. Testimony That Person Appeared Sick. A graduate and experienced nurse may properly testify that a person appeared to be very sick, and it would seem that any witness of ordinary intelligence might be allowed to so testify. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.
- 61. Possibility of Cure. In an action for malpractice, it is not error to permit experts to answer questions as to whether there was any way known to the medical profession by which a blood clot, "in cases of this sort," could be prevented, on the theory that such testimony transcended the limits of all possible human attainment. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.
- 62. Wounds Possibility of Infliction With Particular Weapon. A physician who reached decedent immediately after his death and who describes the wounds

inflicted on decedent, is properly permitted to testify that the wounds could have been inflicted by a razor held by a man coming up from behind decedent and cutting him from behind. State v. Giudice (Iowa) 1917C-1160.

- 63. Result of Observations Under Microscope. A handwriting expert may testify as to the age of ink, as indicated by his observations under the microscope; the testimony of a witness not being limited to the information which he acquires by his senses, unaided by any instrument or process. Williams v. Williams (Me.) 1916D-928. (Annotated.)
- 64. Gasoline Explosion. It requiring peculiar skill and judgment by those who had experience in such matters to state how the gasoline, by the explosion of which plaintiff's testate was killed, might have got into his cellar, it was proper to allow experts to give their judgment thereon. Mahlstedt v. Ideal Lighting Co. (Ill.) 1917D-209.
- 65. Opinion Evidence as to Purpose. In a prosecution for the attempt to entice a girl to enter employment of another for immoral purposes, opinions as to the character of the place of employment, based on hearsay, are inadmissible; such matter not being a subject for expert testimony. State v. Reed (Mont.) 1917E-783.
- 66. Finger Prints. In a prosecution for murder, where there was testimony of five separate marks upon the clapboards of the deceased's house, and proof that such marks were made in human blood, the expert testimony of a witness, who fully explained his qualifications, specified the circumstances upon which he predicated his opinion, swore that he was able to express an opinion with reasonable certainty and who was exhaustively and skilfully cross-examined as to the identity of the defendant's finger prints upon paper with the marks on the clapboards, is competent. People v. Roach (N. Y.) 1917A-410.

(Annotated.)

## c. Nonexpert Opinion.

#### (1) In General.

67. Conclusion of Witness. In an action on a policy on a stallion, where the plaintiff was allowed to testify that the \$2,000 cash which he had paid at the time of the purchase of the insured horse and others was paid for that horse, because the seller claimed that a note was outstanding on such horse, and she had to have the cash to pay it, such testimony is not improper as calling for the conclusion of the witness as to how the money was applied, since it was a mere relation of alleged facts. Simmons v. National Live Stock Ins. Co. (Mich.) 1917D-42.

- 68. On an issue as to whether a note of a married woman was an independent transaction or given as surety for her husband, an offer to prove by plaintiff's cashier that, if plaintiff took the note without any investigation of the parties or genuineness of the signature, it would appear that the transaction was done merely for collateral security as defendant claims and to get rid of the complaint of a bank examiner, is properly refused as an offer to elicit argument from the witness and not to show facts. First National Bank v. Bertoli (Vt.) 1917B-590.
- 69. Evidence as to the cause of an employee's discharge by witnesses who were familiar with the cause was as to a fact and not a conclusion. Johnson v. Aetna Life Ins. Co. (Wis.) 1916E-603.
- 70. It is error to allow plaintiff to state he would not have bought the tract without the spring at the price he paid, if he had not owned the tract with the spring. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

## (2) Subjects of Nonexpert Opinion.

71. Value of Wearing Apparel. The owner of wearing apparel may testify as to its value in an action to recover damages for the loss thereof. Rules of evidence are not so technical as to require expert witnesses to prove the reasonable or market value of chattels in common use, where it is apparent from the facts proven that the value of the articles is within the knowledge of persons of ordinary intelligence and experience. Rogers v. O. K. Bus, etc. Co. (Okla.) 1917D-581.

(Annotated.)

- 72. Value of Chattels. It is the well-known and generally accepted rule that, when a witness testifies as to the value of chattels in common use, it will be inferred that he means their market value, unless a different basis of value is fixed by the witness, or it is apparent that the witness bases his value on a different foundation, Rogers v. O. K. Bus, etc. Co. (Okla.) 1917B-581.
- 73. Knowledge from View. It is not error to permit jurors on the former trial to give their opinions or conclusions derived from and based upon the knowledge acquired on the view. State v. Ward (Minn.) 1916C-674.

(Annotated.)

74. Estimate of Quantity. Where, in an action under Iowa Code, § 2423, to recover payments made for liquor illegally sold by defendant to plaintiff, a witness testified that he delivered liquor to plaintiff, but kept no account of the sales or the quantity, and turned over to defendant the amount each night, it is proper to permit

the witness to give his opinion as to the amount of liquor delivered to plaintiff. Cvitanovich v. Bromberg (Iowa) 1917B-309.

- 75. Testamentary Capacity. A nonexpert, though not a subscribing witness and not present at the execution of the will, may testify to testatrix's mental condition, if he has had adequate opportunities for observation and forming an opinion. In re Rawlings' Will (N. Car.) 1918A-948.
- 76. Knowledge of Another. In an action for the death of a servant employed by defendant in the operation of an electric plant, and whose duty it was to turn the switches, alleging defendant's negligence in the installation of the switches, and that the accident was due to insufficient insulation of the switch handles, the inquiry as to decedent's knowledge of the voltage of the current does not relate to a matter within the realm of expert testimony, where there is nothing in the case to show that it required any technical knowledge to judge accurately of what deceased, in the circumstances disclosed, must have known concerning the voltage. McCarthy's Adm'r v. Northfield (Vt.) 1918A-943. (Annotated.) Note.

Admissibility of direct opinion of witness as to ownership of personalty. 1916D-289.

77. Direct Testimony as to Ownership. A party claiming title to a chose in action or other personal property which is the subject of litigation may properly be permitted to answer a question as to who is its owner, and if his adversary desires the constituent facts on which such claim of ownership is based he may elicit them on cross-examination. First National Bank v. Robinson (Kan.) 1916D-286.

(Annotated.)

- 78. Intoxication. Opinions of nonexperts are admissible on the defense of intoxication in a murder case. Commonwealth v. Boyd (Pa.) 1916D-201.
- 79. Evidence of Intoxication. It is not competent for witnesses of accused to testify that his intoxication rendered him, at the time of the killing, incapable of understanding that he was committing a crime, since that is a conclusion for the jury. James v. State (Ala.) 1918B-119.
- 80. A witness, testifying that accused, relying on the defense of intoxication, was drinking and acted queerly just before the offense, may not testify that he considered accused mentally unbalanced at that time. James v. State (Ala.) 1918B-119.
- 81. In a servant's action for damages for personal injury, wherein the master claimed that the injury was caused by plaintiff's fall while intoxicated, the people with whom plaintiff boarded, who

saw him at the breakfast table and observed his conduct, might state that then and when he left the house shortly afterwards he was very drunk, as whether a person is drunk is a question which one not an expert may answer, being something of common knowledge, and such statements amounting in effect, to a description of facts, a characterization of plaintiff's conduct. American Bauxite Co. v. Dunn (Ark.) 1917C-625.

(Annotated.)

#### Note.

Admissibility of nonexpert testimony to prove intoxication, 1917C-628.

## 7. DOCUMENTARY EVIDENCE.

#### a. In General.

82. Evidence in Another Case. The evidence in an action of debt, dependent upon the same issues of fact as those involved in another action of assumpsit, is made part of the record in the latter by the following agreement filed therein: "The parties hereto agree that the facts in this case are as follows: (Here insert the transcript of the evidence as certified by Henry Garfield Chaney, the official stenographer of this court, as reported in the same styled case, marked Debt No. 1, tried at the September term of this court, 1908.)" Wilson v. Shrader (W. Va.) 1916D-886.

#### b. Records and Public Documents.

- 83. Where plaintiff passenger, after his arrest by defendant railroad's conductor and ejection from the train for being drunk, pleaded guilty to a charge of being drunk and disorderly in the city, the record of the conviction, in plaintiff's subsequent suit against the road for his arrest by the conductor, is admissible in evidence as an inconclusive admission against plaintiff's contention in the suit that he was sober when arrested. Spain v. Oregon-Washington R. etc. Co. (Ore.) 1917E-1104. (Annotated.)
- 84. Deposition at Former Trial. In an action against an attorney for negligence in the trial of an action for plaintiff, suing an employer for a personal injury, a deposition of a witness testifying at a former trial is admissible, where the witness in the deposition has more than merely corroborated the testimony at the trial. McLellan v. Fuller (Mass.) 1917B-1.

(Annotated.)

85. Hearing on Transcript of Former Evidence. Due process of law does not forbid the hearing of a cause upon a transcript of evidence formerly heard in court, especially where the course pursued has the assent of the parties. De La Rama v. De La Rama (U. S.) 1917C-411.

- 86. Certified Copy. A certified copy of the records in the office of the collector of internal revenue relating to the issuance of a liquor license is admissible in evidence in a prosecution for maintaining a liquor nuisance when properly proved, and such record is properly proved when there is attached thereto a certificate by the collector of internal revenue as to its correctness and authenticity. State v. Kilmer (N. Dak.) 1917E-116.
- 87. A statement in a certificate of the collector of internal revenue, which is attached to a certified copy of the record of special taxpayers and registers of his district, does not render the admission of such record reversible error, because it states in substance that the record shows the issuance of United States special tax stamps to the defendant, when the record upon its face shows the same fact. State v. Kilmer (N. Dak.) 1917E-116.
- 88. Testimony at Former Trial. The statute permitting the use of the stenographer's transcript of testimony (Gen. Stat. Kan. 1909, § 2407) does not restrict such use to the limitations which attach to a deposition under sections 337 and 358 of the Civil Code. New v. Smith (Kan.) 1917B-362.
- 89. Police Station Blotter. A memorandum made by the officer in charge of a police station, showing the names of persons arrested, the charges preferred, etc., is not admissible as evidence of the facts therein stated. Carroll v. Parry (D. C.) 1916E-971.

#### Note.

Admissibility in subsequent civil action of judgment of conviction based on plea of guilty. 1917C-1109.

#### c. Private Documents.

## (1) Entries in Course of Business.

90. Book not of Original Entry. In an administratrix's action on open account, where all the books of decedent, who had kept a store of which defendant was manager, had been destroyed by fire, except a ledger, such ledger is admissible as original evidence of the state of account between decedent and defendant, under authenticating testimony of decedent's bookkeeper from personal knowledge that entries on the bill book and cash book were correct copies of the entries on the sale tickets and tickets showing payments of salary, not made by him, but by the clerk who sold goods or the cashier who advanced money, and that the entries on the bill book and cash book were correctly transferred to the ledger, and from thence, when filled, to that sought to be introduced. Givens v. Pierson's Administratrix (Ky.) 1917C-956. (Annotated.)

## (2) Maps.

- 91. Admissibility of Ancient Map. An ancient map of the public roads of a county, purporting to have been made by authority, and coming from the proper custody, is competent evidence to show the existence and location of the public roads of the county at the time it was made, and in a contest between coterminous landowners, where a road delineated on the map is claimed to be a boundary, such map is relevant, and is receivable in evidence, when, upon inspection by the court, the map appears to be what it purports to be and is shown to have been produced from the proper depository. Bunger v. Grimm (Ga.) 1916C-173. (Annotated.)
- 92. Original Map to Explain Later One. Where, in an action by a railroad to recover possession of part of its right of way alleged to have been encroached upon, the defendant introduced in evidence a plat of the right of way used in a previous suit between the railroad and the township, it is error to exclude from evidence another plat of the right of way made earlier by a real estate agent of the company, dead at time of suit, proved to have been his by his handwriting, the second plat being a counter declaration to the first plat introduced by defendant; the purpose of the introduction of such plat being to show the location of plaintiff's right of way. Atlantic Coast Line R. Co. v. Dawes (S. Car.) 1917A-1272.

#### Note.

Admissibility in evidence of ancient map or survey. 1916C-176.

#### (3) Books not Relating to Exact Science.

93. Booklet Issued by Manufacturer of Gas Machine. A booklet issued by defendant relative to its gasoline lighting systems, one of which it sold to deceased and installed in his house, is, in an action for his death by explosion of gasoline therefrom, properly admitted in evidence, he having been seen reading it, and its statements being such as to tend to lead him to think that precautionary measures were unnecessary in the operation of the system. Mahlstedt v. Ideal Lighting Co. (III.) 1917D-209.

## (4) Medical Books.

94. Objections to extracts from scientific medical works introduced in evidence were properly overruled, though there was no proof that they were works of authority and standing with the medical profession, where the objections did not point out this lack of proof, as the deficiency might have been supplied or the extracts excluded had the point been raised. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

95. Medical Books. Relevant .extracts from medical treatises recognized and approved by the medical profession as standard may be read to the jury in evidence. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

## (5) Statutes.

96. Admissibility of Printed Volume. Under Iowa Code, § 4651, providing that printed copies of the statute law of other states, purporting to have been published under the authority thereof, or proven to be commonly admitted as evidence, shall be admitted in the courts of the forum, a copy of the statutes of a foreign state is inadmissible in evidence, where the work itself did not purport to be published under the authority of the state, and no proof was offered to show that it was commonly admitted as evidence of the statutes in the courts of the foreign state. Rudolph Hardware Co. v. Price (Iowa) 1916D-850. (Annotated.)

Note.

Admissibility of printed copy of statutes to prove law of another jurisdiction. 1916D-853.

## (6) Mercantile Reports.

97. The reports of mercantile agencies, offered for the purpose of proving the amount of property owned by a person, are not admissible in évidence to prove the value of such property; nor does their competency in this case appear for the purpose of showing "notice, lack of notice, or motive." Brown v. Caylor (Ga.) 1916D-745. (Annotated.)

#### Note.

The law of mercantile agencies, 1916D-747.

#### (7) Survey Notes.

- 98. Admissibility of Survey. An unofficial survey is admissible in evidence when proved to have been correct. Bunger v. Grimm (Ga.) 1916C-173.
- 99. Field Book of Deceased Surveyor. Field book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed, are admissible in evidence, being made in the discharge of a professional duty; hence on proper foundation, such notes may be received in evidence and another surveyor interpret them. Wightman v. Campbell (N. Y.) 1917E-673. (Annotated.)

#### Note.

Admissibility in evidence of field book entries of deceased surveyor. 1917E-675.

#### (8) Corporate Books and Records.

100. As Between Stockholders. A contract for the sale of a large part of the

stock of a corporation provided that the corporation's indebtedness should be thereafter ascertained and paid in certain proportions by the buyer and seller. Thereafter the buyer furnished a statement of the corporate indebtedness, which should be paid by the seller, and the seller disputed the statement and refused to pay any part of the indebtedness shown by it. Suit was thereupon brought by the buyer for an accounting and to enforce payment of the balance found to be due. It is held that the corporation's books and vouchers, showing its business while both parties were stockholders, were properly admitted in evidence. Miller v. Dilkes (Pa.) 1917D-(Annotated.) 555.

Note.

Admissibility in evidence of books or records of corporation in action between members or between corporation and member. 1917D-558.

## (9) Letters.

- 101. Letters Written by Parties After Suit Begun. Letters written between husband and wife after the institution of a suit for divorce, each to obtain an advantage over the other at trial, will be accorded no weight. Marshak v. Marshak (Ark.) 1916E-206.
- 102. Self-serving Letters. A packer of corn wrote a broker of cornpacking products offering "10,000 cases fancy," at \$1 per dozen cases. The broker procured a purchaser subject to approval of a sample case but upon receipt of the sample case the purchaser wired the broker that it was not of fancy quality and could not be used. The broker wrote the packer stating the substance of the telegram. It is held that, in an action by the broker for commissions, the letter and telegram were improperly excluded, since letters and telegrams by one party to a suit to the other sent in the general course of business and not specifically to manufacture evidence, and which by the character of their contents are naturally calculated to elicit replies and denials, are admissible in evidence, though self-serving and not answered, not as themselves affording proof that the statements therein are true, but on the ground that silence when such statements are made may itself be an admission. Dennis v. Waterford Packing Co. (Me.) 1917D-788. (Annotated.)

#### Note.

Admissibility in evidence of self-serving letter or telegram sent in general course of business. 1917D-790.

## (10) Diary.

103. Admissibility of Private Diary. When a deceased person, a stranger to the transaction, made entries in a book which are relevant to the case, the entries are

admissible in evidence only when made in the regular course of business, which means in the way of business, and hence entries by a private person in a diary concerning the weather kept only as a matter of custom and not as a matter of business or duty are not admissible after his death. Arnold v. Hussey (Me.) 1916C-715.

(Annotated.)

104. In an action for injuries caused by a fall on the ice in front of defendant's building, the erroneous admission of entries in a private weather record kept by one now deceased, tending to show that the temperature was such that ice could not have formed on the day in question, is prejudicial. Arnold v. Hussey (Me.) 1916C-715. (Annotated.)

#### Notes.

Private diary as evidence. 1916C-717. Admissibility of evidence received through detectaphone or dictagraph. 1916E-181.

## (11) Hospital Charts.

105. Admissibility of Hospital Chart. Entries of plaintiff's symptoms, etc., on a hospital chart by various nurses are not admissible in the absence of evidence that the nurses are unobtainable. Osborne v. Grand Trunk R. Co. (Vt.) 1916C-74.

(Annotated.)

106. In an action against a surgeon for malpractice in his treatment of a patient in a hospital, charts or records kept by the nurses for the information of the attending physician or surgeon are properly admitted in evidence, though they doubtless signified little to the jury. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

107. In an action for malpractice on the part of a surgeon in treating a patient in a hospital, it is not error to permit defendant, while testifying as an expert and giving his opinion on the whole course of treatment administered to plaintiff, to read temperature charts kept by the nurses in the hospital, the authenticity and accuracy of which was fully established and undisputed, this being nothing more than a statement of some of the considerations that influenced his professional judgment respecting the proper treatment to be followed. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

## Note.

Hospital chart as evidence. 1916C-78.

#### d. Official Documents.

108. Necessity of Showing Appointment. An administrator's deed, accompanied by the order of the ordinary granting leave to sell, is admissible as a muniment of title, without the production of the letters

of administration. Bunger v. Grimm (Ga.) 1916C-173.

109. An administrator's deed without an order of sale, or a sheriff's deed not accompanied by the execution under which the property is sold, is admissible in evidence as color of title. Bunger v. Grimm (Ga.) 1916C-173.

## 8. DECLARATIONS AND ADMISSIONS. See Admissions and Declarations.

#### 9. COMPARISON OF TYPEWRITING.

110. Proof of Authorship of Typewritten Letters. Where a contract alleged to be embodied in an illiterate person's letters is in issue, testimony as to how he spelled words and wrote letters on the typewriter, and that the letters in question were his, by persons familiar with his methods of writing, is competent. Josephs v. Briant (Ark.) 1916E-741.

#### 10. HANDWRITING.

111. Text by Other Writings. On an issue as to the genuineness of the alleged signatures of indorsers to the notes sued on, it is error to submit to witnesses, testifying to their opinion as to the genuineness of the signatures, on cross-examination, imitated signatures made by engravers in order to test the witnesses' knowledge. Fourth National Bank v. McArthur (N. Car.) 1917B-1054.

(Annotated.)
112. Signature in Court as Standard.
The signature of the defendant in a criminal action, which is made by him in open court and without objection, is admissible in evidence for comparison and in order to prove the genuineness of other handwriting claimed to be his. State v. Gordon (N. Dak.) 1918A-442.

#### Note.

Testing handwriting witness by use of other writing. 1917B-1060.

#### 11. PHOTOGRAPHS AS EVIDENCE.

113. Preliminary Proof Requisite. On an issue as to the genuineness of the signatures of alleged indorsers of certain notes sued on, enlarged photographs of the disputed writings are inadmissible without preliminary evidence of the photographer who made them as to how and under what conditions they were taken, so that the jury might determine whether they were exact reproductions. Fourth National Bank v. McArthur (N. Car.) 19178-1054.

## 12. PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS.

a. Proof of Collateral Agreement.

114. Parol to Vary Writing. Where a contract of sale is reduced to writing, the

written instrument is the exclusive evidence of the contract, and it cannot be varied by parol, proof tending to show the existence of additional warrantics. Pickrell, etc. Co. v. Wilson Wholesale Co. (N. Car.) 1917C-344.

115. Where defendant's special notice, in replevin for two cows under a chattel mortgage given to secure purchase price of a horse, set out misrepresentation of the property sold, a warranty, and an oral contract that the sale of the horse was conditional upon his conforming to the terms of the representation and warranty, but contained no direct allegation of failure of consideration, or of distinct understanding between the parties that delivery of the mortgage was conditional, and not absolute, the admission of testimony of defendant that the sale was conditional, and not absolute, is improper. Solomon v. Stewart (Mich.) 1917A-942.

116. Showing Existence of Right to Rescind. In replevin by a mortgagee for two cows under a mortgage given to secure the purchase price of a horse, parol evidence is inadmissible to show that the sale of the horse was subject to the express condition that it could be returned if not as represented, although parol evidence is admissible to show that a contract was procured by fraud, that there was failure of consideration, or that the understanding was that the delivery of the mortgage and note, etc., was not absolute, but merely conditional. Solomon v. Stewart (Mich?) 1917A-942.

117. Parol Evidence to Vary Lease. A written lease for three years at a monthly rental cannot be varied by parol evidence that the lessor, at the time of the execution of the lease, advised the lessee of a pending action by a third person to enforce the lessor's contract of sale, and that the lessee replied that he would take his chances, and thereby relieve the lessor from liability for the lessee's eviction by the third person, succeeding in his action; the rule that a written instrument, accompanied by a condition precedent to its taking effect, may be modified by parol proof of the condition not being applicable to a written instrument which has once taken effect or to a contract which the statute of frauds requires to be in writing. Wolf v. Megantz (Mich.) 1916D-1146.

118. The mailing and contents of a postal card from carrier to consignee, announcing arrival of shipment, may be shown by parol, in an action by the consignee to recover the goods in which defendant claims for storage, the mailing and contents being matters collateral to the issue, and not the subject-matter of the litigation. Holloman v. Southern R. Co. (N. Car.) 1917E-1069.

119. Parol to Vary Writing—Scope of Contract of Suretyship. Where a wife as

surety for her husband signed a note and mortgage, she cannot in an action on the note and mortgage testify that she only intended to pledge her land and did not intend to incur further obligation, for that would contradict the terms of the written instrument. Royal v. Southerland (N Car.) 1917B-623.

## b. To Explain 'Ambiguity.

120. Effect of Use of Printed Letterhead. Where a contract of guaranty was written on a letterhead of a bank, which showed the names and official capacities of the various officers, and was signed by one who appended the word "manager" after his signature, but there was nothing to show that the manager intended the bank to be bound, the word "manager" must prima facie be taken as mere descriptio personae, though it creates sufficient ambiguity to admit parol evidence as to the intention of the signer. Griffin v. Union Savings, etc. Co. (Wash.) 1917B-267.

(Annotated.)

#### Note.

Evidentiary effect of use of printed letterhead or billhead. 1917B-271.

## c. Showing Real Character of Instrument.

121. Parol to Explain Writing. In a suit by plaintiff railroad to recover possession of a part of its right of way, alleged to have been encroached upon by defendant, where defendant offered in evidence a plat of plaintiff's right of way which had been put in evidence in a previous suit between plaintiff road and another party, and which showed that the right of way by the scale of the plat was less than claimed in suit by the plaintiff road, the explanation of the roadmaster of the road, who was present when the plat was drawn, who had procured data for it, and who knew the purpose for which it was made, that there had been no attempt to draw it to scale is improperly excluded from evidence. Atlantic Coast Line R. Co. v. Dawes (S. Caf.) 1917A-1272.

122. Showing Consideration. Under Ky. St. § 472, providing that the consideration of any writing with or without seal may be impeached or denied by pleading verified by oath, the true consideration of a deed may be shown though it contradicts the writing. Hite v. Reynolds (Ky.) 1917B-619.

123. Apparently Independent Transaction as Suretyship Contract. That a married woman signed a note to plaintiff bank which on its face was a contract apparently independent of her husband's indebtedness to the bank does not preclude her from showing the true intent of the transaction and that she in fact executed the note as surety for him. First National Bank v. Bertoli (Vt.) 1917B-590.

## d. To Show Complete Instrument.

124. Parol Evidence to Explain Writing—Writing Incomplete. The correspondence soliciting the note and transmitting it to the holder in escrow discloses that it is but part of and supplementary to the conditions under which the note was executed and was to be delivered. The correspondence can therefore be explained, and supplemented in such particulars by oral testimony. Northern Trust Co. v. Bruegger (N. Dak.) 1917E—447.

#### e. To Prove Lost Instrument.

126. Parol Evidence of Destroyed Judicial Record. Where a judicial record has been destroyed by fire, and the parties interested in it have no copy thereof in their possession or control, its contents may be established by parol testimony. Williams v. Richardson (Fla.) 1916D-245. (Annotated.)

127. Loss of Official Document. While the loss and contents of a warrant offered in evidence and connected with a legal proceeding should ordinarily be proved by the legal custodian of such paper, rather than by other witnesses, yet if the fact and contents of such paper otherwise sufficiently appear from other parts of the record to which the paper belongs, admitted in evidence, the admission of the evidence of such other witness will not constitute reversible error. Howell v. Wysor (W. Va.) 1916C-519.

128. Lost Letter. In an action to recover a broker's commission on a sale of land, wherein plaintiff testified that defendants gave him a written agreement of employment in the form of a letter, in response to a conversation between himself and defendant, and containing the substance of and confirming it, which writing had been lost, plaintiff's testimony as to such conversation was admissible, as being merely a statement of the contents of the writing. Taggart v. Hunter (Ore.) 1918A-128.

#### Note.

Proof of parol of contents of lost or destroyed judicial record. 1916D-248.

## f. To Show Consideration.

129. Parol evidence is admissible to show the real consideration of a contract reciting a consideration. Queensborough Land Co. v. Cazeau (La.) 1916D-1248.

## g. To Explain Terms.

130. In an action for damages for failing to deliver cucumber seed bought under a written contract as being "Improved Chicago Pickling," evidence that the purchaser was informed as to the kind of seed actually furnished, that it had been developed from seed purchased from a certain

company, and that he agreed that it should be labeled, "Improved Chicago Pickling," is improperly excluded; it being in explanation, and not in variation, of the terms of the written contract. Buckbee v. P. Hohenadel, Jr. Co. (Fed.) 1918B-88. (Annotated.)

131. In an action for damages for failing to deliver "Improved Chicago Pick-ling" cucumber seed under a written contract, evidence that the seller produced cucumbers from the seed contracted for as samples and sent them to the purchaser previous to the delivery is admissible to show notice of the actual nature of the seed to be delivered. Buckbee v. P. Hohenadel, Jr. Co. (Fed.) 1918B-88.

(Annotated.)

#### 13. PRESUMPTIONS.

Of execution of deed from acknowledgment, see Acknowledgments, 3.

Of alienage from foreign residence, see Aliens, 1.

Of continuance until change is proved, see Aliens, 1.

No presumption of alteration from erasure, see Alteration of Instruments, 12.

On appeal, see Appeal and Error, 190-202. That child born in wedlock is legitimate, see Bastardy, 11, 12.

Of consideration from "value received," see Bills and Notes, 16.

That payee is holder of note, see Bills and Notes, 58.

Of negligence from accident, see Carriers of Passengers, 60-62.

Of innocence of accused, see Criminal Law, 87.

Of death from absence, see Death, 1, 2, 4. Of acceptance of some streets from acceptance of others, see Dedication, 11.

That date of deed is that of execution, see Deeds,  $18\frac{1}{2}$ .

After twenty years that judgment has been paid, see Executors and Administrators, 34.

That law of foreign state is law of forum, see Foreign Laws, 1, 3.

Of fraud in fiduciary relations, see Fraud, 13, 14.

No presumption of law against gifts causa mortis, see Gifts, 16.

Of fraud from relation of confidence, see Gifts, 15.

Of undue influence from relation of confidence, see Gifts, 15.

That evidence authorized judgment, see Habeas Corpus, 15.

In favor of homestead right, see Homestead, 1.

In homicide cases, see Homicide, 16.

That highest number of votes for one office equaled number of voting electors, see Initiative and Referendum, 7. That one is sane, see Insanity, 9, 15.

From failure to produce evidence, see Instructions, 66.

By statute that holder of U.S. tax receipt is dealer, see Intoxicating Liquors, 104, 105.

In favor of consent judgment, see Judgments, 45.

That plaintiff is owner of judgment, see Judgments, 16.

Of agreement to pay rent from occupancy, see Landlord and Tenant, 32.

Of malice from wrong done, see Libel and Slander, 10.

Of damage from publication, see Libel and Slander, 115, 120.

As to malice, see Libel and Slander, 121. Of regularity of election, see Local Option, 1.

Under Workmen's Compensation Act, see Master and Servant, 331-333.

That ordinance is reasonable, see Municipal Corporations, 97.

That initial is Christian name, see Names,

Child of six or seven incapable of contributory negligence, see Negligence, 48. Boy of five unconscious of danger, see Negligence, 50.

Against railroad for accident, see Negligence, 77.

Of negligence of carrier from accident, see Negligence, 114.

That public nuisance affects all public

alike, see Nuisances, 16.

No presumption of undue influence in gift
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to child, see Parent and Child, 6.
Malpractice not presumed from result, see

Physicians and Surgeons, 36.

That cause of action accrued within state, see Pleading, 53.

Against state in action in nature of quo warranto, see Quo Warranto, 1.

That order of railroad commission is reasonable, see Railroads, 46.

That testamentary remainder is vested, see Remainders and Reversions, 12.
That statute was regularly enacted, see Statutes, 26.

That legislature knows rules of construction, see Statutes, 78.

As to valuation for taxation, see Taxation, 50, 52.

Of title from possession, see Trespass, 5. Against motion to direct verdict, see Verdict, 29-31.

That waters above ebb and flow are non-boatable, see Waters and Water-courses, 28.

## a. Intention of Parties.

132. Inferences Against Actual Intent of Parties. The law should not be so applied as to create presumptions which have no actual basis of fact in the intention of the parties. Shepard v. New York (N. Y.) 1917C-1062.

#### b. Performance of Public Duty.

133. In such case the court will conclusively presume that the publication was

made according to the constitutional requirements by those to whom the constitution and statutes enacted in pursuance thereof intrusted such duty. Gottstein v. Lister (Wash.) 1917D-1008.

(Annotated.)

134. Acts of Public Officer. The acts of a public officer which presuppose the existence of other acts or conditions to make them legally operative are presumptive proofs of the latter. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.

## c. Receipt of Letter.

135. That notice by postal card, properly addressed and mailed, from carrier to consignee, of arrival of shipment, was received, will be presumed in the absence of evidence to the contrary. Holloman v. Southern R. Co. (N. Car.) 1917E-1069.

(Annotated.)

136. A letter which a witness testified he mailed to defendant by dropping in an iron letter box on a street corner is admissible, since the court judicially knows that such mail boxes are maintained by the government, and it will be presumed that the letter was duly delivered to defendant the same as if it had been deposited in the postoffice. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

(Annotated.)

#### Note.

Presumption of receipt of letter. 1917E-1058.

#### d. Knowledge of Law.

137. Knowledge of Foreign Law. As a general rule, a man is presumed to know and understand, not only the laws of the country where he dwells, but also those of the foreign country or state in which he transacts business. Klein v. Keller (Okla.) 1916D-1070. (Annotated.)

#### e. Ownership.

138. Presumption of Continuance. Title once shown to exist, whether by the probative force of possession or otherwise, is conclusively presumed to continue as against a trespasser. Vidmer v. Lloyd (Ala.) 1917A-576.

#### f. Identity of One of Same Name.

139. Identity of Person from Identity of Name—Conflicting Presumptions. The presumption that identity of names indicates identity of persons will make admissible in a trial for maintenance of a liquor nuisance a government license for the sale of liquor issued to a person of the same name as the defendant, without preliminary proof of the identity of the person. State v. Kilmer (N. Dak.) 1917E-116. (Annotated.)

#### Note.

Conflict between presumption of identity of person from identity of name and another presumption. 1917E-121.

## g. Sobriety.

140. As there is a presumption of sobriety, the erroneous admission of such evidence is harmless. Richardson v. Sioux City (Iowa) 1918A-618. (Annotated.)

#### Note.

Presumption of temperance or sobriety. 1918A-620.

#### h. Receipt of Telegram.

141. Though where a telegram properly addressed is delivered to the company with payment of the fee for transmission, or is shown to have been sent, delivery to the addressee is presumed, there is no presumption from the fact that a telegraph company found a telegram among its files, where no showing was made as to how or for what purpose the telegram came into possession of the company nor as to payment of fee. Ottumwa v. McCarthy Improvement Co. (Iowa) 1917E-1077.

(Annotated.)

142. Delivery of Telegram. Delivery of a properly addressed message to a telegraph company for transmission raises a presumption that it was received in due course by the addressee. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

#### Note.

Presumption of receipt of telegram. 1917E-1081.

- i. Common Law of Sister State.
- 143. In the absence of evidence, the common law of Delaware will be presumed to be the same as that of Massachusetts. Klotz v. Pan-American Match Co. (Mass.) 1917D-895.
- 144. The presumption is that the common law of a sister state is the same as that of the state of suit., German-American Bank v. Wright (Wash.) 1917D-381.
- 145. Law of Sister State. In the absence of proof to the contrary, the law of another state or country is presumed to be like the common law of the forum, but it is not presumed to be like the statutory law. Gowett v. Wallace (Me.) 1917A-754.

#### Note.

Presumption of undue influence arising from relation of man and woman engaged to be married. 1916C-1031.

## j. Authority to Answer Letter.

145½. Authority to Answer Letter. Where a letter was addressed to the land

agent of a railroad company and was answered the following day by a person assuming to act for the company, it should be presumed that the answer was made by one whose duty it was to act in the matter until the contrary appeared. New York, etc. R. Co. v. Cella (Conn.) 1917D—591.

#### Note.

Presumption as to authenticity of letter received in reply to letter. 1917D-925.

#### 14. BURDEN OF PROOF.

- 146. New Matter in Answer. Defendant has the burden of proving matters set up by the answer and denied by the reply. Schworm v. Fraternal Bankers Reserve Soc. (Iowa) 1917B-373.
- 147. Quantum of Evidence. In an action against a decedent's estate to recover for board furnished him, an instruction that the burden of proof was on plaintiff to make out a case and to offer evidence "sufficient by its greater weight to satisfy" the jury of the truth of her allegations, sufficiently stated the correct rule. McCurry v. Purgason (N. Car.) 1918A-907.
- 148. The burden of establishing the truth of a plea in abatement that the plaintiff was a fictitious person is upon the defendant. Baldauf v. Nathan Russell (N. J.) 1917D-1191. (Annotated.)
- 15. PRIVILEGED COMMUNICATIONS. See Witnesses.
- 16. WEIGHT AND SUFFICIENCY OF EVIDENCE.

#### a. In General.

- 149. Preponderance of Evidence. A greater or less probability, leading on the whole to a satisfactory conclusion, is all that can reasonably be required to establish controverted facts. Devine v. Delano (III.) 1918A-689.
- 150. What Amounts to More than Scintilla. To amount to more than a scintilla the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence was introduced. Holstein v. Benedict ('Hawaii) 1918B-941. (Annotated.)
- 151. Relative Weight of Measurement and Estimate. Opinion testimony as to a witness' estimation from observation of the depth of a hole in the street is so conjectural as not to raise a substantial conflict, where there is other positive evidence by one who accurately measured the hole that it was of a different depth, so that the first-mentioned testimony does

not make the question one for the jury. Lalor v. New York (N. Y.) 1916E-572. (Annotated.)

152. To sustain a finding in his favor, it is not essential there should be a distinct preponderance of evidence on behalf of the plaintiff. To have this effect, it is only necessary that the evidence, when considered in its entirety, reasonably justifies such verdict. Hill v. Norton (W. Va.) 1917D-489.

153. Evidence Held Sufficient. The verdict finds support under the evidence and the law. Manning v. St. Paul Gaslight Co. (Minn.) 1916E-276.

154. Sufficiency of Evidence to Show Contents. Evidence of the contents of a lost instrument considered and held not to be of the clear and convincing character required by law. Queen v. Queen (Ark.) 1917A-1101. (Annotated.)

Notes.

Sufficiency of proof to establish contents of lost instrument. 1917A-1104.

Relative weight of deposition and oral testimony. 1917D-758.

Comparative weight of estimate and actual measurement. 1916E-573.

Sufficiency of evidence to show mailing of letter. 1917E-1076.

What constitutes scintilla of evidence. 1918B-943.

#### b. Negative Testimony.

155. The evidence in an action against the landlord by a tenant's guest for injuries from falling in an unlighted hallway within the exclusive control of the landlord is held to sustain a finding that the landlord was obligated by the terms of the tenancy to light the hallway, and that he negligently failed to do so. Galagher v. Murphy (Mass.) 1917E-594.

(Annotated.)

156. Relative Weight of Positive and Negative. The rule that positive testimony outweights negative testimony does not conflict with the rule that the weight of conflicting testimony shall be left to the jury, but is merely a rule of measurement for use by the jury. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

157. Relative Weight of Positive and Inferential Evidence. The evidence of unimpeached witnesses testifying from accurate and positive knowledge concerning facts is not controverted by indefinite statements or negative testimony, or by doubtful inferences from undisputed facts. Johnson v. Aetna Life Ins. Co. (Wis.) 1916E-603.

#### c. Uncontroverted Testimony.

158. Uncontradicted Testimony. Defendant, a stock broker, received two stock

certificates, which it pledged with the bank. In some way defendant's employee, B., who was also plaintiff's confidential agent, obtained possession of the stock certificates and converted them to his own Plaintiff asserted that defendant was liable for the value of the certificates he had deposited, and called defendant's cashier to give evidence as to the transaction. The cashier testified without contradiction that he delivered to B. two other certificates for 200 shares upon making monthly settlement of plaintiff's account, and that for some reason B. substituted those for the ones held by the bank, and which defendant was entitled to hold as margin. Held, that the cashier's testimony was not so improbable as to entitle plaintiff to have its truth submitted to the jury; he having called him as a wit-Carlisle v. Norris (N. Y.) 1917A-

159. Conclusions — Motive. Plaintiff having introduced evidence tending to show a reason favorable to him for an admitted act of defendant, defendant, to explain his conduct, could give his version of the occasion and his reason for the act, though such reason was uncommunicated to any one at the time; this affecting only the weight of his testimony. Comstock's Administrator v. Jacobs (Vt.) 1918A-465.

## d. Circumstantial Evidence.

160. A verdict may be founded on circumstances alone in criminal as well as in civil cases. Devine v. Delano (Ill.) 1918A-689.

161. "Circumstantial evidence" is the proof of certain facts and circumstances in a given case from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. Devine v. Delano (Ill.) 1918A-689.

162. Circumstantial evidence is accepted with great caution. Watson v. Adams (Ala.) 1916E-565.

## e. Number of Witnesses.

163. While the jury is to be guided by the evidence, it is under no necessity of comparing the number of witnesses, and rendering verdict accordingly, but should weigh all the testimony. Music v. Big Sandy, etc. R. Co. (Ky.) 1916E-689.

## f. Impossibility of Truth.

164. Testimony to Fact Physically Impossible. Where one car and the trucks of another rolled off the end of a railroad switch and crashed into the fence in front of plaintiff's residence, wrecking it, but not injuring the house, except breaking a window by a flying picket, testimony by plaintiff that she was thrown over the foot

of a bed, which was two feet higher than the mattress, on to a rocking chair, and thereby injured, when taken into connection with testimony by other occupants that they were not even awakened, is contrary to the physical facts, and no recovery can be had. Louisville, etc. R. Co. v. Chambers (Ky.) 1917B-471.

(Annotated.)

Note. Conversations by telephone as evidence. 1916E-977.

#### EVICTION.

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Punishment, 11, 12.

Liability for unauthorized execution sale, see Sheriffs and Constables, 8, 9.

#### 1. EXEMPTIONS.

## (a) Trust Property.

1. Land Held in Trust. Land held in trust for the defendant is not subject to sale under execution. Johnson v. Whilden (N. Car.) 1916C-783.

## b. Tools and Apparatus of Trade.

#### Note.

Vehicle as "tool," "implement" or "instrument" within exemption statute. 1917D-96.

## c. Proceeds of Fire Insurance.

2. Property not Exempt at Time of Under Rem. & Bal. Wash. Code, § 568, providing that whenever property legally exempt from execution and attachment is insured and destroyed by fire the insurance money, to an amount equal to the exempt property, shall be exempt, where a man, living with and supporting his illegitimate child and its mother, so that he was not the head of a family or a householder and entitled to exemptions when the house in which he lived, which was insured, was burned, by marrying the woman before trial of his creditor's garnishment proceedings against the insurer, legitimatized the child, so that he himself became entitled to exemptions, the insurance money is not exempt from the creditor's claim, since to reach such result it would be necessary to read into the stat-ute a provision that if property is insured which is not exempt and is damaged by fire, and if the fire had not occurred the property would have been exempt at the time of the trial, the insurance money shall be exempt. Peerless Pacific Co. v. Burckhard (Wash.) 1918B-247.

#### d. Public Property.

3. Property in use for public or governmental purposes cannot be sold on execution or other legal process, the rule being founded on "public policy," which is based upon the fundamental law, the declarations of the legislature in the statutes, or the decisions of the courts. School Town of Windfall City v. Somerville (Ind.) 1916D-661.

#### e. Persons Entitled.

4. "Child" as Including Illegitimate Child. Under Rem. & Bal. Wash. Code, §§ 553, 565, providing that every person who has residing on the premises with him and under his care and maintenance his minor child is the head of a family, and that every person who has residing with him and under his care and maintenance

DIGEST. 1916C-1918B.

his minor child is a householder, one living with and supporting his minor illegitimate child and its mother is not the "head of a family" or a "householder," and so not entitled to exemptions from attachment or execution, as the word "child." used in the statute without qualifying words, the context not showing any contrary meaning, does not include an illegiti-mate child. Peerless Pacific Co. v. Burckhard (Wash.) 1918B-247.

(Annotated.)

### f. Evasion of Exemption Laws.

5. Damages for Evading Exemption. In an action brought by a debtor to recover damages caused by his creditor's assignment of the claim to a nonresident so that it might be collected by attachment, evidence held to support a finding that the debtor was not the owner of property, including the fund attached, of a value in excess of the statutory exemption. Anderson v. Knotts (Ind.) 1916D-868.

## 2. LIEN OF EXECUTION.

6. Effect of Issuing Execution. Under N. Y. Code Civ. Proc. § 1250, providing that a judgment required to be docketed neither affects real property nor is entitled to a preference until the judgment roll is filed and the judgment docketed, and section 1251, providing that a judgment docketed in a county clerk's office is a charge upon the debtor's real property in the county for ten years after filing the judgment roll, where a judgment debtor inherited realty from his father, so that the liens of the judgment creditors, whose judgments had been docketed, attached thereto simultaneously on the death of the father, one creditor cannot obtain a preference over the others through the issuance of execution and the advertising of the property for sale by the sheriff. Hulbert v. Hulbert (N. Y.) 1917D-180.

(Annotated.)

7. Necessity of Issuing Execution to Create Lien. Under N. Y. Code Civ. Proc. § 1250, providing that a judgment required to be docketed neither affects real property nor is entitled to a preference until the judgment roll is filed and the judgment docketed, and section 1251, providing that a judgment docketed in a county clerk's office is a charge upon the debtor's real property in the county for ten years after filing the judgment roll, a judgment, upon being filed and docketed, becomes a lien upon the real estate of the debtor, and it is no longer necessary that an execution should be issued upon the judgment to cause it to become a lien upon realty. Hulbert v. Hulbert (N. Y.) 1917D-180.

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## APPOINTMENT AND REMOVAL.

## a. Jurisdiction to Appoint.

1. The word "estate," as used in Shannon's Tenn. Code, § 3935, subd. 4, authorizing the appointment of an administrator of the estate of a nonresident in any county where any suit is to be brought, prosecuted, or defendant in which the estate is interested, means the whole legal entity which may be the subject of devolution on the legatees, devisees, heirs, or distributees of a decedent, under the laws of a state or government, which, under such laws, may be attacked or defended, or to obtain which, a suit may be brought. Sharp v. Cincinnati, etc. R. Co. (Tenn.) 1917C-1212. (Annotated.)

2. Assets Within Jurisdiction. Shannon's Tenn. Code, § 3935, providing that letters of administration may be granted upon the estate of a nonresident by the county court of any county where deceased had any goods, chattels, or assets or any estate, real or personal, at the time of his death, or where the same may be when the letters are applied for, or where any suit is to be brought, prosecuted, or defended in which the estate is interested, an administrator may be appointed in the county in which the decedent was wrongfully killed, though the cause of action for the wrongful death is the only asset in the county, and there are no technical assets. Since the word "chattels" includes not only personal property in possession, but choses in action, the term "goods and chattels" is of very wide signification, and includes choses in action. The term "choses in action" includes rights of action for tort. The word "assets," as used in the administration statutes, though usually meaning items subject to payment of the debts of the decedent, is not wholly limited to this meaning, but has been applied to money collected by an administrator as damages for wrongful killing of an intestate. The word "estate," though in its primary and technical sense referring only to an interest in land, as used with reference to a decedent's property, has acquired a wider application in a popular sense and refers to the entire mass of decedent's property, both real and personal, while the words "goods, chattels, or assets or any estate, real or personal," include every kind of property of any nature whatsoever, and are not limited to technical assets subject to the payment of debts. Sharp v. Cincinnati, etc. R. Co. (Tenn.) 1917C-1212. (Annotated.)

#### Note.

Right of action within jurisdiction as sufficient property right to warrant grant of administration. 1917C-1217.

#### b. Persons Entitled.

3. The quoted phrase in the county between the United States and a foreign country, which provides that, in the event of any citizen of either dying in the territory of the other, the consul of the nation of which the deceased may belong shall, "so far as the laws of each country will permit," and pending the appointment of an administrator, take charge of the

property of the deceased and have the right to be appointed administrator, applies not only to the temporary possession which the foreign consul may take, but qualifies his right to be appointed administrator, and his right to be appointed administrator is subject to the statute declaring that, in the absence of next of kin entitled to inherit, the public administrator is entitled to letters of administration, and the foreign consul is only to administer in the absence of an application by the next of kin or the public administrator, and then only as to persons legally competent within Cal. Code Civ. Proc. § 1365, subd. 10. Estate of Servas (Cal.) 1916D-233.

(Annotated.)

- 4. Right of Foreign Consul to Administer. The phrase "so far as the laws of each country will permit," in the treaty between the United States and Sweden providing that, in the event of any citizen of either country dying in the territory of the other; the consul of the nation of which deceased may belong shall, "so far as the laws of each country will permit," and pending the appointment of an administrator, take charge of the property of decedent for his lawful heirs and creditors and have the right to be appointed as administrator, refers exclusively to the laws of the state within which the foreigner dies. Estate of Servas (Cal.) 1916D-233. (Annotated.)
- 5. Priority of Right to Appointment. Subject to Mo. Rev. St. 1909, § 15, declaring priority of persons entitled to administer estates, and section 19, prescribing when letters testamentary with will annexed shall issue, it is within the discretion of the court to appoint the administrator, and the public administrator has no superior right to appointment as administrator with the will annexed. Brinckwirth v. Troll (Mo.) 1918B-1056.
- (Annotated.) 6. Mistress of Testator. Where testator, after separating from his wife, who became insane, entered into a meretricious relation with R., whom he appointed ex-ecutrix of his will, but on testator's death it appeared that R. had no interest in the estate under the will or otherwise, that she was unfriendly toward the insane widow, and that the estate was probably insufficient to pay its debts, including the widow's allowance, the court should have sustained a protest against the appointment of R. as executrix, under Colo. Rev. St. 1908, § 7111, providing that if any person named as executor shall appear incompetent for any reason, letters of administration may be granted in the same manner as if such person had not been named, etc. Deeble v. Alerton (Colo.) 1916C-863.

Note.

Rights and duties of consul with respect to decedent's estate. 1916D-237.

## e. Contest of Appointment.

7. Effect of Appeal from Order. Executors, whether testamentary or dative, are included within the meaning of the comprehensive language, "or other administrators of successions," as used in article 1059 of the La. Code of Practice, and judgments appointing or removing them become provisionally executory when rendered, and are not subject to suspension by appeal. Succession of Lefort (La.) 1917E-769.

#### d. Removal or Revocation.

- 8. Revocation of Administration by Discovery of Will. The discovery of a will after the appointment of an administrator does not make the appointment void ab initio, and accordingly a person purchasing realty from the administrator prior to the discovery of the will takes a good title. Hewson v. Shelley (Eng.) 1917B-1119. (Annotated.)
- 9. Public Administrator—Revocation of Letters. It being the duty of the public administrator to be at all times in court and take notice of all proceedings, failure to give actual notice of a proceeding to revoke his letters on discovery of a will does not vitiate the order of revocation. Brinckwirth v. Troll (Mo.) 1918B-1056. (Annotated.)
- 10. On discovery and probate of a will, the powers of the public administrator to administer the estate cease ipso facto, and he is therefore entitled to no notice of a proceeding formally to vacate his authority. Brinckwirth v. Troll (Mo.) 1918B-1056. (Annotated.)
- 11. Mo. Rev. St. 1909, § 47, requiring that on discovery and probate of a will the letters of administration of the administrator theretofore appointed shall be revoked, applies as well to the public administrator as to others, although he has on due notice taken charge of the estate. Brinckwirth v. Troll (Mo.) 1918B-1056. (Annotated.)

#### Note.

Validity of acts of administrator whose appointment is revoked by subsequent discovery of will. 1917B-1128.

#### 2. BONDS.

12. Liability of Sureties. For the purpose of charging an administrator's sureties, an indebtedness due the estate from the administrator should not be regarded as an asset as of the time of its maturity, if at that time and at all subsequent periods he was insolvent and did not have or could not procure the money with which to pay the debt. McEwen v. Fletcher (Iowa) 1916D-631. (Annotated.)

#### Note.

Liability of sureties of executor or administrator for debt of their principal to decedent. 1916D-636.

#### 3. ASSETS OF ESTATE.

- 13. Construed as Including Land. Real estate is an "asset" of the estate of a decedent. Friend v. Hogg (Fla.) 1917B-155.
- 14. Collection of Assets. The administrator of a person, in whose name judgments were taken, and who appeared on the record to be the legal owner of one and the beneficial owner of the other, can enforce or collect them for the benefit of the true owner. Brown v. Harding (N. Car.) 1917C-548.
- 15. Appraisement. Section 12, c. 56, W. Va. Acts 1907, respecting the appraisement of notes, bonds, and evidences of debt, owned by a decedent at the time of his death, does not apply to evidences of debt not taxable in this state, owned by a nonresident at the time of his death, and sent to an attorney in this state, by his personal representative, for suit thereon against the debtor who resides here. Austin v. Calloway (W. Va.) 1916E-112.
- 16. Ordinarily debts due by an administrator to the estate are treated as assets of the estate from the time of their maturity, especially where he has mixed the funds of the estate with his private property or reports them as assets in his hands. McEwen v. Fletcher (Iowa) 1916D-631.
- 17. Where an administrator inventoried a debt due from himself on demand as a deposit in his private bank and did not report within a year, as was his duty, or do anything in this regard until ordered by the court, and then filed a report showing money in his bank and a personal indebtedness, but never made a report which secured the approval of the court, it appeared that his bank was a going concern for 16 months after his appointment, and that he did not keep separate funds in the bank for the estate, and there was no proof of his insolvency during such 16 months, his debt is properly charged against him as an asset of the estate, as because of his trusteeship he was under greater obligations to pay that debt than others and was bound to do so, so long as his bank was a going concern, even though it made him insolvent. Mc-Ewen v. Fletcher (Iowa) 1916D-631. (Annotated.)

## 4. RIGHTS AND LIABILITIES.

- 18. Power to Charge Assets. The rule that an administrator or executor is without power to impose a charge on the assets by any new and independent contract, unless expressly authorized by statute or will, even though for the benefit of the estate, applies to the employment of an attorney. Matter of Estate of Munger (Iowa) 1917B-213.
- 19. Implied Powers. The powers and obligations of an executor or administrator are defined and limited by the will

or statute, and he has no implied powers beyond those necessary to effectuate the powers expressly conferred. Matter of Estate of Munger (Iowa) 1917B-213.

- 20. Improvement of Property. An administrator with the will annexed, appointed after the executrix had been declared insane, has no power to build a family dwelling house on the land of the estate. Stuckey v. Stephens (Ark.) 1917A-133.
- 20a. Powers of Administrator de Bonis Non. Under Me. Pub. Laws 1903, c. 193, making it the duty of an administrator de bonis non to collect all assets of the estate, such administrator can recover in his representative capacity from decedent's bank an amount paid out on a forged order. Walker v. Portland Savings Bank (Me.) 1917E-1.
- 21. Personal Liability of Executor. One obtaining an option contract from an executor, with knowledge that he would have to obtain a deed from the heirs at law of testator cannot hold the executor personally liable on the contract. Hedge-cock v. Tate (N. Car.) 1916D-449.
- 22. Personal Liability of Administrator. No cause of action against an administrator in his official capacity can be based upon services rendered him in the administration of the estate. Milbourne v. Kelley (Kan.) 1916D-389.
- 23. Contracts. The contract of an administratrix employing an attorney to prosecute an action, though approved exparte by the judge or court, is of no validity as against those entitled to the estate. Matter of Estate of Munger (Iowa) 1917B-213. (Annotated.)

## 5. PRESENTATION AND PROOF OF CLAIMS.

24. Debt Secured by Mortgage. A mortgage by an intestate not presented to the administrator within the statute of nonclaim, is barred in the absence of payment of interest or other act of estoppel. Fremd v. Hogg (Fla.) 1917B-155.

(Annotated.)

- 25. An indebtedness secured by a real estate mortgage is not "contingent" within Wis. St. 1915, § 3858, though not due at the time of administration; therefore, where it was not duly presented as a claim against the estate, the mortgagor on subsequent foreclosure is not entitled to a deficiency judgment over against distributees after a complete administration of the estate. Schmidt v. Grenzow (Wis.) 1917B-163. (Annotated.)
- 26. Priority of Claim. An expenditure for a monument is not strictly a funeral expense within Iowa Code, § 3347, providing that, as soon as the executor or

administrator has sufficient means, he shall pay charges of deceased's last sickness and funeral, but even though the estate is insolvent the court may in its sound discretion class such an expenditure as a funeral expense, but postponing it to the payment of such part of a claim for nursing during the last sickness of deceased as is preferred by statute. Matter of Estate of Lester (Iowa) 1917B-255.

(Annotated.)

#### Note

Laches or neglect of creditor of deceased as precluding enforcement of debt against heir or devisee. 1917C-95.

Liability of decedent's estate for cost of monument or tombstone. 1917B-256.

Presentation of claim as condition precedent to enforcement of mortgage against decedent's estate. 1917B-156.

## 6. FAMILY ALLOWANCE AND PROBATE HOMESTEAD.

- 27. Rights of Widow—Occupation of Homestead. Under statutes providing that the widow may occupy the homestead until allotment of dower, homestead, or the estate is otherwise distributed, the widow is not by an antenuptial settlement deprived of such right of occupation, especially where the only other person interested in the estate is a nonresident living a great distance from the homestead and it is necessary to the preservation of the property that it should be occupied. Stratton v. Wilson (Ky.) 1918B-917.
- 28. Allowance to Widow. Where there is protracted litigation between the next of kin living outside the state and a widow appointed administratrix, during which the widow, although confined by a marriage settlement to a cash provision in lieu of widow's rights occupied the homestead, allowances for minor house-keeping expenses and court costs may be allowed in the discretion of the trial court. Stratton v. Wilson (Ky.) 1918B-917.
- 29. A widow's allowance out of her deceased husband's estate is not a distributive part of the estate, but a part of the cost of administration. Deeble v. Alerton (Colo.) 1916C-863.
- 30. Where a husband and wife executed a separation agreement providing that neither should have nor claim any part of the other's estate, but containing no plain provision that the wife waived her widow's allowance in case of the husband's death, there is no waiver, and the separation agreement is no bar to its allowance. Deeble v. Alerton (Colo.) 1916C-863.

  (Annotated.)

31. Selection of Personalty on Behalf of Surviving Spouse. The right of the sur-

1916C-1918B.

viving spouse to select personal property to the value of \$500, if not exercised in his lifetime, may be exercised by his administrator. Nordlund v. Dahlgren (Minn.) 1917B-941.

#### Note.

Effect of voluntary separation on right to widow's allowance. 1916C-866.

#### 7. SALE OF DECEDENT'S REALTY.

- 32. Collateral Attack on Sale. Under S. Dak. Prob. Code, § 102, providing that, where real estate belonging to the estate of a decedent is to be sold, the judge must require a special bond unless the general bond is equal to twice the value of the personal property, and the probable amount to be realized from the sale, the determination by the probate judge as to whether the general bond is sufficient is a judicial act which cannot be collaterally attacked. Richelson v. Mariette (S. Dak.) 1917A-883.
- 33. Sale of Reversion for Debt. By the Ga. Civil Code 1910, § 4094, it is declared that "No administrator or executor shall be authorized to sell the reversionary interest in the land set apart as dower during the lifetime of the widow, except it be necessary to pay debts."
- (a) It was not a correct application of this rule to charge that "all property, real and personal, belonging to his [the deceased husband's] estate, and which is subject to the payment of his debts, must first be fully exhausted before the administrator can lawfully obtain an order from the court of ordinary authorizing him to bring to sale the reversionary interest in dower lands for the purpose of paying off debts owing by the estate of the deceased husband."
- (b) Whether the charge on this subject, when taken in connection with its context and the entire charge, would require a reversal, were there no other errors, need not be decided. Sutton v. Ford (Ga.) 1918A-106.
- 34. Time for Application. Though the common-law presumption, from lapse of 20 years, that a judgment has been paid, may be rebutted in scire facias proceedings instituted after the presumption has attached, and though no statute limits the time within which an administrator may apply for and be allowed an order to sell lands to pay judgment creditors of deceased, he will in no case be granted an order to sell lands for payment of debts after the time limited by statute for recovery thereon, or after the time when by the common law the debts are presumed to be paid. Cohen v. Tuff (Del.) 1917C-596. (Annotated.)
- 35. Rights of Lessee. Where an executor authorized by will to sell real estate exercises the power of sale of land

- encumbered by a lease made by testator, the sale must be made subject to the rights of the lessee. Heiseman v. Lowenstein (Ark.) 1916C-601.
- 36. Power to Mortgage. A mere power of sale of real estate conferred on executors by will does not include a power to mortgage. Heiseman v. Lowenstein (Ark.) 1916C-601. (Annotated.)
- 37. Where the bulk of the estate of a testator, who directs his executors to deposit specified sums with trust companies to pay to named beneficiaries, is real estate, and the testator directs the executors to close up the estate as speedily as possible, so that the creditors and beneficiaries may promptly receive what is due them, the executors have power to sell, but not to mortgage, the estate. Heiseman v. Lowenstein (Ark.) 1916C-601. (Annotated.)
- 38. Any words in a will which show an intention to confer on the executor power to sell real estate and execute the requisite deeds, or any form of a will which imposes duties which cannot be performed without a sale, necessarily creates a power of sale. Heiseman v. Lowenstein (Ark.) 1916C-601.
- 39. A testator, who directs his executor to dispose of his real estate, thereby confers on the executive power to execute the requisite deeds of conveyance. Heiseman v. Lowenstein (Ark.) 1916C-601.
- 40. Power to Sell Lands. An executor has no power to sell the land of his testator, unless directed to do so by the will, either expressly or by necessary implication. Heiseman v. Lowenstein (Ark.) 1916C-601.
- 41. Order to Sell Land. An order to sell land, granted to an administrator by the court of ordinary describing the land as located in a named county and known by a certain name, and as containing a stated number of acres, more or less, and lying alongside a certain river, followed by an additional description giving the calls for three sides of it, is not void for uncertainty. When property has a descriptive name, it may be conveyed by that name; and such description will prevail over one which is intended to be a further description, but which is uncertain and imperfect. Extrinsic evidence is receivable to apply the description to its subject-matter. Bunger v. Grimm (Ga.) 1916C-173.
- 42. Power to Give Option. An executor, vested with no power to sell land, has no power to give an option to sell land. Hedgecock v. Tate (N. Car.) 1916D-449.

  (Annotated.)
- 43. Joint Executors—Failure of One to Qualify. The provision of a will, making a trust company an executor and designating another to act with the company,

intended the two to act jointly as executors; and, where one of them failed to qualify, the other had the power, under the express provision of Ky. St. § 3888, to sell and convey land as directed by the will. Varble v. Collins' Executor (Ky.) 1916D-448.

- 44. Implied Power to Sell Land. The executor under a will, giving specific legacies of money payable out of sales of certain lots, though not expressly authorized by the will, yet from his duty to carry out its provisions and to raise the fund with which to satisfy such legacies, had implied power to sell and convey testatrix's realty. Varble v. Collins' Executor (Ky.) 1916D-448. (Annotated.)
- 45. An executor has no implied power to sell lands of the testator when the legal title thereto passes to specific devisees other than the executor, and the will does not direct or show an intent for the payment of debts or legacies with the proceeds of sales of the lands, or direct the executor to divide the estate among beneficiaries, and the power to sell land is not in reality necessary in order to carry out any of the provisions of the will, and the will gives to the executor no directions whatever, and, considered as an entirety, discloses no intent to confer upon the executor power to sell lands of the testator. First Baptist Church v. American Board of Com'rs (Fla.) 1916D-404. (Annotated.)
- 46. Estoppel to Attack Executor's Sale. The receipt by a beneficiary of proceeds of an unauthorized sale of lands by an executor may not estop such beneficiary from claiming rights in the lands, the title to which was given by the testator's will. First Baptist Church v. American Board of Com'rs (Fla.) 1916D-404.

#### Notes.

Implied power of executor to sell real estate of executor. 1916D-410.

Limit of time within which leave will be granted to sell decedent's realty. 1917C-600.

#### 8. ACCOUNTING.

- 47. Counsel Fees of Administrator. Counsel fees of an administratix are necessarily left largely to the discretion of the trial court. Stratton v. Wilson (Ky.) 1918B-917.
- 48. Where an administratrix, seeking to be compensated for money paid to an attorney, showed a contract employing the attorney to collect a claim for the death of the decedent, and agreeing to pay him one-third of the amount collected without suit, and in the event of suit one-half the amount collected, and that a suit begun was settled by payment of \$199 funeral expenses and \$1,875 as damages, and she

- claimed to have paid the attorney \$937, but on objections waived offering any evidence, the court erred in allowing her more than one-third of the amount recovered. Matter of Estate of Munger (Iowa) 1917B-213
- 49. Where a widow was administratrix, her claims for expenses in the employment of an attorney, stated as for "consultation with Mrs. A. on the death of her husband and in relation to estate matters," and another item relating to consultation with her and another person, without stating what it was about, did not on their face appear to involve matters necessarily of concern to the estate, and, the burden being on the administratrix to show that fact, the court did not err in rejecting such items. Matter of Estate of Munger (Iowa) 1917B-213.
- 50. Allowance for Expenditures. Under Iowa Code, § 3415, entitling executors and administrators to compensation for all ordinary services and "such further allowances as are just and reasonable...for actual, necessary, and extraordinary expenses or services," allowances claimed thereunder must be specifically stated; there being no presumption that they are reasonable and just, but the burden being on the administrator. Matter of Estate of Munger (Iowa) 1917B-213.
- 51. Claims not Allowed by Probate Court. Under chapter 265, Minn. Laws of 1899, claims theretofore paid by the administrator without having been allowed by the probate court, may be credited to him in his final account upon proof that such claims were just and existing demands against the estate at the time of payment. Nordlund v. Dahlgren (Minn.) 1917B-941.
- 52. Rents and Profits of Land. Where the administrator takes possession of the real estate he must account for the rents and profits received therefrom, and if the amount received cannot be otherwise determined, the court may charge him with the rental value of the land. Nordlund v. Dahlgren (Minn.) 1917B-941.
- 53. Advancement to Infant Heir—Support from Corpus of Estate. An administrator who makes unreasonable and excessive advances for the support of a minor heir out of the corpus of the estate will not be allowed reimbursement therefor. In re Rundle (Ont.) 1917A—139.

(Annotated.)

54. Debt of Representative to Estate. Where an administrator includes his indebtedness to the estate in his reports as a part of the assets and asks that the amount he claims be fixed as his liability, the court has jurisdiction to find the amount of his liability and charge it against him. McEwen v. Fletcher (Iowa) 1916D-631.

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- 55. Waiver of Jury Trial. An administrator, whose report includes as a part thereof his personal liability to the estate, who goes to trial to the court on the issues tendered by the objections without any objection or demand for a jury, waives a jury trial. McEwen v. Fletcher (Iowa) 1916D-631.
- 56. Review of Finding on Accounting. Where the issues made by the objections to an administrator's report were tried to the court without objection, the findings on disputed testimony have the same force and effect as a verdict of a jury. McEwen v. Fletcher (Iowa) 1916D-631.

#### Note.

Power of executor or administrator to employ attorney under express contract as to amount of compensation. 1917B-216.

## 9. DISTRIBUTION.

#### a. To Heirs and Legatees.

- 57. Determination of Indebtedness. The county court, having jurisdiction to make settlement and distribution of a decedent's estate, may determine the share of each distributee, and to that end it has authority to inquire into and determine the indebtedness of the distributee to the estate, and order a deduction of the same from his share. Stenson v. H. S. Halvorson Co. (N. Dak.) 1916D-1289.
- 58. Extent of Indebtedness. Evidence examined, and held that the finding of the trial court that the extent of such heir's indebtedness to the estate exceeded the value of his distributive share in the estate is fully sustained. Stenson v. H. S. Halvorson Co. (N. Dak.) 1916D-1289.
- 59. Indebtedness by Heir. An indebtedness owing by an heir to a decedent's estate constitutes a prior equitable lien upon such heir's distributive share of the estate as against the liens of judgments docketed against him. Stenson v. H. S. Halvorson Co. (N. Dak.) 1916D-1289.

(Annotated.)

#### Note.

Distributive share of heir in real estate as chargeable with heir's indebtedness to estate either as against land itself or proceeds of sale thereof. 1916D-1294.

## b. To Creditors.

60. N. Car. Revisal 1905, § 87, providing for the order of the payment of claims against the estate of a decedent, was designed only to fix the order of such payment, and does not render a married woman's estate liable for necessaries furnished during her last sickness and for her funeral expenses, which otherwise would be a debt of the husband. Bowen v. Daugherty (N. Car.) 1917B-1161.

(Annotated.)

#### c. Proceedings.

61. Collateral Attack. The decree of distribution of a decedent's estate duly entered by the county court is final and conclusive as against a mere collateral attack. Stenson v. H. S. Halvorson Co. (N. Dak.) 1916D-1289.

#### 10. COMPENSATION.

- 62. Compensation of Administrator. Under Ky. St. § 3883, as to allowance to a personal representative, where the property of the estate is distributed in kind, and the administrator is put to little or no trouble, he should not be allowed the maximum sum of five per cent of the value of the property thus distributed. Stratton v. Wilson (Ky.) 1918B-917.
- 63. Under Ky. St. § 3883, because the personalty is distributed by the administrator in kind, it does not necessarily follow that he should not be allowed anything for his services, but a reasonable allowance should be made to him. Stratton v. Wilson (Ky.) 1918B-917.
- 64. Forfeiture of Commissions. Under Va. Code 1904, §§ 2678, 2679, requiring executors and administrators to settle their accounts and providing for a forfeiture of their commissions, an administrator of an estate qualifying in 1893 and an executor of an estate qualifying in 1892 are not entitled to commissions on that part of the estate of their respective decedents due and payable to heirs, not made until compelled by suit. Crismond's Adm'x. v. Jones (Va.) 1917C-155.

#### Note.

Validity of statute fixing probate or administration fees. 1916C-213.

#### 11. EXECUTORS DE SON TORT.

- 65. What Intermeddling Constitutes. That funds belong to an estate will not make one liable as an executor de son tort for intermeddling therewith, where he would not be liable were the owner an individual, but in the one case, as in the other, there must be a wrongful invasion of the property rights of the owner. Holden v. Farmers, etc. Nat. Bank (N. H.) 1917E-23. (Annotated.)
- 67. Defendant bank paid to one E funds of a decedent on an order forged by E, such funds being used for E's own purposes. It is held that the transaction did not render the latter executor de son tort to make the act of the bank in paying him valid against the estate after his appointment as administrator; more than the mere reception of assets being required to give the payee in such a case character as executor de son tort, so far as the validation of the

payment itself is concerned. Walker v. Portland Savings Bank (Me.) 1917E-1. (Annotated.)

- 68. Effect of Acts of Executor de Son Tort. All lawful acts done in the professed administration of a decedent's estate by one purporting to act as executor, which an executor de jure would have been bound to perform in due course of administration, bind the estate; it being shown that the executor de son tort was acting as an executor, but a single act of an administrative character does not bind the estate. Walker v. Portland Savings Bank (Me.) 1917E-1.
- 69. Definition. An executor de son tort is one deriving no authority from the decedent, with whose estate he yet wrongfully assumes to interfere, as by demanding payment of debts, or paying them, or carrying on decedent's business, etc., although merely asserting colorable title in himself to the decedent's goods is not sufficient to fix the character upon him. Walker v. Portland Savings Bank (Me.) 1917E-1. (Annotated.)
- 70. Ratification of Acts Before Appointment. One who has assumed without right to act as an executor may ratify and validate by relation, after his appointment as administrator, all acts done in a representative capacity, which would have been valid had he been the rightful representative. Walker v. Portland Savings Bank (Me.) 1917E-1.

Note.

What acts of intermeddling charge person as executor de son tort. 1917E-3.

## 12. ACTIONS.

#### a. By Personal Representative.

- 71. An action the cause of which survives may on death of plaintiff at once be revived in the name of a special administrator; there being no general administrator or executor. Aetna L. Ins. Co. v. Taylor (Ark.) 1918B-1122.
- 72. In an action by an executor with power of sale for specific performance of defendant's contract to purchase land of the estate sold to pay specific legacies, the devisees were not necessary parties. Varble v. Collins' Executor (Ky.) 1916D-448.
- 73. Right of Administrator of Heir to Contest. Conceding that Mo. Rev. St. 1909, § 555, in regard to will contests is remedial, and should be liberally construed, it permits contest only by persons interested in the probate; so that the administrator of a deceased contestant is not entitled to revival of the action in his name. Braeuel v. Reuther (Mo.) 1918B-533. (Annotated.)

74. Mo. Rev. St. 1909, § 101, authorizing the administrator to commence and prose-

- cute all actions which may be maintained and are necessary in the course of his administration, and defend all such as are brought against him, does not warrant the administrator's revival of a will contest which is not in any sense a property right, but only a mere right of action. Braeuel v. Reuther (Mo.) 1918B-533.
- 75. Under Mo. Rev. St. 1909, \$ 104, providing that executors and administrators shall prosecute and defend all actions commenced by or against the deceased at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator, the administrator cannot prosecute or maintain actions unless he might have done so had the action not been brought by the deceased. Braeuel v. Reuther (Mo.) 1918B-533. (Annotated.)
- 76. Under Mo. Rev. St. 1909, \$ 105, authorizing administrators to prosecute actions for torts, there is no authority in the administrator to prosecute a will contest. Braeuel v. Reuther (Mo.) 1918B-533. (Annotated.)
- 77. Abatement and Revival. At common law a right of action for personal injuries did not survive the person injured; and, in case an action had been brought, it abated on the death of either party. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.
- 78. Statute Providing for Survival. The purpose of Burns' Ind. Ann. St. 1914, § 286, providing that, wheever has a claim for personal injuries and obtains a judgment, and he dies pending the appeal, the claim shall survive, and be prosecuted by his personal representatives, is to provide for the survival of certain actions, and the classification created by the statute is practical and not palpably arbitrary, and is not in conflict with Const. Ind. art. 1, § 23, and Const. U. S. Amend. 14. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E—1165. (Annotated.)
- 79. The enforcement of Burns' Ind. Ann. St. 1914, § 286, authorizing the personal representative of one obtaining a judgment for a personal injury to prosecute an action on the death of the judgment plaintiff pending an appeal, or before a new trial, if reversal be had, does not deprive the wrongdoer of property without due process of law, for the statute only requires that compensation shall be made for the injuries occasioned by the wrongful act, and imposes no liability in favor of the estate of an injured person which could not have been enforced in his favor had he lived. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165. (Annotated.)

80. An answer, pleading a release as a bar, but which does not aver that the costs

of the administration have been paid, or that there are no creditors of the estate is demurrable, though it avers that there are no creditors who have filed claims against the estate, since that is not equivalent to an averment that there are no claims. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

- 81. Right of Heirs to Release. An action for personal injuries, prosecuted, on plaintiff's death pending an appeal from a judgment in his favor, by his administrator, or after reversal of the judgment, as authorized by Burns' Ind. Ann. St. 1914, § 286, is based on the wrong inflicted on the original plaintiff, and the amount recovered is subject, in the hands of the administrator, to the costs of administration, payment of debts, and distribution of balance in accordance with the statute on that subject, and an attempted release by Cinheirs is not available as a defense. cinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.
- 82. Action on Contract of Deceased. Such a declaration in assumpsit upon a note payable to his intestate, and past due at his death, need not aver a promise to the administrator. It is sufficient to aver a promise to his intestate and a breach, by nonpayment to either his intestate or himself. Austin v. Calloway (W. Va.) 1916E—112.
- 83. Allegation of Representative Capacity. A declaration by an administrator, suing as such, upon a cause of action accruing to his intestate in his lifetime, which fails to aver that plaintiff was appointed and qualified as such administrator, is bad on demurrer. Austin v. Calloway (W. Va.) 1916E-112. (Annotated.)
- 84. Conspiracy to Restrain Trade. right of action for damages sustained from an unlawful conspiracy and combination between the defendants for the purpose of creating restrictions in trade and commerce, and of destroying the credit, reputation, and business of F., whereby F.'s business was ruined, and he was forced to sell its tangible assets for an inadequate price, does not survive the death of F. at common law, nor under Comp. Laws Mich. 1897, § 10117, which provides that actions for negligent injury to persons, for damages to real or personal estate, and actions to recover real estate, where persons have been induced to part therewith through fraudulent representations and deceit, shall survive. Frohlich v. Deacon (Mich.) 1916C-722. (Annotated.)
- 85. Under Pub. Acts 1897, No. 195 (Comp. Laws Mich. 1897, §§ 10421, 10422), providing that where, by the fraudulent representations any injury shall be done to the person, property, or rights of another for which an action for fraud may be brought, assumpsit may be brought to

recover damages for such injury, and that the cause of action shall, upon the death of the person injured, survive, held, by an equally divided court, that such cause of action did not survive the death of F., since defendant's acts, though illegal and oppressive, were neither deceptive nor fraudulent, and, while they would give a right of action on the case, the action was not one for fraud and deceit. Frohlich v. Deacon (Mich.) 1916C-722.

(Annotated.)

#### Notes.

Right of executor or administrator to recover from estate advancement made to member of decedent's family. 1917A-134.

Survival of right of action for conspiracy to restrain trade. 1916C-726.

Necessity that executor or administrator in action brought by him allege that suit is brought in representative capacity. 1916E-114.

Validity of statute providing for survival of action for personal injuries after death of person injured. 1917E-1171.

Power or duty of administrator, guardian, or the like, to contest will. 1918B-536.

- b. Against Personal Representative.
- 86. Inability to Procure Testimony. Plaintiff, in an action against an administrator for breach of intestate's contract, is not entitled to an instruction balancing her inability to testify against defendant's difficulty in not having the benefit of intestate's testimony. Parsons v. Trowbridge (Fed.) 1917C-750.
- 87. Necessity of Presenting Claim. Under Md. Code Pub. Civ. Laws, art. 93, § 83, providing that no administrator shall discharge any claim against the decedent, except at his own risk, unless it first be passed by the orphans' court, or be proven according to the rules prescribed in the statute, section 97, providing that no administrator shall be allowed in his account for any claim discharged by him unless he produce the claim passed by the orphans' court or proven as herein directed, section 99, providing for the defense of claims by the personal representative, section 116, providing that no administrator shall be bound to take notice of any claim against his decedent "unless a suit shall be pending against such administrator for such claim," the fact that the claim on which an executor is sued has not been passed in the orphans' court or proven, does not preclude the suit. Schnepfe v. Schnepfe (Md.) 1916D-988.
- 88. Decree in Action Against. Under Mass. Rev. Laws 1902, c. 172, §§ 6, 7, where decree is for plaintiff, in a suit in which, defendant dying pending the suit, his administrator appeared and defended,

it should provide for execution for the costs alone against the administrator personally. Hanscom v. Malden, etc. Gaslight Co. (Mass.) 1917A-145.

89. Allowance of Costs from Estate. Where an action by an heir against the administrator results in relieving the estate from a charge for excessive advances made by the administrator, the latter should not be allowed costs out of the estate. In re Rundle (Ont.) 1917A-139.

#### c. Limitation of Actions.

- 90. Time to File Claim. The fact that the claim was filed in the probate court, and that the administrator had knowledge of it and had made efforts to adjust and settle it, will not suspend the statute nor estop the administrator from relying upon the bar of the statute. Milbourne v. Kelley (Kan.) 1916D-389.
- 91. In an action to establish a claim against the estate of a deceased person it was shown that the letters of administration issued on December 10, 1910. At that time the statute (Gen. Stat. 1909, section 3516), allowed three years for the presentation of claims. An act which took effect on the 22d day of May, 1911 (Laws 1911, c. 188), reduced the time to two years, with a provision that all demands not exhibited within two years shall be forever barred. Although the plaintiff had 18 months after the act took effect in which he might have commenced his action, his claim was not exhibited until more than two years thereafter. Held, that he was allowed a reasonable time to pursue his remedy, and that the action is barred by the new statute. Milbourne v. Kelley (Kan.) 1916D-389. (Annotated.)
- 92. Nor will the plaintiff be heard to say that by reason of such acts and conduct of the administrator the period of 18 months was not in this case a reasonable time. Milbourne v. Kelley (Kan.) 1916D-389.

#### Note.

Public administrators. 1918B-1059.

#### EXECUTORY DEVISE.

Defined, see Wills, 209.

## EXEMPLARY DAMAGES.

See Damages, 1-2; False Imprisonment, 10; Libel and Slander, 8, 9, 162; Malicious Prosecution, 32, 34, 35; Replevin, 6, 9.

#### EXEMPTIONS.

See Homestead; Executions, 1-6.
Salary not exempt, see Bankruptcy, 3.
From seizure for rent, see Landlord and
Tenant, 35.

From service of civil process, see Process,

Validity of exempting recording fees, see Recording Acts, 4. From taxation, see Taxation, 67-85.

#### EXHIBITS.

See Pleading. Removal to jury room, effect, see Jury, 38, 39.

#### EXPATRIATION.

See Aliens, 15, 16,

#### EXPECTANCY.

Assignability, see Assignments, 8, 9.

#### EXPENSES.

Allowance for, see Judges, 4, 5.

### EXPERTS.

Testimony in shock cases, see Electricity, 14, 16-19.

Competency to testify, see Witnesses, 11-16.

Cross-examination of, see Witnesses, 82.

#### EXPLOSIONS AND EXPLOSIVES.

Explosion of gasoline light plant, see Negligence, 90, 99.

Judicial notice of nature of gas, see Evidence, 15, 16.

Expert testimony as to presence of gasoline, see Evidence, 64.

Descriptive booklet as evidence, see Evidence, 93.

- 1. Leaving Small Quantity Exposed. It is gross negligence for an agent of a powder company, after shooting an oil well with solidified glycerine, to leave a quart of that explosive lying near the well; and the act of a workman, unskilled in the use of such substances, in removing the dangerous article and placing it in the stone fence of a nearby graveyard to prevent injury to himself and his fellow workmen, does not amount to an unrelated, intervening and efficient cause so as to excuse the powder company from its liability for damages to children who afterward find the solidified glycerine and are injured by it. Clark v. E. I. Du Pont De Nemours Powder Co. (Kan.) 1917B-340. (Annotated.)
- 2. The owner of so inherently dangerous a commodity as solidified glycerine is required to exert the highest degree of care to keep it in close custody to prevent its doing mischief, and that duty never ceases; and such owner is liable for all the natural and probable consequences which flow from any breach of that duty. Clark v. E. I. Du Pont De Nemours Powder Co. (Kan.) 1917B-340. (Annotated.)

- 3. The rules heretofore announced by this court for the determination of proximate cause adhered to. Clark v. E. I. Du Pont De Nemours Powder Co. (Kan.) 1917B-340. (Annotated.)
- 4. Injury by Concussion. The use of high-power explosives in making excavations of rock and earth is a lawful method of accomplishing that purpose; but where dirt and stone are thrown by the force of the blast upon the property of another, or where the work of blasting is done in such proximity to adjoining property that regardless of the care used the natural, necessary or probable result of the force of the explosion will be to break the surface of the ground, destroy the buildings, and produce a concussion of the atmosphere, the force of which will invade the adjoining premises, injuring the buildings thereon and making them unfit and unsafe for habitation, the person or corporation making use of such explosives will be liable for the damage proximately and naturally resulting therefrom, irrespective of the question of negligence or want of skill in the blasting operations. Louden v. Cincinnati (Ohio) 1916C-1171. (Annotated.)
- 5. A petition averring that defendants in the use of high explosives broke into plaintiff's land and dwelling house with force and violence by means of explosions of great power and frequency in the street adjacent to and in close proximity to plaintiff's dwelling house, and thereby produced concussions and vibrations of the earth and air, causing foundations, walls, chimneys, ceilings, cistern and vault and window glass of plaintiff's house to break and fall, rendering such house unsafe for habitation and untenantable, states a cause of action. Louden v. Cincinnati (Ohio) 1916C-1171. (Annotated.)

#### Notes.

Injury to property by concussion or vibration resulting from blasting. 1916C-1176.

Liability as for negligence of one throwing away small quantity of explosive. 1917B-345.

#### EX POST FACTO STATUTE.

Cohabitation after statute forbidding marriage, see Incest, 2.

## EXPRESS.

Meaning, see States, 6.

#### EXPRESS COMPANIES.

See Carriers; Carriers of Goods; Carriers of Live Stock.

EXPRESS TRUSTS. See Trusts and Trustees, 1-5. EX REL

See States, 11.

#### EXTENSION OF WATER MAINS.

Public water supply, see Waterworks and Water Companies, 5-7.

#### EXTORTION.

- 1. Sufficiency of Indictment. Under Ariz. Pen. Code 1913, § 943, providing that an information is sufficient if it states the act charged as the offense clearly and distinctly in ordinary and concise language, so as to enable a person of common understanding to know what is intended, and with sufficient certainty to enable the court to pronounce judgment, and which contains the formal allegations of the necessary jurisdictional facts, an information for extortion by threat to accuse another of a crime as defined by Pen. Code 1913, §§ 512, 513, which charges that the defendant threatened to accuse another of grand larceny, is sufficient without alleging the particulars of the larceny. Lee v. State (Ariz.) 1917B-131.
- 2. Threat in Connection With Demand for Payment of Debt. Accused, who wrote one who trespassed on his land and cut his timber that if the trespasser did not compensate him for the damages he would prosecute him, is not guilty of the offense denounced by Miss. Code 1906, § 1364, declaring that any person who shall knowingly send any letter threatening to accuse another of a crime with a view to extort money shall be guilty of an attempt to rob; for a creditor is entitled to demand payment of honest debts. and a threat to charge the debtor with an offense committed in connection with the debt or obligation is not within the statute. State v. Ricks (Miss.) 1917E-244.

(Annotated.)

- 3. Trial. In a prosecution for extortion by threatening to accuse another of grand larceny, it is error to read to the jury all of Ariz. Pen. Code 1913, §§ 481, 483, 484, defining grand larceny, and not to confine the instruction to the particular kind of larceny to which the threat referred. Lee v. State (Ariz.) 1917B-131.
- 4. Threat to Accuse of Crime. One who extorts money from another by a threat to accuse the other of a crime is guilty of extortion, whether the other is in fact guilty or innocent of the crime referred to in the threat. Lee v. State (Ariz.) 1917B-131. (Annotated.)

#### Notes.

Threat to accuse of crime as criminal offense. 1917B-134.

Criminal liability for threat of prosecution in connection with demand for payment of debt. 1917E-246.

#### EXTRADITION.

- 1. Scope of Inquiry. The court, on habeas corpus by one in custody under a requisition warrant for his arrest as a fugitive from the justice of another state, will not go into the facts of his guilt or innocence of the offense charged by the demanding state. Ex parte McDaniel (Tex.) 1917B-335.
- 2. Who is Fugitive. A person who commits a crime in one state and departs therefrom and is found in another is a "fugitive from justice." Ex parte McDaniel (Tex.) 1917B-335.
- 3. Legality of Warrant. An extradition warrant for the arrest of a fugitive from the justice of the demanding state makes a prima facie case on habeas corpus for the discharge of accused, and the burden is on him to show that the warrant was not legally issued. Ex parte McDaniel (Tex.) 1917B-335.
- 4. Sufficiency of Warrant. An extradition warrant, which recites that the demand was accompanied by a "complaint," instead of by a copy of an affidavit duly certified as authentic by the governor of the demanding state, is sufficient on habeas corpus. Ex parte McDaniel (Tex.) 1917B-335.
- 5. Presumption of Authority of Magistrate Taking Affidavit. An extradition warrant, which recites that accused stands charged by complaint before the proper authorities of the demanding state and that the demand is accompanied by a copy of a complaint sworn to before a justice of the peace, duly certified as authentic by the governor of the demanding state, presents a prima facte case of the authority of a justice of the peace to act as magistrate, and accused has the burden of showing the contrary to obtain his discharge on habeas corpus. Ex parte McDaniel (Tex.) 1917B-335.
- 6. Persons Subject to Extradition. Where accused detained under an extradition warrant sought his discharge on habeas corpus and showed that two indictments found in the state were pending against him, the court must order the detention of accused until the indictments are disposed of, with direction for his delivery under the extradition warrant. Ex parte McDaniel (Tex.) 1917B-335. (Annotated.)

#### Note.

Person in custody on charge of other crime as subject to extradition. 1917B-337.

#### EYEWITNESS.

Who is not, see Accident Insurance, 25.

#### FACTORS.

See Brokers.

#### FACTORIES.

See Manufacturers.

#### FAILURE OF CONSIDERATION.

As defense, see Bills and Notes, 15.

#### FAIR COMMENT.

Privileged criticism, see Libel and Slander, 65.

#### FAIRNESS.

As essential to remedy, see Specific Performance, 3.

#### FAIRNESS OF TRIAL.

Excluding outside influence from jury, see Jury, 33, 34.

#### FALSE IMPRISONMENT.

- 1. Persons Liable.
- 2. Defenses.
- 3. Evidence.
- 4. Instructions.
- 5. Damages.

Excessiveness of damages, see Damages, 45-47.

Imprisonment of insane patient, liability, see Hospitals and Asylums, 3-6.

Wife's action for imprisonment of husband, see Husband and Wife, 34.
Liability of warden for holding pardoned convict, see Pardons, 2.

## 1. PERSONS LIABLE.

- 1. Reporting Offense to Officer. One who in good faith reports to a police officer the violation of a city ordinance, and at the same time asks that the violator be arrested, but does not assume to say what steps shall be taken to that end, is not thereby rendered liable for damages because the arrest is made without the issuance of a warrant. Lemmon v. King (Kan.) 1917E-401. (Annotated.)
- 2. Detention of Convict After Pardon. Where a warden, appointed by a contractor for convict labor and confirmed by the court under the statute, refuses, on the ground of lack of authority, to release a convict laborer of whom he had charge, on delivery of a pardon to him, he is liable for false imprisonment. Weigel v. McCloskey (Ark.) 1916C-503.

#### Note.

Liability of person reporting commission of offense to police officer for arrest by officer without warrant. 1917E-404.

## 2. DEFENSES.

3. Truth of Charge. On the trial of an action for false imprisonment and assault, the truth of the matter charged in a void

warrant on which plaintiff was unlawfully arrested, is immaterial. Howell v. Wysor

## 3. EVIDENCE.

(W. Va.) 1916C-519.

- 4. Condition of Jail. Where defendant railroad's conductor arrested plaintiff on the pretext that he was drunk, ejected him from the car, and turned him over to the railroad's watchman, who incarcerated him in a city jail, the road's trespass was one continuing through the incarceration and up to plaintiff's release, and it was liable for the imprisonment, as well as the unlawful ejection, so that evidence is admissible to prove the condition of the city jail. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.
- 5. Character of Associate of Person Imprisoned. In an action against a railroad for injuries sustained by plaintiff when arrested for drunkenness, by defendant's conductor, ejected from the train, and imprisoned, testimony of a witness, who had given plaintiff the bottle from which he was drinking at the time of the arrest, which plaintiff claimed contained ginger ale instead of beer, that he (the witness) was a good clean athlete and drank no liquor, is admissible. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.
- 6. Acts of Servant—Proof of Motive. In an action against a railroad, its special police officer and another for wrongful ejection and arrest, where the evidence justifies compensatory damages only, evidence as to the special officer's motive in making the arrest is inadmissible. Cincinnati, etc. R. Co. v. Cundiff (Ky.) 1916C-513.

## 4. INSTRUCTIONS.

7. Instructions Approved. There was no reversible error in the giving and refusing of the instructions in this case. Howell v. Wysor (W. Va.) 1916C-519.

## 5. DAMAGES.

8. Speculative Consequences. In an action by a railroad passenger for his arrest and ejection from defendant's train as intoxicated, and his subsequent imprisonment, which he claimed caused him to undergo a second amputation of his arm, where plaintiff's evidence as to the cause of such second amputation left it a matter of speculation whether the cause thereof was a cold caught in the jail in the unhealed original amputation, or infection from unsterilized bandages, etc., the court should have withdrawn from the jury the subject of the second amputation, as an element in plaintiff's recovery, since, when the evidence leaves the case in such situation that the jury must guess as to which of several possible causes occasioned the injury, such part of the case should be withdrawn from their consideration. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.

- 9. Elements of Damage. Where a railroad passenger was taken from the train by the conductor and other agents of the road on the pretext that he was drunk and drinking in the car, which arrest was accomplished with some degree of physical force and involved a false imprisonment of the passenger, in his action against the road he could recover for humiliation on account of the public ejectment from the car, although, except in cases of slander, breach of promise, and the like, a recovery for mental suffering unaccompanied by physical injury will not be permitted. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.
- 10. Punitive Damages. Where there was nothing in the conduct of defendant railroad's special police officer and its employee, acting under his direction, in ejecting and arresting plaintiff that can be considered as wanton or reckless disregard of plaintiff's rights as a passenger, and where neither their language nor manner was insulting, punitive damages are not recoverable. Cincinnati, etc. R. Co. v. Cundiff (Ky.) 1916C-513.

#### Note.

What is excessive or inadequate verdict in action for false imprisonment. 1916C-505.

#### FALSE PRETENSES.

- Elements of Offense, 366.
- 2. Indictment, 367.
- 3. Defenses, 367.
- 4. Evidence, 367. 5. Instructions, 368.
- Liability of corporation, see Corporations, 23.

## 1. ELEMENTS OF OFFENSE.

- 1. Pretense as Sole Inducement. It is not essential to the offense of obtaining property by false pretenses that the pretense shall be the sole inducement moving the prosecutor to part with his property. Partridge v. United States (D. C.) 1917D-622.
- 2. Note as Property. A promissory note is "property" or a "thing of value" within a statute against false pretenses. Parridge v. United States (D. C.) 1917D-622. (Annotated.)
- 3. Giving Worthless Check. Where accused asked prosecutor if he would cash a check or identify him at a bank, and they went together to the bank, and the officers thereof refused to give accused money on prosecutor's identification, and thereupon accused wrote a check on his home bank, payable to prosecutor, who indorsed it, and the bank thereupon

paid the money to accused in the presence of prosecutor, the prosecutor was defrauded if the check was not paid for want of funds. State v. Foxton (Iowa) 1916E-727. (Annotated.)

- 4. Under the Iowa statute, any person who, by false pretense or by any false token, obtains, with intent to defraud, any money from another, one who gives a check on a bank in which he has no account, and without reasonable expectation for believing that the check will be paid on presentation, and who delivers the check to a third person and secures money thereon from him, is guilty of obtaining money under false pretenses, though no representation was made other than that involved in the delivery of the check. State v. Foxton (Iowa) 1916E-727. (Annotated.)
- 5. Obtaining Loan. The word "obtain," as used in section 13104, Ohio General Code, is not limited to getting, securing or appropriating money or property as owner. It includes as well the getting or securing of money or property by way of a loan. Tingue v. State (Ohio) 1916C-1156. (Annotated.)
- 6. Intent. Under N. Car. Revisal 1905, \$3432, providing that, in an indictment for obtaining property by false pretenses, it shall be sufficient to allege that the party did the act with the intent to defraud, without alleging an intent to defraud any particular person, and that it shall not be necessary to prove an intent to defraud any particular person, an allegation, in an indictment as to the persons intended to be defrauded, is surplusage, and a claim of variance cannot be predicated thereon. State v. Salisbury Ice, etc. Co. (N. Car.) 1916C-456.
- 7. Reliance on Representation. While, to constitute the offense of obtaining property by false pretenses, defendant's conduct must deceive and be intended and calculated to deceive, the sale of 1,750 pounds of coke as a ton constitutes the offense, though the buyer strongly suspected that defendant was selling by short weight, where he did not and could not know this until he weighed the coke after delivery, as he was induced to part with the price in reliance upon defendant's representation that it was a ton. State v. Salisbury Ice, etc. Co. (N. Car.) 1916C-456.
- 8. Attempt. The acts of a person whose property is insured against loss by burglary in secreting the property and making complaint to the police that it had been stolen are merely preparation for the commission of the offense of obtaining money from the insurer by false pretenses and do not constitute an attempt to commit the offense. Rex v. Robinson (Eng.) 1917B-1229. (Annotated.)

9. Nature of Pretense. It is not necessary that the false pretense should be direct, definite and positive; it is sufficient if it is so worded as reasonably to deceive a person of ordinary intelligence. Partridge v. United States (D. C.) 1917D-622.

#### Notes.

Bill or note as "property," etc., within statute against false pretenses. 1917D-627.

What constitutes attempt to obtain money by false pretenses. 1917B-1230.

Obtaining loan of money as constituting crime of obtaining money by false pretenses. 1916C-1158.

Giving worthless check as false pretense. 1916E-736.

#### 2. INDICTMENT.

10. Sufficiency of Complaint. A complaint for obtaining money by false pretenses, which alleged that the defendant falsely represented that a certain ring was of solid gold, and that the complaining witness, relying on such pretense, was induced thereby to deliver to the defendant a certain sum of money, is not objectionable as failing to show what was the deception practiced or as failing to show the connection between the pretenses alleged and the obtaining of the money. State v. Solomon (Wis.) 1916E-309.

#### 3. DEFENSES.

11. Entrapment. Accused, obtaining money by means of short weight of coke sold to prosecutor, was guilty of obtaining money by false pretenses, punishable by Revisal N. Car. 1905, § 3432, though prosecutor testified that he had been suspecting that accused was selling short weight, and that he had to buy from him to find out whether that was true or not, and that he did not know positively that accused sold short weight until the coke had been weighed after paying the price. State v. Salisbury Ice, etc. Co. (N. Car.) 1916C-728. (Annotated.)

## 4. EVIDENCE.

- 12. Falsity of Representation Ownership of Land. A representation of ownership of land is not shown to be true by proof of the possession of a contract for the purchase thereof. Partridge v. United States (D. C.) 1917D-622.
- 13. Where one is charged with obtaining money by false pretenses by means of a worthless check, the state may not show that accused drew checks on other banks, unless it appears that there were no funds in the other banks, from which a fraudulent intent could be deduced, and that he intended also to defraud prosecutor. State v. Foxton (Iowa) 1916E-727.

- 14. On a trial for obtaining money by false pretenses by means of a worthless check, evidence that accused had drawn another check on another bank, unaccompanied by evidence that the check was ever presented to the bank, or that accused did not have credit there, is inadmissible. State v. Foxton (Iowa) 1916E-727.
- 15. Proof of Other Similar Offenses. On a trial for obtaining money by false pretenses by means of a worthless check, evidence of the giving of other worthless checks by accused about the time of the giving of the check involved is admissible to show intent. State v. Foxton (Iowa) 1916E-727.
- 16. Control by Accused of Subject-matter of Pretenses. Where the false pretenses charged were with respect to the financial condition of a corporation, evidence tending to show that the accused controlled the corporation and that its ostensible officers acted under his direction is admissible. Partridge v. United States (D. C.) 1917D-622.
- 17. Concealment of Documents by Accused. Where the false pretenses on which an indictment is based related to the financial condition of a corporation, evidence that the accused secreted its records and endeavored to prevent an examination of its affairs is admissible. Partridge v. United States (D. C.) 1917D-622.
- 18. Evidence of Other Offenses. The extent to which evidence of other similar offenses may be received on a prosecution for obtaining money under false pretenses to show guilty knowledge or intent rests largely in the discretion of the trial court, and its decision will not be reversed unless the evidence admitted appears clearly to be irrelevant and prejudicial. Partridge v. United States (D. C.) 1917D-622.

#### 5. INSTRUCTIONS.

19. Instructions. On the trial of an indictment for obtaining property by false pretenses an instruction which in effect singles out one of several representations shown by the evidence and tells the jury to acquit if they find it to be true is properly refused. Partridge v. United States (D. C.) 1917D-622.

#### Note.

Jurisdiction of offense of obtaining property by false pretenses. 1917E-311.

FALSE SWEARING.

See Perjury.

FALSE REPRESENTATIONS. See Fraud and Deceit.

FALSUS IN UNO.

See Instructions, 47.

#### FARMING.

See Agriculture.

FARM LOAN ACT.

See Agriculture, 5-19.

FAMILY ALLOWANCE.

See Executors and Administrators, 27-31.

FAVORABLE ERRORS.

Not available, see Appeal and Error, 443-452.

FEDERAL EMPLOYERS' LIABILITY ACTS.

See Master and Servant.

FEDERAL COURTS.

Appeals in, see Appeal and Error, 14. Jurisdiction, see Courts, 8-11.

FEDERAL CORPORATION TAX ACT. Validity, see Taxation, 149.

FEDERAL INCOME TAX ACT. See Taxation, 179, 182.

FEDERAL RESERVE ACT. See Banks and Banking, 77, 79, 80.

## FEES.

Of attorneys, see Attorneys, 17-35. Of judges, see Judges, 3-8. Of referees, see Referees, 8. Sheriff's fees, see Sheriffs and Constables, 12. 13.

FELONIOUSLY.

Meaning, see Homicide, 6.

FELONY.

Defined, see Criminal Law, 7.

#### FELLOW SERVANTS.

See Master and Servant, 25-28.
Assumption of risk under Employers' Liability Act, see Master and Servant, 69.

## FENCES.

Unfenced land, liability of owner, see Animals, 3.

1. Division Fence. There was evidence to show that the defendant company, and its lessor before it, had maintained a certain fence along the whole line of its right of way past plaintiff's close from the very beginning, although it latterly protested

that it was not liable to do so. These protests were inefficacious to discharge the company's liability, and the case was rightly submitted to the jury upon the question of defendant's liability through lack of maintaining a sufficient fence, there being no question of right or obligation on the part of plaintiff or defendant in reference to the fence in question under the provisions of the fence act. Titus v. Pennsylvania R. Co. (N. J.) 1917B-1251.

2. When for a period of over 20 years the owner of one of two adjoining tracts has continuously, without interruption and as of duty, repaired and maintained the whole of a division fence between them, a presumption arises that he or those under whom he derived title were, as owners of a servient tenement, bound to perpetually make and maintain the fence, the existence of a former and lost agreement to do so may be inferred. Titus v. Pennsylvania R. Co. (N. J.) 1917B-1251. (Annotated.)

Note.

Prescriptive obligation to maintain division fence. 1917B-1253.

## FERAE NATURAE.

See Animals, 11-26. Wild animals subject of larceny, when, see Larceny, 1.

## FERRIES.

1. What is Ferryboat. Steamers operated by a railroad company on Lake Tahoe which carry goods and passengers be-tween California points, Nevada points and interstate points are not "ferryboats" within Cal. Pol. Code, § 3643, defining a ferryboat as a vessel traversing across any of the waters of the state between two constant points regularly employed for the transfer of passengers and freight, authorized by law so to do, and also any boat employed as a part of the system of a railroad for the transfer of passengers and freight plying at regular and stated periods between two points. Lake Tahoe R., etc. v. Roberts (Cal.) 1916E-1196.

## FERRYBOAT.

Definition, see Ferries, 1.

## FERTILIZER PLANT.

See Nuisances, 3.

#### FIAT.

Sufficiency for mandamus, see Mandamus, 28.

## FICTITIOUS PAYEE.

Defined, see Bills and Notes, 39.

## FIDELITY INSURANCE.

See Insurance, 31-39.

#### FIDUCIARY RELATION.

Abuse of, see Fraud, 6, 7, 13.

#### FIGHTING.

Not accidental means of injury, see Accident Insurance, 16.

#### FILING.

See Pleading, 105, 106. Effect of filing, see Recording Acts, 1.

#### FINDING.

Rights of finder, see Lost Property, 1, 2.

#### FINDINGS.

See Equity, 29; Life Insurance, 56; Referees, 4; Trial, 63-71.

Conclusiveness of immigration official's . findings, see Aliens, 22.

Review of findings, see Appeal and Error, 136-154.

Harmless and prejudicial error, see Appeal and Error, 320-324.

Necessity of exception to error, see Appeal

and Error, 384-388. Sufficiency of objections for review, see Appeal and Error, 428-431.

In disbarment proceedings, see Attorneys,

In election contest, see Elections, 92. On challenges, see Jury, 27.

In proceedings under Workmen's Compensation Act, see Master and Servant, 299, 300, 304, 305.

On foreclosure of mechanic's lien, see Mechanics' Liens, 59.

In proceedings to contest will, see Wills, 132.

## FINES AND PENALTIES.

See Forfeitures; Sentence and Punishment.

Right to appeal, see Appeal and Error, 4. Assignability of cause of action for penalty, see Assignments, 15, 23.

Interest on penalty of forfeited bail, see Bail, 1.

Punishment for contempt, see Contempt, 16, 17.

Jurisdiction of action for penalty, see Courts, 3.

Sufficiency of proof, see Criminal Law, Penalty for failure to pay loss, see Fire

Insurance, 46.

Penal action as jeopardy, see Former Jeopardy, 6-8.

Fine or ouster, as penalty of foreign corporation, see Monopolies, 18, 19.

Fines not "ordinary revenue," see Schools,

Disposition of fines, see Sentence and Punishment, 5.

Provision for fine or compensation for embezzlement, see Sentence and Punishment, 6.

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Penal statutes, construction, see Statutes,

Penalty for nonpayment of tax, see Taxation. 86.

Forfeiture of usurious interest, see Usury, 3, 5, 8, 19.

Forfeiture of double interest, see Usury, 24, 25.

 Excessiveness — Preventing Test of Statute. The penalties of \$1,000 fine, or six months' imprisonment, prescribed by Florida Laws 1913, c. 6421, § 35, for violations of its provisions against the sale without payment of the specified license fee, of merchandise accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness, or other liability redeemable in premiums, are not so severe as to intimidate against a contest of the validity of such statute, and thus deny the equal protection of the laws. Rast v. Van Deman, etc. Co. (U.S.) 1917B-455.

#### FINGER PRINTS.

Expert testimony, see Evidence, 66.

#### FIRE ESCAPES.

See Fires, 1-5. Duty to provide, see Landlord and Tenant,

#### FIRE INSURANCE.

- 1. Nature of Contract, 370.
- 2. Effect of Binding Slip, 370.
- Statutory Regulations, 371.
   Insurable Interest, 371.
- 5. Construction of Policy, 371.
  - a. Cause of Loss, 371.
    - b. Particular Provisions, 371.

      - Vacancy Clause, 371.
         Provision Against Alienation, 371.
      - (3) Provision Against Incum-
      - brances, 372.

      - (4) Watchman Clause, 372. (5) Agreement to Pay Loss, 372. (6) Arbitration Clause, 373. (7) Designation of Location, 373.
- 6. Waiver of Provisions, 373.
  - a. Vacancy Clause, 373.
  - b. Provision Against Incumbrance,
- 7. Cancellation of Policy, 373.
- 8. Loss and Adjustment, 373.
  - a. Subrogation of Insurer and Assignment of Claims, 373.
  - b. Arbitration and Appraisement, 374.c. Apportionment of Loss, 375.

  - d. Subrogation to Rights of Mortgagee, 375.
- 9. Actions, 375.
  - a. Pleading, 375.
  - b. Sufficiency of Evidence, 376.
  - c. Damages, 376.

Exemption of proceeds of policy, see Executions, 2.

Exemption from creditors of proceeds of, see Fraudulent Sales and Conveyances, 14.

### 1. NATURE OF CONTRACT.

- 1. On Bawdy House-Validity. A policy of fire insurance on a house of prostitution and the furniture therein is void as against public policy. Dominion Fire Ins. Co. v. Nakata (Can.) 1916C-1063.
  - (Annotated.)
- 2. Right of Agent to Insure Own Property. An agent of a fire insurance company with authority to act for it in contracting insurance, countersigning policies, and delivering them, cannot issue a policy to himself on his own property unless the company, with knowledge of the facts, ratifies his act. Salene v. Queen City Fire Ins. Co. (Ore.) 1916D-1276. (Annotated.)
- 3. A mortgagee knew that the mortgagor was an agent of a fire insurance company with power to act for it in contracting insurance. The mortgagor issued a policy on the property payable to the mortgagee as his interest might appear. It is held that the mortgagee was chargeable with knowledge of the want of power of the mortgagor to issue a policy on his own property, and to hold the company he must show that it approved or ratified the policy with knowledge of the facts. Salene v. Queen City Fire Ins. Co. (Ore.) 1916D-1276. (Annotated.)

#### Notes.

Right of fire insurance agent to insure his own property. 1916D-1278.

Validity of insurance policy on property illegally kept or used. 1916C-1070.

#### 2. EFFECT OF BINDING SLIP.

4. Binding Slip as Contract. Where the president of plaintiff lumber company wrote the agent of defendant insurance company, "I wish you would also bind the building of [the owner] being constructed at Lost Springs for \$1,500 as we are furnishing the material. We can probably make this permanent, but we want to be covered in the meantime," to which the agent replied that he had bound the building, but stated that it was necessary for the company to have a definite location on the risk if they were to hold the binder, requesting that his correspondent send a regular application blank for a policy, which the president of plaintiff company thereafter neglected to do, there is a binding contract of present insurance made between the parties, subjecting the insurance company to liability for a loss, such of the necessary terms of every contract of insurance as were unexpressed in the correspondence resting in implication.

Royal Ins. Co. v. Walker Lumber Co. (Wyo.) 1917E-1174. (Annotated.)

#### 3. STATUTORY REGULATIONS.

- 5. Provision for Payment of Less Than Face of Policy. In such case any condition in the policy providing for the payment of a less sum than the amount of the insurance as written therein is void under the provisions of the valued policy law. Neb. Rev. St. 1913, § 3210. Dinneen v. American Ins. Co. (Neb.) 1917B-1246.
- 6. Local Regulations as Part of Policy. When writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city and such laws and ordinances should be considered as a part of the policy. Dinneen v. American Ins. Co. (Neb.) 1917B-1246.

(Annotated.)

#### Note.

Effect of local ordinance or regulation on liability under fire insurance policy. 1917B-1250.

## 4. INSURABLE INTEREST.

7. Leasehold. The interest of a lessee under a lease for years is insurable. Home Ins. Co. v. Coker (Okla.) 1917C-950. (Annotated.)

Note.

Insurable interest of tenant of property for specific term. 1917C-951.

## 5. CONSTRUCTION OF POLICY.

#### a. Cause of Loss.

8. A company issuing a policy of insurance against direct loss by fire is not liable thereon for an injury occasioned to a steam boiler through its negligent management by some one connected with the business. McGraw v. Home Ins. Co. (Kan.) 1916D-227. (Annotated.)

#### Note.

Overheating as fire within fire insurance policy. 1916D-228.

#### b. Particular Provisions.

## (1) Vacancy Clause.

9. Effect of Subsequent Occupancy. Fire insurance policies in the Maine standard form expiring in December, 1913, and December, 1914, provided that they should be void if the premises should become vacant and so remain for more than 30 days without the previous assent of the insurer in writing. The premises were vacant without such assent from January 31, to June, 1912, after which they were occupied until July 28, 1912, when the loss occurred. Me. Rev. St. c. 1, § 6, par. 1, provides that words and phrases shall be

construed according to the common meaning of the language. Held, that the word "void" meant null, of no effect, and that the force of the provision did not depend upon an increase of risk, but that the vacancy worked a forfeiture and not merely a suspension of risk, so that the subsequent occupancy did not revive the policy. Dolliver v. Granite State Fire Ins. Co. (Me.) 1916C-765. (Annotated.)

- 10. Period Between Successive Occupancies. A fire policy contained a stipulation that, if the building should become vacant or unoccupied, it should be null and void. The policy was issued on an application stating that the premises were used as a private dwelling, but after issuance the owner began to rent them. Upon the tenant removing from the dwelling the owner secured a vacancy permit, and about the time of its expiration the tenant returned. After expiration of the vacancy permit the tenant again removed from the premises, though he left a stove and a few other articles which the owner intended to appropriate for rent. Before the premises were reoccupied by the owner they were burned. It is held that, though the owner intended and would have in less than a week reoccupied the premises, no recovery could be had on the policy; this not being a case of a policy issued upon rented property, where short vacancies are to be anticipated. Planters' Fire Ins. Co. v. Steele (Ark.) 1917B-667.
- (Annotated.)

  11. Change in Occupancy. A fire policy was issued on an application containing a statement that the building was occupied as a private dwelling, and the policy provided that, if the building should become vacant or unoccupied, or any change should take place in the title, occupancy, or possession, it should become null and void. After issuance of the policy insured ceased to occupy the premises as a private dwelling, and leased them to tenants. It is held that there was such a change in the occupancy as to avoid the policy, notwithstanding that at the time of a fire the premises were vacant, and insured was intending to reoccupy them within a few days. Planters' Fire Ins. Co. v. Steele (Ark.) 1917B-667.

#### Notes.

Revival of fire insurance policy by occupancy after vacancy. 1916C-770.

Construction of vacancy clause in fire insurance policy issued upon rented property. 1917B-669.

## (2) Provision Against Alienation.

12. Sale of Interest by Joint Owner. Where an insurance policy covering partnership property is voidable by change of title of insured, a sale of his interest by

one partner to a third person affects the risk, because a new party is brought into contractual relations with the insurance company. Firemen's Ins. Co. v. Larey (Ark.) 1917B-1225. (Annotated.)

13. Under such policy, covering property of tenants in common, a sale by a tenant in common of his interest to a stranger ends the contract of insurance as to him or his vendee. Firemen's Ins. Co. v. Larey (Ark.) 1917B-1225.

(Annotated.)

- 14. Under such policy, covering property of tenants in common, a sale by a tenant in common of his interest to a stranger does not affect the insurance as to the remaining tenant or tenants in common, since thereby no stranger is brought into contractual relation with the insurance company so far as concerns that part of the insurance which covers the interest of the tenant or tenants in common not selling. Firemen's Ins. Co. v. Larey (Ark.) 1917B-1225. (Annotated.)
- 15. Fire Insurance Change in Interest or Title—Renewal of Lease. A condition against change in title or interest in a fire insurance policy issued to a lessee holding under a lease giving an option of renewal is not broken by a renewal of the lease, the provisions of the new lease being identical with those of the former one, including the renewal clause. Home Ins. Co. v. Coker (Okla.) 1917C-950.
- 16. Sale and Reacquisition Before Loss. Since a clause in a fire insurance policy, forfeiting the policy if any change takes place in the title, possession, or interest of the insured in the property, or if the policy be assigned, must be construed to contemplate only transfers which permanently divest the insured of all interest in the property, where, upon a sale of the land by insured, the policy was transferred with the consent of the company, subsequently again transferred without the consent of the company, and finally transferred to the original owner without the consent of the company, the policy is not thereby rendered void, in the absence of a declaration of forfeiture; the property having been restored to the party with whom the company originally contracted, before the loss occurred and the liability of the company having merely been suspended during the interim. Germania Fire Ins. Co. v. Turley (Ky.) 1917C-931. (Annotated.)
- 17. Interpretation. A policy of fire insurance on a building under construction in favor of a lumber company contained the provision that it should be void if any change took place in the interest, title, or possession of the subject of insurance. The policy stood in the name of the owner of the building, and to cover the lumber company's interest a rider was attached to

the effect that a loss, if any, was payable to the company as its interest might appear. In the policy there was a printed stipulation that if an interest under the policy should exist in favor of any person having an interest other than the insured, the conditions of insurance, relating to such interest, "as shall be written upon, attached, or appended hereto" should apply. It is held that the conveyance, twelve days before loss of the building, by the owner to his sister did not relieve the insurer of liability to the lumber company, since the stipulation of the policy relating to the effect of a change in title did not apply to the lumber company where not set out in the rider. Royal Ins. Co. v. Walker Lumber Co. (Wyo.) 1917E-1174.

#### Note.

Sale and reacquisition of title as violation of clause in fire insurance policy prohibiting change in interest, title, etc. 1917C-934.

## (3) Provision Against Incumbrances.

18. Effect of Subsequent Satisfaction. Under a policy of insurance on an automobile providing that it shall be void if the property should become incumbered by a chattel mortgage, or if any change other than by the death of insured should take place in the interest or title of the property, a chattel mortgage subsequently given merely suspends the insurance, and, where it is paid and canceled before a loss, the insurance revives. Cottingham v. Maryland Motor Car Ins. Co. (N. Car.) 1917B-1237. (Annotated.)

Revival of fire insurance policy after satisfaction of lien or incumbrance attaching to property in violation of policy. 1917B-1241.

## (4) Watchman Clause.

19. Negligence of Watchman. When the insured employs two competent watchmen and, in good faith, instructs them to watch carefully the property and to guard against fire, both by day and by night, the condition of the "watchman clause" in the policy is fully complied with on the part of the insured and negligence on the part of a watchman does not forfeit the policy. Theriault v. California Ins. Co. (Idaho) 1917D-818. (Annotated.)

#### Note.

Construction of watchman clause in fire insurance policy. 1917D-821.

## (5) Agreement to Pay Loss

20. Agreement to Pay Loss Within Specified Time. Under a contract of insurance, providing that within sixty days

after written notice of the fire or the furnishing of a sworn statement on request the insurer should pay the amount for which it should be liable, which amount, if not agreed upon, should be ascertained by award of three referees chosen in the manner designated, and that the award of a majority should be conclusive and final as to the amount of loss, in view of Mass. Laws 1910, c. 552, relating to sworn statements of loss, the obligation of the insurer is to pay within sixty days after the notice of the fire or the submission of the sworn statement when demanded, even though the precise amount is not then ascertained. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

## (6) Arbitration Clause.

21. Provision for Arbitration. A contract of insurance, providing that the company, within sixty days after notice of fire in writing, or the submission of sworn statement on request, should either pay the amount for which it should be liable, which amount, if not agreed upon, should be ascertained by award of referees, and that the award in writing of a majority should be conclusive and final as to the amount of loss, that such reference, unless waived, should be a condition precedent to any right of action at law or in equity to recover such loss, was not an arbitration of the whole controversy but only a stipulation for determining the amount of damages, and is a valid provision not obnoxious to the principle that contracts to oust courts of their jurisdiction are not binding. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

#### (7) Designation of Location.

22. Absence of Stock from Designated Location. Where a policy insuring horses against fire while contained in a described barn also uses the language of Wis. St. 1913, § 1941-43, which provides for indemnity against loss of the property while contained in the location described, and not elsewhere, insured cannot, on the theory that it was contemplated between the parties that the horses might of necessity be taken from the barn to permit repairs, recover for their loss while away from the barn; there being no ambiguity of language or waiver of that provision in the policy. Rosenthal v. Insurance Co. (Wis.) 1916E-395.

(Annotated.)

Fire insurance policy on live stock in designated location as covering animals temporarily elsewhere. 1916E-398.

## 6. WAIVER OF PROVISIONS.

## a. Vacancy Clause.

23. Waiver of Forfeiture. An insurer may waive a breach of a provision for

forfeiture in case of vacancy without its assent. Dolliver v. Granite State Fire Ins. Co. (Me.) 1916C-765.

## b. Provision Against Incumbrance.

24. Failure to Make Inquiry. Where a fire policy is issued by an insurance company without written application, the company must be held to have waived the condition of the policy, providing that if the property be, or shall become, incumbered by a chattel mortgage, the policy shall be void, for while effect should be given to the contract, the insured has practically no voice in framing it, and to permit the company to obtain the premiums where the insured was in ignorance of the stipulation would work a fraud. Great Southern Fire Ins. Co. v. Burns (Ark.) 1917B—497. (Annotated.)

#### 7. CANCELLATION OF POLICY.

25. Necessity of Return of Unearned Premium. Under a fire insurance policy in the New York standard form providing that it might be canceled at any time at the request of the insured, or by the insurer, by giving five days' notice of such cancellation, and that if the policy should be canceled as provided the unearned part of the premium actually paid should be returned on surrender of the policy or last renewal, the insurer retaining the customary short rate, except that on a cancellation by it by giving notice it should retain only the pro rata premium, the giving of the five days' notice was sufficient to cancel the policy, and the return of or offer to return the premium is not an essential element of the cancellation. Mangrum & Otter v. Law Union, etc. Ins. Co. (Cal.) 1917B-907. (Annotated.)

## Note.

Necessity of return or tender of unearned premium to effect cancellation of fire insurance policy by insurer. 1917B-910.

## 8. LOSS AND ADJUSTMENT.

Subrogation of Insurer and Assignment of Claims.

26. Enforcement of Subrogation. Burns' Ind. Ann. St. 1914, § 249, declares that there shall be no distinction in pleading between actions at law and suits in equity, while section 251 declares that every action must be prosecuted in the name of the real party in interest. Sections 269 and 270 require all persons having an interest and desiring relief to be joined as plaintiffs, and permit the joinder as defendants of persons who are necessary parties or have refused to join as plaintiffs. An insurer against fire paid a policy on property destroyed by fire

communicated from a railroad train. It is held that, as the insurer was subrogated to the rights of the owner, it could, in its own name, maintain an action for the destruction of the property, and in case the property destroyed was of a greater value than the amount of the insurance, the owner should be joined. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.

Annotated.)

27. Subrogation to Rights Against Wrongdoer. An insurer of property destroyed by fire, who has paid the loss, is subrogated by equitable assignment to the rights of the owner to recover against one who is responsible for the property's destruction. Pittsburgh, etc. R. Co. y. Home Ins. Co. (Ind.) 1918A-828.

28. Burns' Ind. Ann. St. 1914, \$5525a, making railroad companies liable for the firing of property by locomotives, and providing that they shall have an insurable interest therein, does not destroy the right of an insurer of property fired by a locomotive to be subrogated to the rights of the owner to recover damages; the statute merely giving the railroads an insurable interest which they might protect by taking a policy in its own name. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.

29. Effect of Release by Insured. Where a tortfeasor, who fired property, with knowledge that the insurer had paid the amount of the policy, paid the insured a further sum, and procured a release such release is no defense against an action by the insurer. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.

## b. Arbitration and Appraisement.

30. Procedure at Arbitration. Pub. St. 1882, c. 188, §§ 1, 6, 7, now Rev. Laws, c. 194, §§ 1, 6, 7, the general law authorizing reference to arbitration, by section 7 provides that arbitrators shall meet and hear the parties, and by section 1 that all controversies which may be the subject of an action at law or a suit in equity may be submitted to arbitration. A reference in writing solely to determine the amount of the loss under a policy of fire insurance was not limited to the words of the policy, but expressly incor-porated the statute by reference. It is held that the parties might agree to a reference broader or more detailed in its scope than the policy demanded, that the requirement that the referees meet and hear the parties implied that relevant evidence should be received and considered, especially as the reference to the procedure under the general law necessarily imported into the reference the general arbitration, of practice, under general arbitration, of hearings at which evidence is received.

Second Society v. Royal Ins. Co. (Mass.) 1917E-491. (Annotated.)

31. Scope of Arbitration. Under Mass. St. 1907, c. 576, setting forth the standard form of policy, by section 57 providing that if buildings insured against loss by fire are totally destroyed, the insurer shall not be liable beyond the actual value of the property at the time of the loss or damage, in force when the policy was issued, it is proper for referees, to determine the amount of the loss, to refuse to consider the cost to the insured from the tearing down of the walls of the building during the fire at its expense by public officers, and after the fire by itself at its own expense, and the increased cost of rebuilding, due to the fact that under the building laws a new structure must be of more expensive materials, since those matters had no relation to the actual value of the property. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

32. The refusal of referees, appointed to fix the amount of loss under a policy of fire insurance, to receive evidence as to the loss when the submission required them to listen to evidence, requires that the award be set aside, although an award should stand unless it primarily appears that the alleged misconduct has prejudiced, or may have prejudiced, the party complaining, or had violated the rules which justice requires should be observed to secure the fair determination of the matters in dispute. Second Society v. Royal Ins. Co. (Mass.) 1917E-491. (Annotated.)

33. Ground for Vacating Award, Insured, by written agreement submitting to referees amount of its loss under a policy of fire insurance, is entitled to an honest award free from the taint of fraud or prejudice, but mere inadequacy of an award honestly made without mistake is no ground for setting the award aside, to justify which the inadequacy of the award must be so strong, gross, and manifest that it would be impossible to state it to a man of common sense without producing an exclamation at the inequality of it, so that the difference between the insured's alleged value of \$100,000 and an award of \$57,604 after the referees had disallowed elements of damages, one of which amounted to at least \$20,000, did not, of itself, show fraud, bias, or prejudice, so as to justify a setting aside of the award on the ground of inadequacy, but the parties having chosen that tribunal were bound thereby. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

34. Effect of Failure of Arbitration. The provision of a policy of fire insurance for ascertainment of the amount of loss or amage by a reference and award is not satisfied by one appointment of referees, and it is not the law that an insured may

recover, unless it appears that the award has failed through his fault. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

- 35. Conclusiveness of Award. The question whether an award of referees appointed under a policy of fire insurance to ascertain the amount of loss should be set aside may be determined in the insured's action of contract upon the policy, without resort to equity, under the rule that an award may be impeached at law for mistake of fact not appearing on its face, and in such action the defendant might offer to show the validity of the award in bar to an action thereon. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.
- 36. Under a policy of fire insurance that if the amount for which the company was liable was not agreed upon it should be ascertained by an award of referees, that an award in writing of a majority should be conclusive, and that such reference, unless waived, should be a condition precedent to any action at law or in equity to recover for such loss, the insured's cause of action is upon the policy of insurance, and not upon the award, which, if valid, is simply the evidence as to the amount of loss. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

## c. Apportionment of Loss.

37. Building Incapable of Repair. When an insured building is injured by fire to such an extent as to destroy its use as a building and require it to be demolished or removed, the insured will be entitled to recover as for a total loss. Such construction of the valued policy law does not deprive the insurance company of its property without due process of law. Dinneen v. American Ins. Co. (Neb.) 1917B—1246.

#### d. Subrogation to Rights of Mortgagee.

- 38. Subrogation of Insurer to Rights of Mortgagee. Where a mortgagee insures the hypothecated property at his own expense, the insurer, paying a loss by fire to such mortgagee to the amount of the debt, is subrogated to the mortgagee's right in such debt, since the insurance contracted and paid for by the mortgagee in effect makes the insurance company a surety to the holder of the mortgage for the payment of the debt. Milwaukee Mechanics' Ins. Co. v. Ramsey (Ore.) 1917B-1132.

  (Annotated.)
- 39. Realty was insured against fire, the loss being payable to a mortgagee as its interest might appear; otherwise to the insured. Within the term of the policy the property was destroyed by fire, and upon the mortgagee and owner suing the insurance company the mortgagee recovered judgment for the amount of its secured

debt, while the owner failed to recover because he had contracted to sell, violating a policy restriction. The insurance company paid the mortgagee's judgment, and demanded that the mortgagee assign to it the owner's note and mortgage, which was refused. Thereupon the company sued the mortgagee and the owner, claiming subrogation to the rights of the mortgagee against the owner, and seeking to foreclose the security and recover the amount of the debt. It is held that the insurance company could not recover, since by the policy it agreed with the owner to pay a certain designated person, the mortgagee, in case of a loss, but did not agree to pay the owner's debt to the mortgagee as such. Milwaukee Mechanics' Ins. Co. v. Ramsey (Ore.) 1917B-1132. (Annotated.)

40. Subrogation to Rights Against Tortfeasor. Where insured property is burned by the tortious act of one not a party to the contract, the insurer, paying the loss, is subrogated pro tanto to the chose in action the payee has against the tortfeasor by reason of his insurable interest. Milwaukee Mechanics' Ins. Co. v. Ramsey (Ore.) 1917B-1132.

#### Note.

Subrogation of insurer to rights of mortgagee. 1917B-1135.

#### 9. ACTIONS.

## a. Pleading.

- 41. Declaration, in an action of contract upon a policy of fire insurance in the standard form, setting out a contract of insurance, a total loss of the property insured, together with a compliance with the condition precedent to the effect that there must be a reference to ascertain the amount of loss that the award was invalid, insured's offer to proceed to a new arbitration and the insurer's refusal to do so and its insistence on the validity of the award made, sets out a cause of action on the policy. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.
- 42. Award as Condition Precedent to Recovery on Policy. Under a contract of insurance, providing for the determination of the amount of loss by award of referees. and that an award in writing of a majority should be conclusive, and that such reference, unless waived by the parties, should be a condition precedent to any right of action at law or in equity to recover such loss, the reference, and not the award. was the condition precedent to an action at law, so that the declaration, alleging a reference and a definite refusal to join in another reference, is not defective in failing to allege a valid award. Second Society v. Royal Ins. Co. (Mass.) 1917E-
- 43. Avoiding Arbitration for Fraud. Allegations in an action of contract on a

policy of fire insurance that the inadequacy of the award arose from the fraud, bias, and prejudice of the referees, without alleging definite acts constituting fraud, bias, or prejudice, are not enough to require judicial inquiry. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

44. Avoidance of Arbitration. An allegation, in an action of contract upon a policy of fire insurance in the standard form, that no notice of hearings was given to the plaintiff by the referees to fix damage, without alleging that no hearings were given as required by the terms of the reference, nor that the plaintiff did not, in fact, have notice of the hearings, or was not heard, does not show that any substantial right of the plaintiff was affected; and no intendment in this respect can be made in favor of the pleader. Second Society v. Royal Ins. Co. (Mass.) 1917E-491.

## b. Sufficiency of Evidence.

45. What Constitutes Fire. Evidence that, when the person in charge of a steam boiler used in a laundry left it at night, it was over half full of water, the gas by which it was heated being turned off, and was then in good condition, and that when the building was unlocked the next morning no fire was burning under the boiler, but it was empty of water, and was ruined by the action of excessive heat, nothing being shown as to whether any one connected with the business returned during the night, does not justify an inference of an intentional injury to the property having been done by some one, who gained wrongful entrance to the building. Mc-Graw v. Home Ins. Co. (Kan.) 1916D-227. (Annotated.)

#### c. Damages.

46. Penalty for Failure to Pay Insurance. Insured and insurer agreed upon the amount of a fire loss. Thereafter the insurer denied liability on the ground that the property was encumbered at the time the policy was written. The original complaint prayed recovery for the amounts named in the face of the policies, but the insured shortly amended, praying recovery for the amounts agreed upon. It is held that, as the insurer contested all liability, the insured could recover the attorney's fees and penalties provided by Ark. Acts 1905, p. 307. Great Southern Fire Ins. Co. v. Burns (Ark.) 1917B—497.

#### FIRE INSURANCE PATROL.

Liability for torts of employees, see Master and Servant, 365.

#### FIREMEN.

See Municipal Corporations.

#### FIRES.

- Regulations in General.
   Fires Set by Railroads.
  - a. Care Required.
  - b. Proximate Cause.
  - c. Actions.
    - Pleading.
    - (2) Admissibility of Evidence.
  - (3) Sufficiency of Evidence.d. Statutes Imposing Liability.

Volunteer fire company, charitable corporation, see Charities, 7.

Liability of innkeeper for injury to guest, see Innkeepers, 8-10.

Duty to provide fire escapes, see Landlord and Tenant, 13.

Effect of fire damage to leasehold, see

Landlord and Tenant, 16.
Fireman as within Workmen's Compensa-

tion Act, see Master and Servant, 242. Liability of railroad for fire started by its laborers' campfire, see Master and Servant, 364.

City fire departments, see Municipal Corporations, 161-166.

Owner's duty to extinguish, see Negligence, 17.

Duty to guard stationary engine, see Negligence, 33.

Spark from sawmill engine, see Negligence, 91.

Statute imposing absolute liability, see Railroads, 61-63.
Liability of railroads, title of statute, see

Statutes, 13.

Duty of street car employees as to fire engines, see Street Railways, 33.

Failure to furnish water, liability, see Waterworks and Water Companies, 10.

## 1. REGULATIONS IN GENERAL.

- 1. Fire Escapes. Though Ill. Factory Act, § 14, required the equipping of factories and mercantile establishments with sufficient and reasonable fire escapes, the fact that a fire escape was built pursuant to the statute does not show that it was adequate; the statute not prescribing any standard for fire escapes. Lichtenstein v. L. Fish Furniture Co. (Ill.) 1918A-1087.
- 2. Ill. Factory Act (Hurd's Rev. St. 1913, c. 48, § 102), § 14, requiring sufficient and reasonable fire escapes to be furnished in factories, mercantile establishments, etc., is valid. Lichtenstein v. L. Fish Furniture Co. (Ill.) 1918A-1087.
- 3. Neither elevator shafts nor inside stairways, both of which serve as means of spreading fire, can be considered as fire escapes within Ill. Factory Act, § 14, requiring factories, etc., to be equipped with fire escapes. Lichtenstein v. L. Fish Furniture Co. (Ill.) 1918A-1087.
- 4. A master is bound to furnish fire escapes under Ill. Factory Act, § 14, requiring factories and mercantile establishments to be equipped with fire escapes, though

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no notice to furnish same has been given by a factory inspector. Lichtenstein v. L. Fish Furniture Co. (III.) 1918A-1087.

5. In an action for the death of an employee based on defendant's violation of Ill. Factory Act, § 14, requiring the furnishing of sufficient and adequate fire escapes in factories, mercantile establishments, etc., an instruction that there was a statute making it the duty of every person employing servants in a factory or mercantile establishment to exercise reasonable care in furnishing to such servants sufficient and reasonable means of escape in case of fire, and to exercise reasonable care in keeping the means of escape free from obstruction, is not erroneous; the master in such case being liable if the fire escapes were insufficient or if they were obstructed. Lichtenstein v. L. Fish Furniture Co. (Ill.) 1918A-1087.

## 2. FIRES SET BY RAILROADS.

## a. Care Required.

6. The placing by a railroad company of bunk cars for the use of its laborers upon its right of way, adjacent to plaintiff's property, does not of itself create a nuisance so as to render the railroad liable for loss caused by a fire kindled by the laborers upon the right of way to heat water to wash their clothes, and communicated to plaintiff's property. Excelsior Products Mfg. Co. v. Kansas City So. R. Co. (Mo.) 1917B-1047. (Annotated.)

7. Where the conductor of a railroad passenger train observed a fire upon the right of way kindled by laborers for their own purpose and not obviously dangerous to adjoining premises, the railroad is not liable for his failure to stop his train and extinguish the fire, since the circumstances did not impose such a duty upon him. Excelsior Products Mfg. Co. v. Kansas City So. R. Co. (Mo.) 1917B-1047.

8. The knowledge of railroad laborers who kindled a fire on a railroad right of way for a purpose outside the scope of their employment is not knowledge of the fire by the railroad company, which requires it to use due care to prevent the spread of the fire. Excelsior Products Mfg. Co. v. Kansas City So. R. Co. (Mo.) 1917B-1047.

#### b. Proximate Cause.

9. The negligence of a railroad company in permitting combustibles to accumulate on its right of way is not the proximate cause of the burning of adjoining property, where the fire was started by railroad laborers on the right of way for their own purposes, and there was no evidence that the rubbish became ignited and thereby communicated the fire to the plaintiff's property. Excelsior Products Mfg. Co. v. Kansas City So. R. Co. (Mo.) 1917B-1047. (Annotated.)

## c. Actions.

## (1) Pleading.

10. Under Burns' Ind. Ann. St. 1914, \$5525a, declaring that railroad companies shall be responsible to every person whose property may be destroyed by fire communicated by locomotives, and that, in all actions instituted under the act, the burden of proving contributory negligence shall be on the defendant, a complaint seeking to recover for the firing of property by a railroad company need not aver the negligence of the company or plaintiff's freedom from contributory negligence. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.

11. Liability of Railroad. In an action under Burns' Ind. Ann. St. 1914, §§ 5525a and 5525b, which impose upon a railroad company liability for fires communicated by locomotives, regardless of its negligence, the complaint need not allege the duty of the railroad company to exercise care to protect plaintiff's property, as would be necessary if negligence were relied upon. Pittsburgh, etc. R. Co. v. Chapnell (Ind.) 1918A-627.

## (2) Admissibility of Evidence.

12. Condition of Locomotive at Another Time. The property burned was a chocolate factory and its contents. There was evidence that the fire originated soon after a mixed train passed the factory going east early in the morning and that the engine was working steam when it passed. Evidence that the same engine when going west the evening before threw fire when working steam was admissible. Hollinger v. Missouri, etc. R. Co. (Kan.) 1916D-802.

#### (3) Sufficiency of Evidence.

13. Railroads—Evidence Sufficient. Findings that the fire was communicated by the engine referred to and of damages closely approximating the totals of the schedules attached to the petition were sufficiently sustained by the evidence. Hollinger v. Missouri, etc. R. Co. (Kan.) 1916D-802.

## d. Statutes Imposing Liability.

14. Mo. Rev. St. 1909, §§ 3150, 3151, making railroads liable for fires started by engines and those communicated by the ignition of dry vegetation negligently permitted to remain on the right of way, does not make the railroad liable for a fire kindled by its laborers on the right of way outside the scope of their employment and communicated directly to adjoining property without the ignition of rubbish upon the right of way. Excelsior Products Mfg. Co. v. Kansas City So. R. Co. (Mo.) 1917B-1047. (Annotated.)

- 15. Railroads—Statutory Liability for Fires—Enforcement in Another State. The statute of the state of Missouri making railroad corporations responsible in damages for loss by fire communicated by their engines is compensatory and remedial and may be enforced in an action for such damages prosecuted in this state. Hollinger v. Missouri, etc. R. Co. (Kan.) 1916D—802.
- 16. Statute Imposing Absolute Liability. Burns' Ind. Ann. St. 1914, § 5525a, making railroad companies liable for fires caused by its locomotives, and providing that contributory negligence shall be a matter of defense, is not invalid as working an impairment of the obligation of a contract, because at the time the railroad acquired its right of way, and at the present, it is authorized to propel its trains by steam power. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.

#### FISCAL MANAGEMENT.

See States, 5-7.

## FISH AND GAME.

1. Right to Take Fish, 378.

2. Statutory Regulations, 378.

- 3. Offenses Against Fishing Laws, 380.
- 4. Interference With Hunting Rights, 380.

5. State's Title to Wild Game, 380.

Property rights in inclosed deer herd, see Animals, 21.

Killing deer in defense of property, see Animals, 22.

Domesticated wild fowl, see Animals, 20, 23-26.

## 1. RIGHT TO TAKE FISH.

- 1. Right of Property in Fish. Where one catches fish in public waters and confines them in a private pond having no outlet to public waters, he becomes the owner of such fish and may recover their value from another wrongfully taking them from his possession. Murphy v. Hitchcock (Hawaii) 1917B-976.
  - (Annotated.)
- 2. Sale of Leasehold Interest in Pond. Fish in a private pond, unconnected with public waters, do not pass by sale of a leasehold interest in the pond made under execution, the levy and notice of sale being silent as to the fish, and the execution defendant being admitted to be the owner of the fish at the time of the levy and sale. Murphy v. Hitchcock (Hawaii) 1917B-976.

#### 2. STATUTORY REGULATIONS.

3. Validity of Statute. Vt. Const. c. 2, § 63, provides that the inhabitants of a state shall have liberty in seasonable times to hunt on their own lands and others not

inclosed, and take fish in all waters under proper regulations, and chapter 1, art. 5, provides that the "people of this state by their legal representatives have the sole ... right of governing and regulating the internal police of the same." Held, that article 5 authorized the enactment of Acts Vt. 1912, No. 201, requiring hunting licenses, section 1 of which provides that the word "resident" as used in the act which provides that, if applicant is a bona fide resident or owner of improved realty of a certain taxable value, he shall pay a certain fee shall "cover all citizens of the United States" living in the state for not less than 6 months, even though the section is considered to exclude a resident alien. Bondi v. MacKay (Vt.) 1916C-130. (Annotated.)

- 4. Treaties-Right of Resident Alien-Exclusion from Privilege of Hunting. The treaty between the United States and Italy (Feb. 26, 1871, 17 Stat. 845) providing that citizens of each country shall enjoy the same rights and privileges which are granted to the natives is not violated by Acts Vt. 1912, No. 201, § 1, providing that the word "resident" as used in the act which related to hunters' licenses is intended to include all citizens of the United States, though the section construed excludes from obtaining a license an Italian subject who is both a resident and a taxpayer. Bondi v. MacKay (Vt.) 1916C-130.
- 5. A hunting license fee of \$10.50 required by Acts Vt. 1912, No. 201, § 48, of nonresidents is not unreasonable. Bondi v. MacKay (Vt.) 1916C-130.
- (Annotated.)
  6. Acts Vt. 1912, No. 201, § 1, providing that the word "resident" as used in the act which requires one hunter's license fee of a bona fide resident or property owner, and another in case of a nonresident, shall cover all citizens of the United States living in the state for 6 months, does not contravene Const. U. S. Amend. 14, relating to the equal protection of the law, even if construed to exclude a resident alien and taxpayer from obtaining a license. Bondi v. MacKay (Vt.) 1916C-130. (Annotated.)
- 7. The legislature may regulate the right to take game, with respect to its decrease as well as its preservation and increase. Bondi v. MacKay (Vt.) 1916C-130. (Annotated.)
- 8. Requirement of License to Hunt. Acts Vt. 1912, No. 201, § 47, provides that, if the applicant for a hunter's license is a bona fide resident of the state, or owns improved realty listed for taxes at \$1,000, he shall pay 75 cents. Section 48 provides that, if he is a nonresident, and does not own improved realty of a certain valuation, he shall pay \$10. Section 1 pro-

vides that the word "resident" as used in the act is intended to cover "all citizens of the United States who have lived in this state for not less than six months" before applying, and that the term "nonresident" shall include all persons not coming within the definition of "resident." Section 4, subd. 3, provides that game or fish protected by law, if taken by a nonresident, may be transported without the state as provided. Held, that one who had for 14 years been a bona fide resident and taxpayer of the state, though not on real estate of the required value, but was not a citizen of the United States, being a subject of Italy, was not entitled to a license. Bondi v. MacKay (Vt.) 1916C-130.

- 9. Wash. Laws 1897, p. 82, § 1, and Laws 1899, p. 277, § 1, making it unlawful for anyone at a specified season to take or destroy any deer, Laws 1901, p. 279, §§ 1, 2, limiting the number of deer that may be killed, Laws 1903, p. 94, § 1, making it unlawful for any person at a certain season to take or "possess" any deer, Laws 1905, p. 277, providing for licenses, and Laws 1911, p. 396, making it unlawful to take or possess any deer, did not cover the possession of deer which were reclaimed and kept in an inclosure. Graves v. Dunlap (Wash.) 1917B-944. (Annotated.)
- 10. Regulation of Salmon Fishing. Ore. L. O. L. §§ 5293, 5298, regulating fishing for salmon, sturgeon, or other anadromous fish in the waters of the state, is not class legislation within the prohibition of Const. art. 1, § 20, providing "no laws shall be passed granting to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens," since the statute protects the right of all persons possessing the requisite qualifications who pursue the salmon fishery under similar circumstances and conditions. State v. Catholic (Ore.) 1917B-913.
- 11. Ore. L. O. L. § 5298, regulating fishing for salmon, etc, in the waters of the state, is not in violation of Const. U. S. Amend. 14 (9 Fed. St. Ann. 392), providing that no state shall make a law to abridge the privileges and immunities of citizens of the United States, since a business, to be protected from interference by state legislation under such amendment, must be a calling which any person can pursue anywhere in the United States as of common right, while the qualified ownership of roving fish in navigable waters within the state is in that sovereignty in trust for its citizens alone. State v. Catholic (Ore.) 1917B-913.
- 12. Regulation of Method of Taking Fish. Laws Wash. 1915, p. 80, § 36, providing that it shall be unlawful to operate in any of the waters of Puget Sound any purse seine, drag seine, or other like

seine or net of a greater length than 500 feet with meshes less than 21 inches stretch measure, and after January, 1916, 3 inches stretch measure, and that it shall also be unlawful to operate any gill net of a greater length than 500 feet with meshes less than 5 inches stretch measure, does not, because it permits the use of purse and drag seines of over 500 feet in length with a smaller mesh than the mesh required with respect to gill nets of the same length, deny to gill net fishermen the equal protection of the laws, in violation of Const. U. S. Amend. 14, or grant to purse and drag seine fishermen privileges and immunities which it withholds from gill net fishermen, in violation of Const. Wash. art. 1, § 12, as it discriminates only as to appliances used, and permits every person to use each class of appliances under exactly the same conditions and restrictions, and it does not affect the validity of the act that its operation will entirely destroy the vocation of the gill net fishermen, assuming such to be its effect. Barker v. State Fish Commission (Wash.) 1917D-810. (Annotated.)

13. The classification of territory in game and fish laws preventing hunting or fishing in a portion of the state and permitting it elsewhere in the state is not a discrimination between or a classification of persons in violation of the state or federal constitution. Barker v. State Fish Commission (Wash.) 1917D-810.

(Annotated.)

- 14. Enforcement of Game Law. Accused, who was charged with unlawfully shooting ducks from a point in the open sea near an island within the jurisdiction of the state, cannot complain that the warrant against him was directed to and served by a fish warden, for Laws Me. 1913, c. 206, § 45, declares that the general supervision of the sea and shore fisheries is extended to islands and to game and birds found thereon, and that such department shall have charge of the enforcement of laws relating to sea and shore fisheries and fish wardens, who are empowered to enforce all laws relating thereto, and have the same power to serve criminal process as sheriffs. State v. Sawyer (Me.) 1917D-
- 15. Validity of License Law. The power and discretion of the legislature to control and regulate the subject of hunting game is not limited by the organic law, and the subject regulated may be as restricted in manner and extent as the legislature deems advisable; but the regulations should affect alike all persons similarly situated and conditioned with reference to the particular regulations. State v. Philips (Fla.) 1918A-138. (Annotated.)

16. The discretion of the legislature in classifying those who are to be affected by a regulation for the protection of game,

1916C-1918B.

will not be disturbed by the courts where the classification has some just, fair and practical basis in real differences with reference to the subject regulated; and all doubts will be resolved in favor of the validity of a statute. State v. Philips (Fla.) 1918A-138. (Annotated.)

17. Sections 26, 27, 28, 29, 30, 31 and 32 of chapter 6969, Fla. Acts of 1915, must be eliminated as clearly violative of the provisions of the constitution relative to the appointment of officers and fixing their compensation, but such elimination will not render the entire act inoperative. State v. Philips (Fla.) 1918A-138.

(Annotated.)

(Annotated.)

(Annotated.)

- 18. The provisions of chapter 6969 requiring residents of the state to pay a license tax of \$3 to hunt game in each county of the state other than the county of residence, and requiring residents of a county to pay only \$1 as a license tax for hunting game in such county, are not on their face purely arbitrary and unlawful. State v. Philips (Fla.) 1918A-138.
- 19. Federal Regulation of Migratory Birds. Act Cong. March 4, 1913, c. 145, 37 Stat. 847 (3 Fed. St. Ann. 2d ed. 412), declaring that all migratory and insectivorous birds shall be deemed within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations providing for, and providing for regulations of the taking of such game, purports to regulate exclusively the matter and to deprive the states of control over such
- 20. Federal Regulation of Game. As the states retained all powers not granted to the federal government, the states, as sovereignties, have the exclusive right to regulate the taking and capturing of wild game, unless such right is conferred upon the federal government. State v. Sawyer (Me.) 1917D-650. (Annotated.)

game. State v. Sawyer (Me.) 1917D-650.

- 21. The commerce clause of the constitution, giving Congress the right to regulate commerce with foreign nations, among the several states, and with the Indian tribes, does not warrant Act Cong. March 4, 1913, purporting to regulate the killing and taking of migratory and insectivorous birds within the several states; the killing or taking of such birds not being an act of "commerce." State v. Sawyer (Me.) 1917D-650. (Annotated.)
- 22. Validity of Fishing Laws. That Wash. Laws 1915, p. 80, § 36, is unwise or unjust, in that the three-inch mesh thereby permitted to be used in purse and drag nets is much more destructive to fish than the five-inch mesh permitted to be used in gill nets, is a matter with which the court has nothing to do, as

it does not, for this reason, discriminate between persons or grant privileges or immunities to any class and withhold them from another, nor deny to any person the equal protection of the laws. Barker v. State Fish Commission (Wash.) 1917D-810.

(Annotated.)

Notes.

Validity of statute requiring license to hunt game. 1916C-134.

Validity and construction of federal statutes protecting oame. 1917D-654.

Validity and construction of statute regulating method of taking fish. 1917D-814.

## 3. OFFENSES AGAINST FISHING LAWS.

23. Fishing Without License. That the defendant, convicted under Ore. L. O. L. § 5298, regulating fishing for salmon, etc., in the waters of the state, of fishing for salmon in the Columbia river without a license, was employed by one properly licensed, is not a defense. State v. Catholic (Ore.) 1917B-913.

## 4. INTERFERENCE WITH HUNTING RIGHTS.

24. Effect of Conveyance of Fishing and Hunting Rights. Where the right of nonresidents to shoot or fish in the state can exist only as incident of their ownership of land therein on which they hunt or fish, a deed to them granting only the right to hunt and fish, and this to revert on abandonment of the property, gives no right as against the game law. Stokes v. State (Ark.) 1917D-657.

## 5. STATE'S TITLE TO WILD GAME.

25. Wild game belongs to the people of the state in their collective capacity except so far as private ownership is acquired under the Constitution. Bondi v. MacKay (Vt.) 1916C-130.

(Annotated.)

- 26. Title to game belongs to the state in its sovereign capacity, in trust for the use and benefit of its people, which, through its legislature, has the right to control the killing, taking, and use of game, so long as the rights guaranteed either by the state or federal constitution are not encroached upon. Graves v. Dunlap (Wash.) 1917B-944.

  (Annotated.)
- 27. Wild Game. The purpose of Acts 34th Iowa Gen. Assem. c. 118, as amended by Acts 35th Gen. Assem. c. 206, decla-

by Acts 35th Gen. Assem. c. 206, declaring that the ownership of and title to all wild game shall be in the state, and that no wild game shall be killed unless the person so doing shall consent that the title shall remain in the state, etc., is to estab-

lish title in the state to all wild game, dead or alive. State v. Ward (Iowa) 1917B-978. (Annotated.)

28. Nor does the general welfare clause, declaring that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, for wild game is not property belonging to the federal government. State v. Sawyer (Me.) 1917D-650.

(Annotated.)

### FIXTURES.

See Sales, 61. Compensation for in condemnation, see Eminent Domain, 41.

- 1. Gas and Electric Light Accessories. Combination gas and electric light chandeliers and brackets, mantels, stationary washstands, bathtubs, etc., attached to a building by the owner thereof for the service and exploitation of said building, are immovable by destination, and pass with the house when it is mortgaged or sold, if not reserved by the owner. Scovel v. Shadyside Co. (La.) 1917B-178.
- (Annotated.) 2. Statutory Enumeration of Fixtures. The instances given in article 468, La. Civil Code, of immovables by destination are merely illustrative, and are not restrictive. Scovel v. Shadyside Co. (La.) 1917B-178.
- 3. Intent in Attaching Property. After movables have become immobilized by destination the mere change of mind on the part of the former owner cannot, of itself, deimmobilize them as against a purchaser without notice. It is the same with reference to a mortgage. Scovel v. Shadyside Co. (La.) 1917B-178.
- 4. Manner of Attachment as Controlling Intent. Whilst the purpose for which tuings are placed, by the owner, on "a tract of land," ordinarily determines whether or not they acquire the immobility of the land, the immobility vel non of things placed in a tenement or building (other, perhaps, than a manufacturing establishment which, legally speaking, has become part of the tract of land upon which it is erected) depends, finally, upon the manner in which they are attached thereto. Scovel v. Shadyside Co. (La.) 1917B-178.
- 5. Gas or Electric Light Plant and Accessories. Combination gas and electric light chandeliers and brackets which form parts or accessories of gas and electric light plants established, the one, in the cellar of the residence on a plantation, and the other, in the sugar house, and without which those plants would be unable to render the service for which they were established, partake of the immobility of the plants, and cannot be reclaimed by the vendor of the plantation, on the ground that they are not permanently at-

tached to the house, but may be unscrewed without injury to it or themselves. v. Shadyside Co. (La.) 1917B-178.

(Annotated.)

6. Revocation of License to Sever. A purchaser's implied license to enter and sever from the realty a chattel sold, such as a building, would be revoked by the seller's conveyance of the land, leaving the purchaser to his remedy for breach of contract. Wetkopsky v. New Haven Gas Light Co. (Conn.) 1916D-968.

7. Severance by Contract. Where an intent to sell a building as a chattel is apparent from the contract and attending circumstances, the severance may be made by the purchaser; the fact that he is to remove the building only being important as bearing on the intention of the parties in determining whether title is to pass at once, or after severance. Wetkopsky v. New Haven Gas Light Co. (Conn.) 1916D-968.

#### Note.

Gas or electric light plant or accessories as fixtures. 1917B-183.

## FLAGS.

Prohibiting black and red flags, see Constitutional Law, 80.

- 1. Carrying Red Flag. Mass. St. 1913, c. 678, § 2, prohibiting the carrying of any red or black flag in parades, applies to a flag which was entirely red on both sides, save that on one side there were gilt letters indicating the society represented by the flag. Commonwealth v. Karvonen (Mass.) 1916D-846. (Annotated.)
- 2. In a prosecution for carrying a red flag in a parade, in violation of Mass. St. 1913, c. 678, § 2, it is no defense that the flag was the usual banner of a society affiliated with a political party. Commonaffiliated with a political party. wealth v. Karvonen (Mass.) 1916D-846. (Annotated.)

#### FLOODS.

Damage to shipment, see Carriers of Goods, 4-6.

#### FLY POWER.

Defined, see Corporations, 81.

## FOOD.

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3. Matters of Regulation, 382.

- a. Purity, Adulteration and Wholesomeness, 382.
- b. Brands and Labels, 382. c. Itinerant Venders, 382.
- 4. Regulation of Particular Articles, 383.
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5. Civil Liability, 384.6. Criminal Prosecutions, 385.

See Drugs and Druggists; Health; Physicians and Surgeons.

#### 1. DEFINITION.

1. What Constitutes. Tobacco, even chewing tobacco, is not a foodstuff, within the exception of foodstuffs from the rule that ordinarily the manufacturer of an article placed by him on the market for sale, and sold by another, is not liable to the ultimate consumer for injuries from defects or impurities in it; "food" including only what tends to build bodily tissues. Liggett, etc. Tobacco Co. v. Cannon (Tenn.) 1917A-179. (Annotated.)

## 2. STATUTORY REGULATIONS.

- 2. Legislative Power of Regulation. Whether there is danger of the public buying food injurious to health or different from that intended to be bought so as to authorize the exercise of the police power, and whether such danger sufficiently affects the public interests to justify the intervention of the government, is a question for the legislative department, but the legislative action is subject to revision by the courts. New Orleans v. Toca (La.) 1918B-1032.
- 3. Regulation of Ice Cream—Validity. A municipal ordinance requiring ice cream to contain at least ten per cent of butter fat, and providing that any frozen product, with certain exceptions, containing milk or cream, whether designated as custard, etc., or by whatever name it is designated, shall be deemed ice cream, is invalid as applied to a frozen product offered for sale only as custard, and which is pure and wholesome, Lough not containing the required percentage of butter fat. New Orleans v. Toca (La.) 1918B-1032.

(Annotated.)

#### 3. MATTERS OF REGULATION.

- a. Purity, Adulteration and Wholesomeness.
- 4. The elimination of a harmful ingredient from a proprietary food which without such ingredient would not be the same, does not constitute an adulteration under the U. S. Food and Drugs Act of June 30, 1906, section 7, by the abstraction of a "valuable constituent." United States v. Coca-Cola Co. (U. S.) 1917C-487.

(Annotated.)

5. Proprietary Article. A poisonous or deleterious ingredient called for as a constituent by a secret formula for a food product sold under its own distinctive name may still be an added ingredient within the meaning of the provisions of the Food and Drugs Act of June 30, 1906 [34 Stat. at L. 768, c. 3915, 3 Fed. St. Ann.

(2d ed.) 358, et seq.], condemning as adulterated any article of food that contains "any added poisonous or other added deleterious ingredient which may render such article injurious to health," and the provisos in § 8 that food mixtures or compounds "which may be now or from time to time hereafter known as articles of food under their own distinctive names" are to enjoy the stated immunity only in case they do "not contain any added poisonous or deleterious ingredients," and that nothing in the act shall be construed to require manufacturers of proprietary foods "which contain no unwholesome added ingredient" to disclose their trade formulas except as the provisions of the act may require to secure freedom from adulteration or misbranding. United States v. Coca-Cola Co. (U. S.) 1917C-487. (Annotated.)

## b. Brands and Labels.

- 6. A secondary significance cannot be attributed to the name "Coca Cola," as descriptive of a product known to be destitute of either of the products indicated by its primary meaning, so as to save it from condemnation under the U. S. Food and Drugs Act of June 30, 1906, section 8, on the theory that it is within the protection accorded by the proviso in that section to food mixtures or compounds known under their own distinctive names. United States v. Coca-Cola Co. (U. S.) 1917C-487.
- 7. The name "Coca Cola" cannot be said as a matter of law to be distinctive rather than descriptive of a compound with coca and cola ingredients, so as to escape con-demnation under the U. S. Food and Drugs Act of June 30, 1906, section 8, as misbranded in case of the absence of either coca or cola, on the theory that it was within the protection of the proviso in that section that an article of food shall not be deemed to be misbranded in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names," if the distinctive name of another article is not used or imitated, and the name on the label or brand is accompanied with a statement of the place of production. United States v. Coca-Cola Co. (U. S.) 1917C-487. (Annotated.)

## c. Itinerant Venders.

8. St. Cal. 1903, p. 284, imposes a state license tax on itinerant venders of drugs, and section 2, as amended by St. 1907, p. 765, contains a proviso that the act shall not affect the operation of St. 1905, p. 307, which exempts ex-Union soldiers and sailors from paying local license taxes as peddlers. Held that, the proviso having no effect as an exemption from the state tax imposed, the act was not in violation

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of section 1 of the fourteenth amendment to the federal constitution as depriving persons of the equal protection of the law, nor of Const. art. 1, § 21, by granting privileges to certain citizens not granted to all on the same terms. Matter of Gilstrap (Cal.) 1917A-1086. (Annotated.)

9. Nor does the proviso bring the act into conflict with U. S. Const. art. 1, \$ 11, requiring all general laws to operate uniformly. Matter of Gilstrap (Cal.) 1917A-1086. (Annotated.)

10. Cal. St. 1903, p. 284, as amended by St. 1907, p. 765, and St. 1909, p. 419, requiring a semi-annual license fee of \$100 from all itinerant venders of drugs, is a legitimate exercise of the police power of the state, since the subject-matter is a proper one for legislative control, the amount of the license is not oppressive or discriminatory, the provisions of the act apply uniformly upon the whole of a single class of clearly defined individuals, and the classification is founded upon a natural and intrinsic distinction. Matter of Gilstrap (Cal.) 1917A-1086. (Annotated.)

11. The Cal. act prescribing a license tax for itinerant venders of drugs (St. 1903, p. 284, St. 1907, p. 765; St. 1909, p. 419), being a regulation of the business within the state, applicable to all under like circumstances, is not repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States, as abridging the privileges and immunities of the citizens of the United States, and depriving them of liberty and property without due process of law, since the amendment was not designed to interfere with the reasonable exercise of the police power of the state. Matter of Gilstrap (Cal.) 1917A-1086. (Annotated.)

12. Licensing Itinerant Venders. The definition of "itinerant venders" of drugs in St. Cal. 1903, p. 284, § 3, providing that the term shall include all persons who carry on the business by passing from house to house, or by haranguing the people on the public streets or in public places, or use the various customary devices for attracting crowds and therewith recommending their wares, and offering them for sale, is broad enough to include hawkers and peddlers. Matter of Gilstrap (Cal.) 1917A-1086. (Annotated.)

## 4. REGULATION OF PARTICULAR ARTICLES.

#### a. Syrup.

13. Caffeine introduced into a syrup during the second or third melting is an "added" ingredient within the meaning of the U. S. Food and Drugs Act of June 30, 2006, condemning as adulterated any article of food that contains "any added poisonous or other added deleterious ingredient which may render such article injuri-

ous to health," although it is called for as a constituent by the secret formula under which the syrup is compounded. United State v. Coca-Cola Co. (U. S.) 1917C-487.

(Annotated.)

#### b. Lard.

14. There is no repugnancy between the pure food and drugs act of June 30, 1906 (34 Stat. at L. 768, a. 3915, Fed. St. Ann. 1909 Supp. p. 145) which is directed against the adulteration, and misbranding of articles of food transported in interstate commerce, and the prohibition of N. D. Laws 1911, p. 355, against retail sales of lard otherwise than in bulk, unless put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers. Armour & Co. v. North Dakota (U. S.) 1916D-548. (Annotated.)

15. As applied to retail sales not in the package of importation, the commerce clause of the federal constitution is not violated by the prohibition of N. D. Laws 1911, p. 355, against the sale of lard otherwise than in bulk unless put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers. Armour & Co. v. North Dakota (U. S.) 1916D-548.

(Annotated.)

16. Singling out lard from other food products as is done by the prohibition of N. D. Laws 1911, p. 355, against the sale of lard otherwise than in bulk unless put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers, does not make the statute repugnant to U. S. const. 14th Amend., as denying the equal protection of the laws. Armour & Co. v. North Dakota (U. S.) 1916D-548.

(Annotated.)

17. Regulation of Sale. Prohibiting the sale of lard otherwise than in bulk unless put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers, as is done by N. D. Laws 1911, p. 355, does not render the statute repugnant to U. S. Const. 14th Amend., as denying due process of law. Armour & Co. v. North Dakota (U. S.) 1916D-548. (Annotated.)

## c. Eggs.

18. Regulation of Sale of Eggs. St. Cal. 1915, p. 1163, declaring that any dealer selling eggs imported from without the United States shall stamp each egg "Imported" and shall display at his place of business a sign "Imported Eggs Sold Here," but which did not require the dealer to disclose the age of his imported eggs, is not, in view of the fact that in portions of the state of California eggs can be imported from foreign countries in a shorter time than they can come from other portions of the state and United States, a valid exercise of the police power, and is void as interfering with foreign commerce, it being obvious that the

purpose of the statute was not to protect the public health against unwholesome eggs, but merely to prejudice buyers against imported eggs in favor of the local product, it appearing that the statute as written would place all imported eggs, regardless of the distance they were transported, on the same footing. Matter of Foley (Cal.) 1918A-180.

(Annotated.)

#### Note.

Validity and construction of statute or ordinance regulating sale of eggs. 1918A-181.

#### d. Ice Cream.

19 Percentage of Butter Fat in Ice Cream. State statutes which prohibit the sale as "ice cream" of a product containing less than a fixed percentage of butter fat do not take property without due process of law nor deny the equal protection of the laws—the particular percentage fixed not being so exacting as to be in themselves unreasonable—although the ice cream of commerce is not iced or frozen cream, but is a frozen confection, varying in composition, and under some formulas may be made without either cream or milk. Hutchinson Ice Cream Co. v. Iowa (U. S.) 1917B-643. (Annotated.)

#### Note.

State or municipal regulation of ice eream. 1917B-645.

#### e. Opium.

20. Federal Regulation of Opium. The grave doubts as to congressional power which any other construction would raise require that the provision of the Act of December 17, 1914 (38 Stat. L. 789, c. 1, \$8; 4 Fed. St. Ann. 2d ed. 187), making it unlawful for "any person" who has not registered or paid the special tax imposed by that act to have in his possession or control opium or coca leaves, their salts, derivatives, or preparations, be construed as referring to those only who are required by that statute to register and pay the special tax, viz., all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away, any of said drugs, notwithstanding the exception in such section in favor of the possession of drugs prescribed in good faith by a physician, since this exception stands alongside of one that saves em-ployees of registered persons and nurses under the supervision of a physician, etc., and is so far vague that it may have been intended to mean other persons carrying out a doctor's order, rather than the patient's. United States v. Jin Fuey Moy (U. S.) 1917D-854. (Annotated.)

## Note.

Validity and construction of federal regulation of manufacture, sale or posses-

sion of opium or other narcotic. 1917D-856

#### 5. CIVIL LIABILITY.

21. Foreign Substance in Animal Food. In an action for the death of two cows alleged to have been caused by eating bran purchased from defendants and containing arsenic, the evidence is held to be sufficient to support findings that the cows died from arsenic poisoning. Newell v. Reid (Mich.) 1918B-224.

(Annotated.)

22. Foreign Substance in Beverage. In an action for damages for an illness caused by swallowing a decomposed mouse in a bottle of Coca-Cola purchased from a local dealer to whom it had been sold by a bottling company, the evidence is held to sustain a finding that the bottling company was not at fault. Crigger v. Coca-Cola Bottling Co. (Tenn.) 1917B-572.

(Annotated.)

- 23. One who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, or articles inherently dangerous is liable for breach of a duty to the public in the preparation thereof, regardless of the privity of contract to any one injured for a failure to properly safeguard and perform such duty. Crigger v. Coca-Cola Bottling Co. (Tenn.) 1917B-572.
- 24. Liability of Manufacturer to Consumer. The duty of one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous of exercising care to see that nothing unwholesome or injurious is contained in the bottle or package is not in the nature of an implied warranty, and is based upon negligence. Crigger.v. Coca-Cola Bottling Co. (Tenn.) 1917B-572.
- 25. Remedy for Injury. The remedy of a guest at a restaurant injured by impure food served to him must probably be based on the negligence of the proprietor. Merril v. Hodson (Conn.) 1916D-917.

(Annotated.)

26. Liability for Sale of Unwholesome Food. The Conn. Sale of Goods Act (Pub. Acts 1907, c. 212, § 1, defines a sale of goods as an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price. Section 76 defines goods to include all personal chattels other than things in action and money, and property to mean the general property in goods, and not merely a special property. Section 15 declares an implied warranty that the goods shall be reasonably fit for the purpose for which they are ordered. Held, that neither under the statute is merely declaratory, was a restaurant keeper's service of food on a patron's order for immediate consumption a sale of goods, since the consumer does

not become the owner of the food served, but has only a privilege of consuming what he needs; and hence there was no implied warranty that food so served was wholesome and fit for consumption. Merril v. Hodson (Conn.) 1916D-917.

(Annotated.)

Notes.

Liability as for negligence of proprietor of restaurant or lunch room to person injured by eating therein. 1916D-921.

Liability for injury resulting from foreign substance in beverage. 1917B-575.

Liability for injury resulting from foreign substance in food. 1981B-225.

## 6. CRIMINAL PROSECUTIONS.

27. Whether caffeine added to a food product is a poisonous or deleterious ingredient which may render the article deleterious to health, within the meaning of the U. S. Act of June 30, 1906, condemning as adulterated any article of food that contains "any added poisonous or other added deleterious ingredient, which may render such article injurious to health," is a question of fact for the jury, where the evidence on that point is conflicting. United States v. Coca-Cola Co. (U. S.) 1917C-487. (Annotated.)

#### FOR.

Defined, see Process, 9.

## FORCIBLE ENTRY AND DETAINER.

- 1. Entry Distinguished from Detainer.
- 2. Scope of Action.
- 3. Persons Liable.
- 4. Extent of Force.
- 5. Pleading.

## 1. ENTRY DISTINGUISHED FROM DETAINER.

1. The unlawful detention, unaccompanied with force, where the original possession was taken peaceably and under claim of right, is not sufficient to authorize proceedings under section 7657, Minn. G. S. 1913. Ejectment is the remedy in such cases. Mastin v. May (Minn.) 1916C-493. (Annotated.)

#### 2. SCOPE OF ACTION.

2. Payment of Rent. Under Cal. Code Civ. Proc. § 1161, providing that a tenant is guilty of "unlawful detainer" when he continues in possession after default in the payment of rent, and after three days' notice in writing, requiring its payment or the possession of the property, shall have been served upon him, in an action in unlawful detainer, the defendant may show that there was no forfeiture of the lease because there was no breach of the covenants of the lease, and if by reason

of dealings between the lessor and lessee the rent was paid or discharged by applying thereon claims due the tenant from the landlord, he may show this fact, but this showing can only go to the question whether or not, when the notice to quit was given, the rent claimed therein was due. Arnold v. Krigbaum (Cal.) 1916D 370.

3. Set-off and Counterclaim. In an action in unlawful detainer against a tenant, neither a counterclaim nor a cross-complaint of any kind is permissible, whether the subject-matter arises out of a violation of the terms of the lease or not. Arnold v. Krigbaum (Cal.) 1916D-370.

(Annotated.)

4. Forcible Entry—Right of Recovery—Basis. A plaintiff in forcible entry and detainer must either show a superior title in himself or a forcible entry or unlawful detainer by defendant. Phillips v. Phillips (Ala.) 1916D-994.

## 3. PERSONS LIABLE.

5. Possession under Claim of Right. Proceedings under the forcible entry and detainer statute to recover the possession of land alleged to be unlawfully and forcibly detained, cannot be maintained against a person who peaceably and under claim of right entered into possession of the property, and does not forcibly detain the same. Mastin v. May (Minn.) 1916C-493. (Annotated.)

## 4. EXTENT OF FORCE.

6. What Constitutes Forcible Entry. The act of cutting through an inside fence, as an act separate and apart from a prior entry on and possession of the premises as a whole, is not a forcible entry on the premises, and will not support an action for forcible entry and detainer. Phillips v. Phillips (Ala.) 1916D-994.

## 5. PLEADING.

7. Unlawful Detainer—Complaint Sufficient. In an action in unlawful detainer against a tenant, a complaint, which pleads in full a copy of the notice to quit and alleged service thereof upon the tenants, is sufficient as against the objection that the details of the service of the notice are not sufficiently set forth. Arnold v. Krigbaum (Cal.) 1916D-370.

## FORD AUTOMOBILE.

A "motor vehicle," see Homicide, 5.

#### FORECLOSURE.

Of chattel mortgage, see Chattel Mortgages, 26-28.

Of mechanics' liens, see Mechanics' Liens, 41-64.

DIGEST. 1916C-1918B.

Of mortgages, see Mortgages and Deeds of Trust, 24-28.

Of tax lien, see Taxation, 88, 89.

FOREIGN ACKNOWLEDGMENTS. See Acknowledgments.

FOREIGN ATTACHMENTS. See Attachment, 1, 2,

FOREIGN COMMERCE.

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#### FOREIGN CORPORATIONS.

See Corporations, 160-180. Taxation of stock, see Taxation, 14-21, 68,

Exemption of stock, see Taxation 85. Foreign corporation tax act, see Taxation, 150-170.

FOREIGN CORPORATION TAX ACT. See Taxation, 150-170.

#### FOREIGN LAWS.

See Death by Wrongful Act, 7-9. Extraterritorial effect of divorce, see Divorce, 66, 67.

Representations as to, see Fraud, 2-4. Operation of Workmen's Compensation Acts outside state, see Master and Servant, 179-183.

Construction of adopted laws, see Statutes, 90-94.

- 1. Where a contract, made in a foreign state, is sought to be enforced in this state, unless the laws of the foreign state be pleaded and proved, it will be presumed that the laws governing the rights of the parties under such contract are the same as the laws of this state. Marx v. Hefner (Okla.) 1917B-656.
- 2. Where a contract is made in a foreign state, and the laws of such foreign state are relied upon for a recovery, such laws of the foreign state must be pleaded and proved. Marx v. Hefner (Okla.) 1917B-656.
- 3. Where the laws of a foreign state are not proved, it will be presumed that they are the same as those of the forum. Rudolph Hardware Co. v. Price (Iowa) 1916D-850.

#### FOREST LAWS.

Validity and construction, see Trees and Timber, 2-18.

FORFEITURE OF CHARTER, See Corporations, 6.

#### FORFEITURES.

Of easement by misuser, see Easements, 7. Vacancy clause, see Fire Insurance, 9, 23. Forfeiture of franchise, see Franchises, 1. Of homestead, see Homestead, 19.

Of policy, see Insurance, 30.

Of mining lease by inaction, see Mines and Minerals, 6, 7. Of usurious interest, see Usury, 3, 5, 8, 19.

Of double interest, see Usury, 24, 25.

1. Necessity of Demand Before Suit to Enforce Forfeiture. Where a deed contains a condition that intoxicating liquor shall never be sold on the premises, and provides that upon an adjudication of a court of competent jurisdiction that such condition and covenant have been violated. the title to the premises thereby conveyed shall revert to, and revest in, the grantor, its successors and assigns, a demand for possession or a claim or entry upon the land by the grantor is not essential before instituting an action to forfeit the grantee's title to the lots, as an action and adjudication were essential to reinvest the title in the grantor. Fusha v. Dacons Town Site Co. (Colo.) 1917C-108.

FORGED INDORSEMENT. See Checks, 13.

FORGED INSTRUMENTS. See Bills and Notes, 53, 54,

#### FORGERY.

- 1. Typewriting. Forgery may be committed by the insertion of typewritten words into a document. People v. Risley (N. Y.) 1916D-775. (Annotated.)
- 2. Expert Evidence as to Probabilities. A university professor of mathematics is improperly permitted to testify that, by the application of the law of mathematical probabilities, the chance of the same defects, as were shown by the inserted words, being produced by another typewriter, is so small as to be practically a negative quantity, where his statement is not based on actual observation but is purely specu-lative. People v. Risley (N. Y.) 1916D-
- 3. Standard for Comparison. In a prosecution under N. Y. Penal Law (Consol. Laws, c. 40) § 810, for offering in evidence as genuine, a document knowing that same had been forged and fraudulently altered by the insertion of certain typewritten words, specimens of typewriting made on the machine in defendant's office two days subsequent to the alleged offense are properly admitted as standards for comparison. People v. Risley (N. Y.) 1916D-775.

#### Note.

Forgery of or by typewriting. 1916D-784.

#### FORGETFULNESS.

Not contributory negligence, see Negligence, 41.

## FORMER JEOPARDY.

1. In General, 387.

2. What Constitutes, 387.

a. In General, 387.b. Identity of Offenses, 387.

c. Defective Information Set Aside.

d. Penal Action, 387.

3. Pleading, 388.

#### IN GENERAL.

1. Application to States. That the fifth amendment to the federal constitution (9 Fed. St. Ann. 264), that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," applies only to proceedings in federal tribunals, and in no way restricts or pre-scribes the limits of the constitutional provisions and statutory enactments of the several states. State v. Barnes (N. Dak.) 1917C-762.

2. The terms "jeopardy of life and liberty for the same offense," "jeopardy of life or limb," "jeopardy for the same offense," "twice in jeopardy of punishment," and other similar provisions used in the various constitutions, are to be construed as meaning substantially the same thing. Stout v. State (Okla) 1916E-858.

#### 2. WHAT CONSTITUTES.

## a. In General.

3. When Jeopardy Attaches. Though the jury was sworn before arraignment, accused's jeopardy did not begin, and he may thereafter be arraigned and the jury second time sworn. State v. Gould (Mo.) 1916E-855.

## b. Identity of Offenses.

4. Similar Acts on Different Dates. Where an indictment against two defendants for practicing medicine without obtaining the requisite certificate from the state board of medical examiners charged that the acts complained of were done "on or about September 1, 1912," such indictment being dismissed, its dismissal was no bar to prosecution under a second indictment for the same offense, found on October 16, 1913, charging that the acts com-plained of were done "on or about October 4, 1913, and from that date to October 16, 1913," since the test of whether a former indictment is a bar to prosecution under a second is whether if what is set out in the second indictment had been proved under the first, there could have been a conviction, in which case the second indictment cannot be maintained, but can be where proof of what is charged in it

could not have made out the charge in the first. State v. McAninch (Iowa) 1918A-559.

#### c. Defective Information Set Aside.

5. Rem. & Bal. Wash. Code, § 2101, entitles a defendant to have an information set aside when it is not verified. Section 2125 provides that an order for dismissal as provided in the chapter is a bar to another prosecution for the same offense if it be a misdemeanor, but is not a bar if the offense charged be a felony. Section 2123 provides for the dismissal of an action after indictment or information by the court upon its own motion or upon application of the prosecuting attorney. Section 2124 abolishes the entry of a nolle prosequi. Section 2316 provides that no order of dismissal or directed verdict of not guilty on the ground of variance between the information and proof shall bar another prosecution for the same offense. It is held that the "setting aside" of the information provided for by section 2101 would not be a bar to a further prosecution, but that only those dismissals of misdemeanor prosecutions, made by the court upon its own motion or upon the motion of the prosecuting attorney in such manner as to evidence an abandonment by the state of the prosecution which take the place of the common-law nolle prosequi, would render an accused immune from another prosecution for the same misdemeanor. State v. Haffer (Wash.) 1917E-

#### d. Penal Action.

- 6. Section 4191 Okla. Comp. Laws 1909, imposing as the penalty for the offense there described, a penalty to be recovered at the suit of the state, and a fine and imprisonment to be administered in a criminal prosecution, is not in conflict with article 2, § 21, of the Okla. Con-stitution, which provides, "Nor shall any person be twice put in jeopardy of life and liberty for the same offense." Stout v. State (Okla.) 1916E-858.
- 7. Article 2, § 21, of the constitution (Williams' Ann. Const. Okla. § 29) which provides, "Nor shall any person be twice put in jeopardy of life and liberty for the same offense" is not intended to apply to a civil proceeding which affects merely property rights even though such proceeding is in part a punishment of an offense. Stout v. State (Okla.) 1916E-858.
- 8. Defenses. A defendant sued for the penalty provided by section 4191 Okla. Comp. Laws 1909 for unlawfully permitting his premises to be used in violation of the prohibition law may plead that the statute is invalid because in conflict with the former jeopardy section of the constitution although he has not been previously prosecuted for the crime pronounced

1916C—1918B. by the statute. Stout v. State (Okla.) 1916E-858.

#### 3. PLEADING.

9. The failure to interpose the plea of prior jeopardy prior to verdict was a waiver of the defense of former jeopardy arising from such former conviction. State v. Barnes (N. Dak.) 1917C-762.

(Annotated.)

10. Necessity of Special Plea. A criminal complaint was laid in justice court against defendant Barnes, charging him with assault and battery, a misdemeanor. He pleaded guilty, and paid a fine and costs imposed on judgment. Subsequently he was prosecuted for felony—assault and with intent to kill. On trial thereon the jury found him guilty of the included offense charged, of assault and battery, a misdemeanor. The prosecution for felony was based upon the same acts committed upon the same person as was the first prosecution for misdemeanor in justice court, to which the plea of guilty was entered. When defendant was called for judgment on the verdict of guilty of assault and battery, he moved an arrest of judgment, asserting for the first time that he had been once before convicted and punished for that same offense, and that under the statutes and the state and federal constitution the court was without jurisdiction to render a judgment of conviction. The motion was denied, and a sentence of fine and imprisonment was imposed. He applies to the supreme court, asking for a writ of habeas corpus directing his discharge from custody, claiming he is being legally restrained of his lib-erty under a void sentence. It is held: That under the statutes, defendant in pleading to the information for felony should also have interposed a plea of former jeopardy arising from prior conviction for the same offense, to the included misdemeanor charged in the information. The statutes contemplate that the jury shall determine as a fact whether prior conviction has been had, and find either for the defendant or for the state on that question, in addition to their general verdict of guilty or not guilty. State v. Barnes (N. Dak.) 1917C-762.

(Annotated.)

11. The statutes defining and providing for motion in arrest of judgment prevent former jeopardy being interposed in arrest of judgment. State v. Barnes (N. Dak.) 1917C-762. (Annotated.)

12. Section 13 of the N. Dak. state constitution, that "no person shall be twice put in jeopardy for the same offense," merely prescribes immunity from a second prosecution, and is not a bar thereto unless the immunity given is claimed by a plea of former jeopardy and prior to verdict. State v. Barnes (N. Dak.) 1917C-762. (Annotated.)

Note.

Failure to interpose objection of former jeopardy on second trial as waiver of plea. 1917C-765.

#### FORNICATION.

See Adultery; Prostitution; Seduction.

FOR RESIDENCE PURPOSES. Meaning, see Deeds, 50, 51.

FORTHCOMING BOND. See Replevin, 4.

FOUNDATION FOR IMPEACHMENT. See Witnesses, 96–98.

FOURTEENTH AMENDMENT. See Constitutional Law, 15, 30, 79.

## FRANCHISE.

See Corporations. Ferry franchise, see Ferries.

Of street railway companies, see Street Railways, 1-3.

Right to enjoin illegal taxation of, see Taxation, 95.

Franchise tax, see Taxation, 147, 148. Of telegraph and telephone companies, see Telegraphs and Telephones, 2-5.

- 1. Forfeiture, Construction to Avoid. Forfeitures of franchises are not favored, and legislative enactments of that character are strictly construed. State v. Iowa Tel. Co. (Iowa) 1917E-539.
- 2. Construction of Franchise. Where the meaning of a grant or contract regarding any public franchise is ambiguous or doubtful, it will be construed favorably to the rights of the public. State v. Water Supply Co. (N. Mex.) 1916E-1290.

#### FRATERNAL BENEFIT ASSOCIA-TIONS.

See Beneficial Associations; Insurance.

#### FRATERNITIES,

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#### FRAUD.

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FRAUD. 389

See Fraudulent Sales and Conveyances; Rescission, Cancellation and Reformation.

Assignability of cause of action, see Assignments, 12-14.

In procuring confession, effect, see Confessions, 1.

Fraud in confusion, see Confusion, 8, 9. Misrepresentation and concealment, see Contracts, 53, 100.

Stockholder's action against officers, see

Corporations, 47. Waiver by delay, see Corporations, 65. Survival of actions, see Executors and Administrators, 84, 85.

In procurement of guaranty, see Guar-

anty, 1.

Effect of concealment on antenuptial contract, see Husband and Wife, 18, 19. ground for vacating judgment, see

Judgments, 30, 37, 38. Imputation of, see Libel and Slander, 30. Effect on incontestable clause, see Life Insurance, 29, 32, 34, 36. When cause of action accrues, see Limita-

tion of Actions, 17-19.

ground for vacating award under Workmen's Compensation Act, see Master and Servant, 303.

Fraudulent service of process, see Process, 4-17.

In obtaining release, see Release and Discharge, 5. Warranty as to concealed fact no defense,

see Ships and Shipping, 4. As defense to remedy, see Specific Per-

formance, 8.

Use of one's own name to defraud, see Trademarks and Tradenames, 5, 7.

## 1. WHAT CONSTITUTES.

### a. In General.

1. Representations as to Future. To constitute actionable fraud in the sale of property, the representations must be of existing facts relating to the subject matter of the contract, made by the vendor as inducements, which are false and known by the vendor to be false, or made by him as of his own knowledge without knowledge as to the facts, which are not open to knowledge of or known by the other party, and are relied on by him in making the purchase to his damage; representations as to future facts or promises, or matters of opinion, not constituting actionable fraud. Hunt v. Lewis (Vt.) 1916C-17.

## b. Opinion on Question of Law.

2. Representations as to Foreign Law. In an action tor damages for fraud in the settlement of a fraternal beneficiary certificate, a Missouri contract, by false representations as to the insurer's liability thereunder on suicide of the insured, the evidence is held to show that the representations of the law were correct, and hence that there was no fraud. Travelers Protective Assoc. v. Smith (Ind.) 1917E-(Annotated.)

- 3. Misrepresentation as to Foreign Law. A complaint, alleging that defendant was a mutual assessment accident association, organized under the laws of Missouri; issued its membership certificates to plaintiff's husband, naming plaintiff as the beneficiary entitled to \$5,000 in case of death by accident, the constitution of which association provided that \$100 should be paid the beneficiary where death resulted from suicide, and a rule of which provided that the association should not be liable if insured inflicted fatal injury upon himself while sane or insane; that insured while of unsound mind inflicted a fatal revolver shot; that due notice and proof of death was given and demand made for the amount of the certificate, but that defendant, though knowing that under the laws of Missouri suicide was not a defense, fraudulently represented that it was; that plaintiff in ignorance thereof and in reliance thereon, accepted the sum of \$100 and executed a release of claimsufficiently pleads fraud. Travelers Protective Assoc. v. Smith (Ind.) 1917E-1088. (Annotated.)
- 4. There is no fraud in a representation as to the law of the state of the domicil of the party to whom the representation is made, but the misrepresentation of the law of a foreign state is a misrepresentation of fact. Travelers Protective Assoc. v. Smith (Annotated.) (Ind.) 1917E-1088.

#### Note.

Misrepresentation as to foreign law as fraud. 1917E-1096.

- c. Misrepresentation as to Value.
- 5. Opinion as to Value as Fraud. On an exchange of real property for a rooming house business, where plaintiff is familiar with the rooming house which she received in the exchange, and has some experience in running a rooming house, and knows the rent received for the rooms occupied at the time, and defendants make no false representation as to what they had made by conducting the rooming house, statements by defendants as to what plaintiff could make if she took the rooming house are expressions of opinion, and not statements of fact constituting fraud, or forming the basis for rescission of the exchange. Haney v. Parkison (Ore.) 1916D-1035. (Annotated.)

## d. Breach of Promise.

#### Note.

Right of action for fraud in inducing performance of personal service without intent to pay therefor. 1916C-172.

#### e. Concealment of Facts.

6. Concealment of Lien by Seller. One who sells a ship and the freight on her then voyage two weeks after he has drawn a disbursement note for the total amount of the freight, which he made a lien against the ship as well as the freight, is guilty of actionable fraud in not informing the buyer of the existence of the draft, of which the latter has no means of acquiring knowledge. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

#### f. Abuse of Fiduciary Relation.

7. What Constitutes Fiduciary Relation. Wherever special confidence is reposed by reason of blood, business friendship or association, by one person in another who is in a position to have and exercise or does exercise and have influence over the other, a fiduciary relation may exist. Dawson v. National Life Ins. Co. (Iowa) 1918B-230.

## 2. ACTIONS.

## a. Persons Entitled to Suc.

8. Procuring Personal Property. The rules and principles governing actions for deceit in the sale of real or personal property apply to actions for procuring personal services by fraud. Hunt v. Lewis (Vt.) 1916C-170.

## b. Pleading.

- 9. An amended count in the same declaration, which alleged that defendant had the money with which to pay for the services and he so informed the plaintiff and promised to pay for them, but did not intend to do so, merely alleges a promise, and not a misrepresentation as to an existing fact, and is insufficient. Hunt v. Lewis (Vt.) 1916C-170. (Annotated.)
- 10. Inducing Performance of Personal Services. A declaration for fraud in procuring the services of an attorney, which alleged in the first count that the defendant represented that he would pay for the services, knowing that he would not have the money with which to pay and intending to deceive the plaintiff, and in the second count that the defendant falsely and maliciously represented that he would and could pay for the services, not knowing that he could or would have the money with which to pay, charges representations or promises as to future and not as to existing facts, and therefore does not state a cause of action. Hunt v. Lewis (Vt.) 1916C-170. (Annotated.)
- 11. Alleging Knowledge of Falsity. A count for deceit in the form prescribed by Ala. Code 1907, § 5382, subsec. 21, except that it does not allege defendant's knowledge of the falsity, is sufficient where there is a legal implication of such knowledge from the facts pleaded. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

- 12. Sufficiency of Pleading. In pleadings in chancery for which no abbreviated code form is provided, all the elements of actionable deceit must be severally alleged. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.
- c. Presumptions and Burden of Proof.
- 13. Effect of Fiduciary Relation. Whenever the relations between the contracting parties are such as to render it certain that they do not deal on terms of equality, but that either, on the one side from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or, on the other, from dependence, or a trust justifiably reposed, unfair advantage in a transaction is rendered probable, the transaction is presumed void, and the burden shifts to the stronger party to show affirmatively that no deception was practiced and no undue influence used. Dawson v. National Life Ins. Co. (Iowa) 1918B-230.
- 14. Burden of Proof. Under a count for deceit in the form prescribed by Ala. Code 1907, § 5382, subsec. 21, the burden is on plaintiff to prove every element of actionable deceit. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

## FRAUDS, STATUTE OF.

- 1. Contracts not to be Performed Within a Year, 390.
- 2. Sale of Chattels, 391.
- 3. Estates in Land, 391.
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  - b. Signature of Parties, 392.
  - c. Statement of Consideration, 392.
- 6. Part Performance, 393,
- 7. Performance and Enforcement, 393.
- 8. Pleading and Practice, 393.
- 9. Loss of Memorandum, Effect, 393.

## 1. CONTRACTS NOT TO BE PER-FORMED WITHIN A YEAR.

- 1. Renewal of Written Contract for Year. Where a bookkeeper was employed under a written contract for one year and continued from year to year thereafter, his contract for each of the succeeding years was a contract for one year's service to begin and be performed within the year, and consequently was not within the Va. statute of frauds. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171.
- 2. Contract Depending on Contingency. An oral contract binding one to rear and maintain another's child until the child's maturity is not within the Ky. statute of

frauds requiring contracts to be in writing which are not to be performed in a year, for the child mav die within the year and thereby terminate the contract. Myers v. Saltry (Ky.) 1916E-1134.

(Annotated.)

Note.

Whether contract which depends upon contingency for performance within year is within statute of frauds. 1916E-1136.

## 2. SALE OF CHATTELS.

- 3. Where sale of personal property is made to a buyer in possession, the Cal. statute of frauds does not require him to quit it and to retake possession as the new owner. Wilson v. Hotchkiss (Cal.) 1917B-570. (Annotated.)
- 4. Letention of Vendee in Possession. Under the Cal. statute of frauds providing that sales of personal property for a price of \$200 or more shall be invalid unless there be some written memorandum, except where the buyer accepts part of the goods, the mere words of the buyer, who was already the pledgee in possession, or proof of his acts of dominion over the property inconsistent with his former rights as pledgee, may establish a transfer of possession from that of a pledgee to that of complete ownership. Wilson v. Hotchkiss (Cal.) 1917B-570.

(Annotated.)

- 5. Contract for Sale of Building. A contract for the sale of a house to be immediately removed from the land, to which it is affixed, is a sale of personalty, and not of an "interest in realty," within the Conn. statute of frauds prohibiting an action on a contract for the sale of realty unless it is in writing. Wetkopsky v. New Haven Gas Light Co. (Conn.) 1916D-968. (Annotated.)
- 6. Delivery Avoiding Statute. Where G. orders lumber of F., and F. then orders of T., and T. on the order of and primarily billing it to F. delivers it to G., this amounts to a delivery to F., and by F. to G.; the latter, under Rem. & Bal. Code, § 5290, taking F.'s contract for sale to G. out of the Wash. statute of frauds. First National Bank v. G. Geske & Co. (Wash.) 1917B-564. (Annotated.)
- 7. Part Payment. Within the provision of the Md. Uniform Sales Act (Code Pub. Civ. Laws, art. 83) that a contract to sell or a sale of goods of the value of \$50 or upward shall not be enforceable by action unless the buyer shall accept part of the goods and actually receive them or give something in earnest to bind the contract or in part payment, etc., if a reservation of a growing crop by a grantor amounts to a contract to sell or a sale, the grantor both accepts and receives the crop and gives something in part payment, where the crop is subsequently delivered

to him by a tenant; the conveyance of the property constituting payment in full. Willard v. Higdon (Md.) 1916C-339.

- 8. Sale of Corporate Stock. A contract relating to the sale of corporate stock of the value named falls within the statute of frauds relating to the sale of personal property. Such contract is one for the disposal of goods within the meaning of section 8384 (1), Ohio General Code, and is required to be in writing and signed by the parties to be charged. Davis Laundry, etc. Co. v. Whitmore (Ohio) 1917C-988. (Annotated.)
- 9. Delivery Avoiding Statute of Frauds. Where plaintiff sent orders by mail from time to time to defendants for flour for future delivery, the most of which were accepted in writing, but one was not, deliveries afterward made without any designation of the particular contract on which they were applied were presumptively intended to apply and were applied on the contracts in their chronological order, and, where there was not sufficient to fill the orders prior to the one not accepted, there is no ground for claiming a delivery thereon to take the sale out of the statute of frauds. Van Boskerck v. Torbert (Fed.) 1916E-171.

#### Notes.

Effect on sales of corporate stock of seventeenth section of statute of frauds and equivalent enactments. 1917C-991.

Symbolical or constructive delivery of goods within statute of frauds. 1917B-566.

Continuance of existing possession by vendee as sufficient delivery to take verbal sale of goods out of statute of frauds. 1917B-572.

Contract for sale of building as contract for sale of realty within statute of frauds. 1916D-970.

## 3. ESTATES IN LAND.

- a. Agreements Other Than Contracts of Sale.
- 10. Parol Reservation of Growing Crop. As a growing crop may be sold by parol, a parol reservation of such a crop upon a conveyance of land is valid, since a crop may be so dealt with as to make it personal property, and therefore does not necessarily pass with the land upon which it is growing. Willard v. Higdon (Md.) 1916C-339. (Annotated.)

Note.

Validity of parol reservation of crops by vendor of land. 1916C-344.

#### b. Contracts of Sale.

11. Transfer of Growing Crop. Growing crops, if fructus industriales, such as a crop of wheat, are chattels, and may be

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sold without complying with the requirements of the statute of frauds, especially in view of Md. Uniform Sales Act (Code Pub. Civ. Laws, art. 83), § 97, providing that "goods" includes all chattels personal other than things in action or money, and that the term includes emblements, industrial growing crops, and things attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale. Willard v. Higdon (Md.) 1916C-339.

## c. Agreements With Agent.

12. Broker's Authority to Sell. Under Colo. Rev. St. 1908, § 2660, providing that no estate or interest in lands other than leases for not exceeding one year shall be created, granted, etc., unless by operation of law or by a conveyance in writing subscribed by the party creating it, or by his lawful agent thereunto authorized by writing, section 2662, requiring contracts for the sale of the land to be in writing and subscribed by the party by whom the sale is made, section 2663, providing that such instruments may be subscribed by such party's agent lawfully authorized by writing, and section 2677 defining "convey-ance" as used in that chapter as embracing every instrument in writing except a will by which any estate or interest in lands is created, aliened, assigned, or surrendered, an agent's authority to contract for the sale of land on behalf of his principal must be conferred in writing. Springer v. City Bank, etc. Co. (Colo.) 1917A-520.

# 4. PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

13. Agreement of Stockholder to Repay Advance to Corporation. A promise by a stockholder that he will repay advances to be made to the corporation, on the strength of which advances are made, creates an original and not a secondary liability and is not within the Can. statute of frauds. Gillies v. Brown (Can.) 1917D—354. (Annotated.)

## 5. SUFFICIENCY OF MEMORANDUM.

## a. In General.

14. Memorandum Insufficient. A writing which stated the receipt from plaintiff of \$5 "deposit on house No. 44 Mill street, balance of \$35 to be paid on or before the date named," and signed by defendant, and another writing, signed by defendant, reciting the receipt from plaintiff of \$35 "balance on house No. 44 Mill Street," were insufficient as memoranda of any contract for the sale of land, not showing any sale. Wetkopsky v. New Haven Gas Light Co. (Conn.) 1916D-968.

15. Contract of Sale—Evidence of Writing Insufficient. Evidence in behalf of cross-complainant in ejectment claiming under a contract for a conveyance by de fendant bank, plaintiff's grantor, is held to be insufficient to prove any written agreement or memorandum to convey the realty, as required by Ore. L. O. L. § 808, subd. 6. Brown v. Farmers', etc. National Bank (Ore.) 1917B-1041.

## b. Signature of Parties.

16. Sale of Goods. An unsigned statement given by defendants to plaintiff, purporting to show the number of barrels of flour sold by defendants to plaintiff and remaining undelivered, which included a certain number of barrels sold on a certain date, is not a sufficient memorandum to take such sale out of the statute of frauds of New York, which requires contracts of sale of goods for the price of \$50 or more not delivered to be evidence by some note or memorandum in writing subscribed by the party to be charged or Van Boskerck v. Torbert (Fed.) his agent. 1916E-171.

17. Printed Signature. A printed and written contract between an owner of land and a broker or agent for the sale of land was signed by the owner by his own hand. The signature of the broker was printed. The broker acted upon the contract. In this, an action to recover a commission for the sale of the land described in the contract, the trial court excluded the paper as not being sufficient under section 2628, Rev. St. 1913, and refused an offer to show that the land was sold by virtue of the contract. Held, that the rulings were erroneous. Berryman v. Childs (Neb.) 1918B-1029. (Annotated.)

## Note.

Sufficiency of printed signature to memorandum within statute of frauds. 1918B-1030.

#### c. Statement of Consideration.

18. Necessity of Stating Consideration. Under Ore. L. O. L. § 808, declaring void certain agreements, including one authorizing or employing an agent or broker to sell real estate for compensation or a commission, unless the same, or a memorandum thereof, expressing the considerations, be in writing and subscribed by the party to be charged, the written authorization to a broker to sell real estate must state the compensation to be paid him. Taggart v. Hunter (Ore.) 1918A-128.

## (Annotated.)

## Note.

Necessity for statement of consideration in contract within statute of frauds other than contract to answer for debt of another, 1918A-134,

## 6. PART PERFORMANCE.

19. Verbal Agreement to Divide Estate. Where plaintiff's father before his death made an agreement with his children for the distribution of his property, giving equal shares to all except to the plaintiff. who was a cripple and in ill health, and who continued to live with her father, and where he executed deeds to the other children for the property which they were to receive under the agreement, but failed to execute a deed to plaintiff for the 75 acres of the home place which she was to receive, and thereafter, by acts of the defendant, the father was led to deed a portion of the 75 acres orally given to plain-tiff to the defendant, plaintiff was entitled to a decree setting aside the deed to the defendant and vesting title in her, in spite of the statute of frauds. Simmons v. Ross (III.) 1916E-1256.

20. Delivery of Stock. The delivery of the 242 shares of stock to the National Bank of Commerce, accompanied by defendant's possession and operation of the plant for a period of two weeks, was evidence justifying a jury in finding that this was an acceptance under the verbal contract, and took the case out of the Ohio statute above mentioned. Davis Laundry, etc. Co. v. Whitmore (Ohio) 1917C-988. (Annotated.)

#### 7. PERFORMANCE AND ENFORCE-MENT.

- 21. Executed Contract. The statute of frauds does not apply to executed contracts; hence the acceptance by defendant of part of the materials purchased by plaintiff, who agreed to furnish the materials and stake out a telephone line of sixteen sections, takes the case without the Vt. statute. Camp v. Barber (Vt.) 1917A-451.
- 22. Oral Contract as Defense. A party may rely upon an oral contract as a defense, though the contract could not be enforced on account of the statute of frauds, especially in view of the provision of the Md. Uniform Sales Act (Code Pub. Civ. Laws, art. 83) that a contract to sell or a sale "shall not be enforceable" un-less the buyer shall accept part of the goods and actually receive them, etc. Willard v. Higdon (Md.) 1916C-339.

## PLEADING AND PRACTICE.

23. Necessity of Pleading as Defense. The defense of statute of frauds is waived, not being pleaded or otherwise raised in the trial court, though the complaint fully disclosed the basis of plaintiff's claim. First National Bank v. G. Geske & Co. (Wash.) 1917B-564.

## 9. LOSS OF MEMORANDUM, EFFECT.

24. Proof of Lost Memorandum. The contents of a written memorandum of sale required by the statute of frauds, which has been lost, may be proved by parol, and proof of a statement by a defendant that an order for merchandise sent by letter had been accepted by mail is sufficient to establish such a written memorandum of sale, although the acceptance was not received by plaintiff. Van Boskerck v. Torbert (Fed.) 1916E-171.

(Annotated.)

#### Note.

Proof by parol of contents of lost memorandum required by statute of frauds, 1916E-173.

#### FRAUDULENT SALES AND CONVEY-ANCES.

In General, 393.

Transactions Invalid, 393.

3. Remedies of Creditors, 394.

4. Avoidance of Conveyance, 394.

a. Who may Avoid, 394.b. Evidence, 394.

c. Instructions, 394.

- 5. Property Subject to Claims of Creditors.
- 6. Sales in Bulk Acts, 395.

a. Validity, 395.

b. Construction, 395.c. Defenses, 395.

d. Liability of Purchaser, 395.

What law governs, see Bankruptcy, 17. Avoidance in bankruptcy, see Bankruptcy, 12, 17-20.

Conveyance of homestead, validity, see Homestead, 12-16.

Suit to set aside transfer, see Limitation of Actions, 9, 10.

## 1. IN GENERAL.

- 1. Right to Prefer Creditor. At common law a debtor may prefer one creditor to another, provided there is no secret trust for the debtor; and such genuine transfer is not vitiated by the fact that in other respects the preferred creditor desired to and did help the debtor to secre'e his property from another creditor. Gurney v. Tenney (Mass.) 1918A-739.
- 2. Conveyance in Consideration of Support. A conveyance by an old and feeble man, of his homestead to his daughter in consideration of her caring for him in his old age is not necessarily fraudulent. McKillip v. Farmers' State Bank (N. Dak.) 1917C-993.

#### 2. TRANSACTIONS INVALID.

3. Voluntary Conveyance Producing Insolvency. Where a debtor conveys unexempt property without consideration and without retaining sufficient other property to pay his then existing debts, the conveyance is void as against prior creditors. Thysell v. McDonald (Minn.) 1917C-1015.

## 3. REMEDIES OF CREDITORS.

- 4. Right to Ignore Conveyance. Under Ky. St. § 1907, declaring that every conveyance by a debtor without valuable consideration shall be void as to his then existing liabilities, where the legal title to land vested in a debtor's children un-der a conveyance from their grandfather to whom their father conveyed, is subject only to the claim of the debtor's creditors to the extent of \$50, the amount of the purchase price paid by the father, no part of the property can be subject to the creditor's claim without a proceeding to have the conveyance declared to be fraudulent as to amount paid by the father, and in such case an execution could not be levied thereon on the theory that the title thereto never passed. Hall v. Casebolt (Ky.) 1917C-1012.
- 5. Where conveyances by a debtor through his father to his children were without consideration, the conveyances are void under Ky. St. § 1907, as to prior debts, and no title passes to the grantee, and the property may be sold under an execution against the debtor, ignoring the fraudulent conveyances. Hall v. Casebolt (Ky.) 1917C-1012.

## 4. AVOIDANCE OF CONVEYANCE. a. Who may Avoid.

- 6. Mortgagee of Other Land. A mortgagee may maintain a suit to set aside a fraudulent conveyance of property other than that covered by the mortgage by a purchaser assuming payment of the mortgage debt, where the purchaser is insolvent. Fidelity Mortgage Bond Co. v. Morris (Ala.) 1917C-952. (Annotated.)
- 7. Consideration—Indemnity to Surety. A surety who guaranteed performance of a contract may, upon furnishing the principal with advances necessary to enable him to carry out his contract, demand security, and other creditors of the principal cannot attack mortgages given or assignments made as in fraud of creditors. Dickey v. Southwestern Surety Ins. Co. (Ark.) 1917B-634.
- 8. Withholding Deed from Record. Where a grantee withheld his conveyance from record for over three years, during which time the grantor was in open and exclusive possession of the land, the conveyance being withheld so as not to impair the credit of the grantor, the conveyance is, as to those extending credit on the faith of the grantor's apparent ownership, fraudulent; consequently a complaint by the grantor's trustee in bankruptcy, alleging such facts, is good against demurrer. Manders v. Wilson (Fed.) 1918A-1052. (Annotated.)

#### b. Evidence.

9. Sufficiency of Evidence. After plaintiff obtained verdict against T., T. induced

- H. to foreclose her second mortgage on his property, and after she had been obliged to pay the first mortgage she insisted on a change; and the property was conveyed to P., by arrangement between P. and T., and P. gave a first mortgage to a bank and a second mortgage to H., the two being less than the original mortgages. It is held that, as against a finding of no fraudulent purpose by H., it was not necessary, as matter of law, to attribute one to her. Gurney v. Tenney (Mass.) 1918A-739.
- 10. Proof of Fraud. Where one seeks to set aside a deed on the ground of fraud, his proof must be clear and convincing. McKillip v. Farmers' State Bank (N. Dak.) 19170-993.
- 11. In an action to quiet title to two tracts of land and to set aside a levy and sale thereof in a creditor's suit against the debtor, the plaintiff's father, the evidence is held to show that the debtors' conveyance of the tract to the plaintiffs was voluntary, without consideration, and for the fraudulent purpose of defeating his creditors. Hall v. Casebolt (Ky.) 1917C-1012.
- 12. Sufficiency of Evidence. In an action by the assignee of a judgment to subject corporate stock and bonds thereto, the evidence is held to show that the securities were sold in good faith by the judgment debtor, with indorsement and delivery, to interveners, his creditors. Husband v. Linehan (Ky.) 1917D-954.

#### Note.

Delay in recording deed as constituting fraud on creditors of grantor. 1918A-1054.

## c. Instructions.

13. Consideration—Payment by Grantee of Balance of Price Due from Grantor. The court erred in instructing the jury that if one who was insolvent conveyed to another property upon which he owed an unpaid balance of the purchase price, upon the sole consideration of payment of the balance of the purchase money, by the transferee, such conveyance would be without a valid consideration and void as against other creditors; that the equity which the vendor had, if he had an equity, in the property under the circumstances stated, was subject to his debts, and that he could only "convey it for a valuable consideration; otherwise, it belonged to his creditors, and he could not give it away to a person without receiving something for it which would inure either to the benefit of himself or his creditors." conveyance by an insolvent under the circumstances to another party upon the consideration of the payment by the latter of the balance of the unpaid purchase money would not be without consideration, and

would not be a mere voluntary conveyance, and it was error to so instruct the jury; though they might properly have been informed that in passing upon the bona fides of the transaction between the vendor and his transferee they could take into consideration the value of the equity in the land with which the vendor was vested and the amount of the unpaid purchase money, and the insolvency of the grantor. Ga. Civ. Code, § 4244. Loewenherz v. Merchants', etc. Bank (Ga.) 1917E—877.

## 5. PROPERTY SUBJECT TO CLAIMS OF CREDITORS.

14. Proceeds of Fire Insurance Policy. The proceeds of the insurance on a building on land conveyed to insured in fraud of the creditors of the grantor do not take the place of the property destroyed by fire, and the trustee in bankruptcy of the grantor may not recover them. Trenholm v. Klinker (Miss.) 1917E-289.

(Annotated.)

Note.
Right to proceeds of insurance on property conveyed in fraud of creditors.
1917B-291.

## 6. SALES IN BULK ACTS. a. Validity.

a. Validity.

15. The Act of April 18, 1913, to amend section 11102 et seq., Ohio General Code, relating to the transfer of stocks of merchandise and fixtures other than in the usual course of trade (103 O. L. 462), is a valid enactment not repugnant to the state or federal constitutions. Steele, etc. Co. v. Miller (Ohio) 1917C-926.

(Annotated.)

16. The New York Bulk Sales Law (Personal Property Law, § 44) invalidating as to creditors a sale in bulk of a stock of merchandise is constitutional. Klein v. Maravelas (N. Y.) 1917B-273.

(Annotated.)

17. The Ark. Bulk Sales Law (Laws 1913, p. 326), which requires a purchaser of stock of goods in bulk to give notice to creditors before purchase, is not invalid as violating Const. art. 2, §§ 2 and 18, guaranteeing the right of acquiring, possessing, and protecting property, and prohibiting the granting of special privileges and immunities to any person or class. Stuart v. Elk Horn Bank, etc. Co. (Ark.) 1918A-268.

(Annotated.)

#### b. Construction.

18. Notice to Creditors of Seller. Ark. Bulk sales act requires the seller to furnish a written list of the names and addresses of his creditors with the amount of indebtedness due each not less than ten days before the sale and delivery, and requires the purchaser, before taking pos-

session of the stock of goods or paying the purchase price, to notify personally, or by registered mail, every creditor whose name appears on the list, or of whom he has any knowledge, of the sale. Defendant purchased the stock of goods, agree-ing to assume payment of all indebtedness which the debtor disclosed. The debtor concealed his indebtedness to the plaintiff bank, and the list of creditors was not prepared by the debtor ten days before the sale, nor were the notices given at that time. Defendant paid all the creditors of whose claims he was notified. It is held that, as the statute in requiring notice to be given some days before the sale contemplated that creditors who were not notified might learn of the proposed defendant did not substantially comply with the act so as to escape liability to plaintiff. Stuart v. Elk Horn Bank, etc. Co. (Ark.) 1918A-68.

## c. Defenses.

19. Waiver of Failure of Seller to Comply. Where the owner of a stock of merchandise, in good faith, and for a fair consideration placed in escrow during the consummation of a transfer of such stock, proceeds to comply with the provisions of the Okla. Bulk Sales Act (section 2903, Rev. Laws 1910), and furnishes a list of his creditors to the representative of the purchasers, which list complies substantially with the requirements of the statute, but where the notice given the creditors was signed by the transferor instead of the transferees, a resident creditor, who receives such notice with knowledge of all the facts connected with the proposed sale, and who assents thereto, waives any objection he might otherwise have to a strict compliance with the statute, and is estopped from thereafter, and within the ten-day period named in the statute, attaching the stock of goods, on the ground that the seller has not fully complied with the statute. First Bank of Texola v. Terrell (Okla.) 1917A-681.

## d. Liability of Purchaser.

20. Effect of Failure to Comply With Act. Though a purchaser of a stock of goods in bulk did not comply with the bulk sales act, he does not become liable for all of the debts of the seller, but only for the seller's debts, so far as they can be satisfied out of the stock of goods which he is held to be a receiver for benefit of the seller's creditors. Stuart v. Elk Horn Bank, etc. Co. (Ark.) 1918A-268.

## FREEDOM OF PRESS.

See Contempt, 4-6.

## FREE SCHOOLS.

See Schools.

## DIGEST. 1916C—1918B.

FREIGHT CHARGES. See Carriers of Goods, 15-23.

#### FROM.

Meaning, see Time, 5, 7.

#### FRONT FOOT RULE.

For special assessment, see Taxation, 132.

## FRUCTUS INDUSTRIALES.

Sale by parol, see Frauds, Statute of, 11.

#### FRUIT STAND.

See Nuisances, 6. Meaning, see Streets and Highways, 22.

#### FRUIT TREES.

Destruction of diseased trees, see Agriculture, 2, 3.

## FUGITIVE FROM JUSTICE.

Meaning, see Extradition, 2.

GAMBLING.

See Gaming.

#### GAME LAWS.

See Fish and Game. Defined, see "Animals," 26.

#### GAMING.

As ground for deportation, see Aliens, 23. Consideration, see Bills and Notes, 6.

1. "Pool." In a prosecution under Pen. Code 1913, § 321, for conducting a gambling device consisting of a pool known as "pari mutuel," conviction set aside. McGall v. State (Ariz.) 1918A-168.

(Annotated.)

2. What Constitutes Lottery. Revisal 1905, § 3726, declares that any person who shall promote a lottery, or by such means sell or dispose of any property, evidences of debt, etc., shall be guilty of an offense. Defendant took orders for furniture, under contracts providing for weekly instalments until the entire purchase price should be paid, but holding out the prospect that the purchaser might for advertising purposes be given the article before the payments had been completed. The contracts further provided that a lapse in payment should work forfeiture. It is held that as the purchasers had no control over the way in which the prizes were to be distributed, and as the prizes were ordinarily given before any advertising was done, the transaction was a "lottery," which term in common parlance means a scheme for the distribution of prizes, by lot or chance,

by which one, on paying money or giving any other thing of value, obtains a token, which entitles him to receive a larger or, smaller value, as some formula of chance may determine; the fact that the purchasers could at all events keep up their payments, and ultimately receive the furniture, not changing the nature of the transaction. State v. Lipkin (N. Car.) 1917D-137.

(Annotated.)

### GARAGE.

As a nuisance, see Nuisances, 17.

#### GARNISHMENT.

- 1. Bank Deposit in Name of Debtor. Money deposited in bank by a judgment debtor as agent for a third person cannot be reached by garnishment proceedings by the judgment creditor, who did not extend credit on faith of the deposits being the agent's. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143.
- (Annotated.)
  2. Funds in Hands of Executor or Administrator. Section 228 of the code authorizing creditors to proceed by garnishment against "any person" who shall be indebted to, or have any property, real or personal, in his possession or under his control belonging to, the debtor, is sufficiently broad in its terms to authorize an action in garnishment against an executor or administrator after an order of final distribution. Sherman v. Havens (Kan.) 1917B-394.
- 3. It being one of the agreed facts in the present case that the estate of the testator is solvent and able to respond to the quarterly payments due to the beneficiary, and that they have made such payments to him in advance and recognized the provision, no order of distribution was necessary in order to authorize them to make the payments, and such quarterly payments are subject to attachment before final settlement. Sherman v. Havens (Kan.) 1917B-394.
- 4. Deposit With Sheriff to Discharge Liens. The proceeds of a cashier's check deposited by a bank with a sheriff and receiver to secure the discharge of a loggers' liens in a foreclosure suit is not subject to garnishment at the suit of other creditors of the defendant in the foreclosure action, though the check was in-dorsed by the sheriff to the clerk of the court and was by him cashed, and though defendant prevailed as against the loggers' liens, where the check was not a loan by the bank to defendant, but was a special deposit to be returned to the bank in the event that it was not used for the purpose intended, and it was immaterial that a note for the amount of the check was given by defendant to the bank to evidence the transaction. Beaston v. Portland Trust, etc. Bank (Wash.) 1917B-488.

5. Bank Account of Third Party in Debtor's Name. In garnishment proceedings by a judgment creditor against a bank having on deposit funds of the judgment debtor, held by the latter as agent for a third person, the evidence is held to warrant the conclusion that the transaction between the judgment debtor and his principal, resulting in the deposit of the funds in the debtor's name, was conducted in good faith. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143. (Annotated.)

#### Note.

Money standing in name of debtor but belonging to third person as reachable in garnishment proceeding. 1917C-1145.

#### GAS AND GAS COMPANIES.

Judicial notice of nature of gas, see Evidence, 16.

Sufficiency of garnishee's intervention plea, see Intervention, 2, 3.

Ordinance fixing rates, see Constitutional Law, 116.

Nature of gas and oil lease, see Landlord and Tenant, 2, 3.

- 1. Rate Regulation. The property of a gas-distributing company cannot be said to have been taken without due process of law, contrary to U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), by a decree which enforced, without prejudice to the right to apply thereafter for modification, a municipal ordinance fixing gas rates for five years, where there was no claim that the company could not operate profitably under such ordinance so long as its contract with a producing gas company, under which the latter was to furnish gas to the former upon the basis of a percentage of meter readings, which had two or three years to run when the suit was commenced, remained in force, and no evidence was offered to show the rate paid by the distributing to the producing company after the expiration of such contract. Newark Natural Gas, etc. Co. v. Newark (U. S.) 1917B-1025. (Annotated.)
- 2. Liability for Injury Caused by Escape. Defendant manufactures and distributes illuminating gas. Such gas, when allowed to escape, in any considerable quantity, becomes a highly dangerous substance, and the defendant must exercise a commensurate degree of care to prevent the gas from escaping up to the time it is measured and delivered, through its meter, to the consumer. Manning v. St. Paul Gaslight Co. (Minn.) 1916E—276. (Annotated.)
- 3. The rule of res ipsa loquitur may be applied to a situation which discloses that gas escaped in destructive quantities from a break in the service pipe installed by the gas company upon the consumer's premises, at his cost, where the evidence further shows that there had been no work or change upon such premises which could

- have affected the pipe, and no interference therewith. Under this rule defendant was not entitled to a directed verdict. Manning v. St. Paul Gaslight Co. (Minn.) 1916E-276. (Annotated.)
- 4. Complaint Held Sufficient. The complaint, without the permitted amendment, held sufficiently broad to admit of proof showing improper installation of the service pipe. Manning v. St. Paul Gaslight Co. (Minn.) 1916E-276.
- 5. Extension of Mains—Reasonableness of Order. The fact that the increased return from an extension of gas mains ordered by a Public Service Commission amounts to less than three per cent on the cost of making the extension does not show that the order is arbitrary or capricious. People v. McCall (N. Y.) 1916E—1042.
- 6. Proof of Reasonableness of Rates—Rate Prevailing Elsewhere. In proceedings by a city against a gas company before the Public Service Commission, the fact that other cities of similar population are procuring gas at a much less rate than defendant company charges is some evidence of the fact that its rates are unreasonable. State v. Public Service Commission (Mo.) 1917E-786.
- 7. Regulation of Rates—Power to Make Test Order. In a city's proceeding before the Public Service Commission against 2 manufacturer and distributer of gas, the evidence tended to show an exorbitant rate for gas in the city, and that a reduction in rates would increase the sales or consumption. It is held that an order of the commission fixing lower rates for the gas company temporarily, merely to make a test, that the real question of a reasonable rate might be ultimately determined, the order leaving that open, was not unreasonable. State v. Public Service Commission (Mo.) 1917E—786. (Annotated.)

## Notes.

Liability of gas company for injury caused by escape of gas from pipes. 1916F-277.

State or municipal regulation of gas rates. 1917B-1026.

#### GASOLINE,

Judicial notice of properties of, see Evidence, 15.Storage as a nuisance, see Nuisances, 5.

GASOLINE LIGHTING PLANT. Explosion of, see Negligence, 90, 99.

GENERAL.

Meaning, see Descent and Distribution, 5.

GENERAL AND SPECIAL LAWS. See Constitutional Law, 86-88. GENERAL APPEARANCE. See Appearances, 3-6.

## GENERAL DENIAL.

See Pleading, 31, 32.

#### GEOGRAPHICAL NAME.

Acquisition of exclusive right to use, see Trademarks and Trademames, 4.

### GIPTS.

1, Gifts Inter Vivos.

a. Nature and Elements.

b. Subjects of Gift.

c. Delivery and Acceptance.

d. Evidence.

2. Gifts Causa Mortis.

a. Nature and Elements.

b. Delivery.

c. Evidence.

Charitable gifts, see Charities, 10-26. Creating disability to pay debts, validity, see Fraudulent Sales and Conveyances, 3.

Suit to set aside, see Laches, 1.
Parent to child, see Parent and Child, 6.
Statute against perpetuities not applied to charities, see Perpetuities, 5, 6, 10.
Validity of Sunday gift, see Sundays and Holidays. 7.

Construed as creating tenancy in common, see Tenants in Common, 3.
Testamentary gift, see Wills, 216-218.

## 1. GIFTS INTER VIVOS.

a. Nature and Elements.

1. Between Husband and Wife—Death of Husband. Where a husband had on a trip abroad given his wife express checks for their expenses amounting to \$800, and at another time sent her \$2,000 in a draft, and there is no showing that he intended that she should account therefor, she is entitled to retain the same on his death. Stratton v. Wilson (Ky.) 1918B-917.

#### b. Subjects of Gift.

- 2. Parol Gift of Mortgage. A valid gift inter vivos of a mortgage may be made without a writing. Hoyt v. Gillen (Mich.) 1916C-812. (Annotated.)
- 3. Note Payable to Donor's Estate. Where a person takes a note payable to his estate he does not thereby deprive himself of the right to dispose of it during his lifetime. Poole v. Poole (Kan.) 1918B-929.

#### Note.

Validity of gift of mortgage intervivos without writing. 1916C-814.

#### c. Delivery and Acceptance.

4. An owner of a bank deposit when making an additional deposit informed the

assistant cashier that she wanted the deposit arranged so that in case she died, her two children P and D could get the money, but so that she could draw the interest. The money was thereupon placed in an account by itself, and entered in the depositor's passbook as "payable to P or D, an equal amount to each," but in the bank's ledger as "payable to self or P or D, an equal amount to each." It is held that there was a gift of the money to the two children and a delivery thereof to the bank as trustee to be held by it for their use and benefit during the life of the depositor, with the right on her part to have the use and benefit of the accruing interest. Boyle v. Dinsdale (Utah) 1917E-363. (Annotated.)

- 5. That the depositor's passbook is in her possession at the time of her death does not prevent the gift from taking effect, since there was an actual delivery of the money to the bank as trustee, and a symbolical delivery by delivery of the passbook was unnecessary. Boyle v. Dinsdale (Utah) 1917E-363. (Annotated.)
- 6. The gift is not invalid on the ground that it is a testamentary disposition. Boyle v. Dinsdale (Utah) 1917E-363.

  (Annotated.)

## Note.

Complete execution of gift inter vivos by deposit of money in bank to credit of another. 1917E-367.

## d. Evidence.

- 7. Sufficiency of Evidence of Gift. A finding of a gift inter vivos of a note and mortgage affirmed by equally divided court. Hoyt v. Gillen (Mich.) 1916C-812.
- 8. The entry of the deposit on the bank's ledger as payable to the depositor or to the two children did not affect the validity of the gift, as a trust in personalty need not be in writing or in any particular form. Boyle v. Dinsdale (Utah) 1917E-363.

  (Annotated.)
- 9. Corroborating Testimony as to Gift. Where plaintiff, to show that his intestate, while living with defendant, had not, as claimed by defendant, given him all of her property for her support, showed that she gave defendant's young daughter fifty dollars, defendant could, as against objection going only to its weight, in corroboration of his testimony that he gave intestate the money with which to make the gift, introduce his personal cashed check for fifty dollars, payable to R, and indorsed by him for her. Comstock's Administrator v. Jacobs (Vt.) 1918A-465.
- 10. Deposit in Bank in Name of Donee. In an action involving the title to money deposited in a bank and entered in the depositor's passbook as "payable to P or D (children of the depositor), an equal amount to each," but entered in the bank's

ledger as "payable to self or P or D, an equal amount to each," the evidence is held to be sufficient to show that it was the depositor's intention that she should have the right to have the interest for her own use during her life if she so desired, and that the principal sum should go to the two children. Boyle v. Dinsdale (Utah) 1917E-363. (Annotated.)

#### Note.

When gift to "children" and like includes child en ventre sa mere. 1916E-1034.

#### 2. GIFTS CAUSA MORTIS.

#### a. Nature and Elements.

11. Validity of Gift Causa Mortis. Gifts causa mortis, if made by competent persons, and fully executed, are valid, in the absence of fraud or undue influence if the rights of creditors are not affected. Baber v. Caples (Ore.) 1916C-1025.

## b. Delivery.

- 12. Gift of Note. Whether a gift of a promissory note or other chose in action is causa mortis or inter vivos, the actual delivery of the written evidence of the debt is sufficient, without any assignment or indorsement. Baber v. Caples (Ore.) 1916C-1025.
- 13. Requisites of Gift Causa Mortis. A "gift causa mortis," like a gift inter vivos, must be completely executed and go into immediate effect, and be accompanied by an actual and complete delivery. Baber v. Caples (Ore.) 1916C-1025.

## c. Evidence.

- 14. Evidence Sufficient. Evidence held to show that decedent gave the promissory notes in controversy to defendant; that she indorsed each of them with her own hand, and delivered them to the defendant with intent to vest title in him, and that he accepted them as a gift causa mortis. Baber v. Caples (Ore.) 1916C-1025.
- 15. Undue Influence—Persons Engaged to be Married—Presumption. Where a relation of confidence exists, as between a man and woman engaged to be married, it is incumbent upon the donee causa mortis to show that the gift was not obtained by fraud or undue influence. Baber v. Caples (Ore.) 1025. (Annotated.)
- 16. No Presumption. While gifts causa mortis are sustained only on clear proof of the essential facts, there is no presumption of law against them. Baber v. Caples (Ore.) 1916C-1025.
- 17. Fraud and Undue Influence. Evidence held to show that a gift causa mortis was not induced by fraud or undue influence of the dones. Baber v. Caples (Ore.) 1916C-1025.

#### GOOD FAITH.

No defense to false imprisonment, see Hospitals and Asylums, 4.

#### GOODS.

Defined, see Frauds, Statute of, 11.

#### GOODS AND CHATTELS.

Meaning, see Executors and Administrators, 2.

#### GOOD WILL,

See Sales, 3, 19.

#### GOVERNOR.

Grant of conditional pardon, see Pardons, 4.

Veto power, see Statutes, 23, 24, 27.

- 1. Civil Liability for Official Acts. The office of governor is political and the discretion vested in the chief executive by the constitution and laws of the state respecting his official duties is not subject to control or review by the courts. His proclamations, warrants and orders made in the discharge of his official duties are as much due process of law as the judgment of a court. Hatfield v. Graham (W. Va.) 1917C-1.
- 2. The governor cannot be held to answer in the courts in an action for damages resulting from the carrying out of his lawful orders or warrants issued in good faith in discharge of his official duties. Hatfield v. Graham (W. Va.) 1917C-1.

#### GRADE CROSSINGS.

See Railroads, 19-25, 50, 51, 64-77.

#### GRAND JURY.

1. Powers and Duties, 399.

2. Selection, 400.

3. Number, 400.

Misconduct, effect on indictment, see Indictments and Informations, 1.

Member as complainant, see Indictments and Informations, 23, 24,

Resubmission, see Indictments and Informations, 26, 27.

Disqualification of member for trial jury, see Jury, 21.

Expunging report of district attorney's misconduct, see Prosecuting Attorneys, 3, 4.

## 1. POWERS AND DUTIES.

drawn, summoned and impaneled to serve during a term of court continuing two weeks, and, having completed their work at or near the end of the first week, were discharged by the court for the term, and

on the day following their discharge a homicide was committed in the county in which the court was being held, and the court by appropriate written order directed the sheriff and regular bailiffs sworn at the term of the court then being held to resummon the same grand jury to reconvene during the second week of the court, for the purpose of investigating the case of the person charged with the murder of the person killed, and also to take into consideration any other matter that might legally come before the grand jury during the term, such reconvening of the grand jury was legal, and an indictment properly found by them against such person was also legal.

The order of the court reconvening the grand jury, after they had been discharged, had the effect of abrogating the former order of discharge. Bird v. State (Ga.) 1916C-205. (Annotated.)

2. Powers of Grand Jury. Under Comp. Laws 1897, §§ 1395, 11443, authorizing a grand jury to make reports or presentments relating to trespass on public lands and violations of election laws, and sections 11891, 11893, providing how indictments shall be found, without providing for the filing of a report or presentment reflecting on the conduct of public officials a grand jury has no right to file a report reflecting on the official conduct of the prosecuting attorney, unless followed by an "indictment," which is a written accusa-tion that one or more persons have committed a crime, presented on oath by a grand jury; for a "presentment," as dis-tinguished from an "indictment," is a notice taken by a grand jury of any offense from its own knowledge or observation without a bill of indictment laid before it at the suit of the commonwealth, and is generally regarded in the light of instructions on which an indictment must be found. Bennett v. Kalamazoo Circuit Judge (Mich.) 1916E-223.

(Annotated.)

Power of grand jury to report crime or misconduct otherwise than by indictment or presentment. 1916E-228.

Power of court to reassemble discharged grand jury. 1916C-207.

#### 2. SELECTION.

3. Irregularity in Drawing. So much of section 3, c. 157, serial section 5539, Code 1913, as relates to the issuance of a venire facias for grand jurors is directory, and the failure to issue such writ will not vitiate an indictment found by a grand jury selected and drawn, in the manner provided by the statute, who actually attended and are impaneled and sworn according to law. Such a grand jury is lawfully constituted. State v. Wetzel (W. Va.) 1918A-1074. (Annotated.)

- 4. Likewise, the failure of the clerk of the circuit court to issue a summons requiring the clerk of the county court to attend the drawing of grand jurors, does not affect the legal status of a stand jury, provided the clerk of the county court does actually attend and assist in the drawing of such grand jurors. State v. Wetzel (W. Va.) 1918A-1074. (Annotated.)
- 5. The presence of the clerk of the county court at the drawing of grand jurors, and the list of names of persons selected by the county court to serve as such, as well as its delivery to and preservation by the clerk of the circuit court, are all indispensable requirements, and a failure to comply with all, or any one, of them renders the grand jury illegal and their indictments void because not selected in the manner provided by law. Respecting these matters the statute is mandatory. State v. Wetzel (W. Va.) 1918A-1074. (Annotated.)

## Note.

Legality of grand jury not selected in accordance with statute. 1918A-1080.

## 3. NUMBER.

- 6. Quorum, Number Constituting. The provisions of section 3 of Act No. 98 of 1880 that the grand jury for the parish of Orleans should consist of sixteen members, twelve of whom should constitute a quorum, were entirely superseded by the provisions of article 117 of the constitution of 1898 (retained in the constitution of 1913) that the grand jury shall consist of twelve members, nine of whom must concur to find an indictment. The number required to constitute a quorum is the number who must concur to find an indictment. State v. Pailet (La.) 1918A-102. (Annotated.)
- 7. As the law only requires the concurrence of nine members of the grand jury to find an indictment, it does not require the presence of more than nine members during the deliberations or finding or presentment of the indictment. State v. Pailet (La.) 1918A-102. (Annotated.)

### GRAND LARCENY.

See Larceny, 3.

GRATUITOUS UNDERTAKINGS. See Automobiles, 30.

#### GRAVEYARDS.

See Cemeteries.

GROUNDS FOR NEW TRIAL. See New Trial, 3-24.

#### GUARANTY.

Power of banks to guarantee, see Banks and Banking, 1-3.

Warranty distinguished, see Sales, 16.

1. Fraud in Procurement. The evidence is held to sustain findings that a guaranty was procured by fraud. American National Bank v. Donnellan (Cal.) 1917C-744.

#### GUARDIAN AND WARD.

- 1. Nature of Relationship, 401.
- 2. Appointment, 401.

a. In General, 401.

- b. Proceedings for Appointment, 401. 3. Powers, 402.
  - a. To Maintain and Defend Actions, 402
  - b. Sale of Ward's Property, 402.c. Investment of Funds, 402.

  - d. Lease of Ward's Property, 402.
  - e. Release of Ward's Claim for Damages, 402.
- 4. Accounting, 403.
- 5. Transactions Between Guardian and Ward, 403.
- 6. Compensation of Guardian, 403.

Guardians ad litem, see Infants, 19-22. Privilege in statements by guardian in interest of estate, see Libel and Slander, 52, 53.

#### 1. NATURE OF RELATIONSHIP.

- 1. Where the property of an aged person is placed in the hands of a guardian or conservator to be managed for his benefit, as provided by Burns' Ann. St. 1914, § 3111a, it is not "taken" by law in such a sense as to require that compensation shall be made under Const. art. 1, § 21, providing that no man's property shall be taken by law without just compensation. Kutzner v. Meyers (Ind.) 1917A-872.
- (Annotated.)
- 2. Such statute, applying to and enforceable against all persons who, on account of old age, shall become incapable of managing their estates or business affairs, and applying to all persons under like conditions, does not deny to such persons the equal protection of the laws guaranteed by Const. U. S. Amend. 14. Kutzner v. M yers (Ind.) 1917A-872. (Annotated.)
- 3. In view of the state's policy to protect those who, by reason of youth or incapacity, are incapable of managing their estates by placing their property in the hands of guardians or conservators, statutes may extend the same protection to persons incapable of managing their es-tates and affairs by reason of old age. Kutzner v. Meyers (Ind.) 1917A-872.

(Annotated.)

4. For Aged Person-Validity of Statuto. Burns' Ann. St. 1914, § 3111a, providing that whenever any person files a com-

plaint in a court of probate jurisdiction to the effect that any inhabitant of such county, because of old age, is incapable of managing his estate or business affairs, the court shall cause ten days' notice to be given such aged person, and that, if on trial he is found incapable, the court shall appoint a guardian for his estate, who shall give bonds and be under like restrictions and act in the same manner and with the same powers as in cases of guardians for minors, provides due process of law, within the meaning of Const. U. S. Amend. 14. Kutzner v. Meyers (Ind.) 1917A-872. (Annotated.)

Note.

Validity of statute providing for appointment of guardian for aged person. 1917A-874.

#### 2. APPOINTMENT.

## a. In General.

5. Right of Aged Person to Select Guardian. Burns' Ann. St. 1914, § 3111a, providing for the appointment of a guardian for a person incapable of managing his estate or affairs, who shall give bonds and be under like restrictions and act in the same manner and with the same powers as in cases of guardians for minors, refers to the manner in which the duties of the trust shall be performed by the guardian after appointment, and the court properly refuses to permit an alleged incompetent to select his guardian, since section 3057, providing that an infant over fourteen may select a guardian, applies only to the appointment of guardians for infants. Kutzner v. Meyers (Ind.) 1917A-872.

## b. Proceedings for Appointment.

- 6. Petition for Guardianship. A petition under Burns' Ann. St. 1914, § 3111a, roviding for the appointment of a guardian of the estate of any person who, by reason of old age, is incapable of managing his estate or affairs, stating the facts showing the disability of the aged person and his residence in the county where the petition was filed, is sufficient against a demurrer; and its allegation that shortly before the proceeding he conveyed real estate, valued at \$3,800, for an expressed consideration of \$1, and that it had been obtained by fraud and undue influence, tendering no issue which could be tried in the proceeding, does not render the complaint insufficient. Kutzner v. Meyers (Ind.) 1917A-872.
- 7. Issues Under Petition. Under such petition, the validity of the alleged deed is not in issue and could not be decided; and hence the court does not err in excluding evidence as to the grantor's mental capacity at the time he executed the deed. Kutzner v. Meyers (Ind.) 1917A-872.

8. Evidence. In such proceeding, evidence identifying the record containing the deed from the alleged incompetent and the admission of the record in evidence are proper, since, when considered with other evidence, it showed that a short time before the proceeding he had conveyed valuable real estate in consideration only of the grantee's agreement to look after him, and is proper for the court to consider in determining whether a guardian should be appointed. Kutzner v. Meyers (Ind.) 1917A-872.

#### 3. POWERS.

- a. To Maintain and Defend Actions.
- 9. With Respect to Will of Ward. A guardian of an insane person has no legal interest either in establishing or disestablishing his ward's will executed before his appointment, though he possibly has sufficient special interest and right of possession to maintain replevin to recover possession of the instrument for safekeeping from one in unauthorized possession, since the law does not notice wills during the lifetime of their makers, except to provide a method of custody and safekeeping. Pond v. Faust (Wash.) 1918A-736.
- 10. Action to Cancel Ward's Will. Rem. & Bal. Code, §§ 1659, 1662, do not confer on the guardian of a living insane person the right to maintain an action to cancel a will of the ward in the custody of a third person. Pond v. Faust (Wash.) 1918A-736.

## b. Sale of Ward's Property.

11. Effect of Failure to Give Bond. Where the lands of an insane person were sold by his guardian without any special sale bond being given, and the guardian wholly failed to account for the proceeds of the sale, the owner is not estopped from attacking the validity of the sale after being restored to his reason. Richelson v. Mariette (S. Dak.) 1917A-883.

(Annotated.)

12. Under Prob. Code, § 403, providing that every guardian authorized to sell real estate must, before the sale, give bond to account for the proceeds thereof, the requirement of the bond is mandatory, and an order confirming a sale, made without the giving of such bond, is void and subject to collateral attack. Richelson v. Mariette (S. Dak.) 1917A-883.

(Annotated.)

13. Application of Doctrine of Caveat Emptor. The doctrine of caveat emptor does not apply to sales by guardians under order of the court, and where a guardian selling a lot as an entirety under order of court and the purchaser did not know that it was subject to an easement not disclosed in the records as shown by an

abstract, the purchaser is entitled to an abatement in the price because of the incumbrance by the easement. Stonerook v. Wisner (Iowa) 1917E-252. (Annotated.)

14. Sale of Personalty. A guardian of a minor having the same jurisdiction over the minor's choses in action as an executor has over the personal property of his testator, the guardian, at his peril and the peril of his bondsmen, may assign and transfer notes belonging to the minor's estate. Echols v. Speake (Ala.) 1916C-332. (Annotated.)

#### Notes.

Power of guardian to sell personal property of ward. 1916C-334.

Doctrine of caveat emptor as applicable to sale by guardian. 1917E-255.

#### c. Investment of Funds.

- 15. Investment Outside Jurisdiction. A guardian who makes investments beyond the jurisdiction of the court is, except under peculiar circumstances, responsible for the safety of the funds invested. In re Moore (Me.) 1917A-645.
- 16. Injudicious Investment. A guardian who invests guardianship funds without security is liable for all losses arising therefrom. In re Moore (Me.) 1917A-645.

## d. Lease of Ward's Property.

- 17. Lease of Realty. Under Kirby's Dig. § 3798, a lease of a ward's estate by the guardian is void if not confirmed, and that the court ordered the lease and prescribed the terms does not constitute confirmation. Gaines v. Gaines (Ark.) 1917A-1254. (Annotated.)
- 18. Validity of Lease not Approved. Where an instrument, purporting to be a lease executed by the guardian of a minor Indian, is not shown to have been executed upon the order of court of probate, as provided by section 2405, Stat. Ind. Ter., is offered in evidence, an objection to its competency is properly sustained. Fisher v. McKeemie (Okla.) 1917C-1039.

## Note.

Power of guardian to lease ward's real estate. 1917 4-1256.

- e. Release of Ward's Claim for Damages.
- 19. Effect. A release given by plaintiff's guardian to the employer in whose service he had been injured, on the ground that plaintiff's claim against the employer was regulated by the Workmen's Compensation Laws does not settle the claim for damages for injury resulting from his wrongful employment in violation of St. 1915, § 1728a, subd. 1, forbidding employment of children between fourteen and

sixteen, without permit, etc., and if so intended is not binding because it was not approved by the county court as expressly required by section 3982. Stetz v. F. Mayer Boot, etc. Co. (Wis.) 1918B-675.

#### 4. ACCOUNTING.

- 20. Settlement of Account. Though a guardian at the time of the settlement of his account represented the face value of securities to be the cash value, the probate court may investigate the character of the investments and determine the liability of the guardian thereon. In re Moore (Me.) 1917A-645.
- 21. Finality. Where the probate court opened the final account of a guardian on the petition of the adult ward and disallowed items of credit and commissions and restated the account, the restated account must be deemed final, though informal. In re Moore (Me.) 1917A-645.
- 22. Allowance for Expenses. A sum applied by a guardian to preserve investments without security and beyond the jurisdiction of the court cannot be allowed to him on his final settlement, where losses arising from the investment are chargeable to him. In re Moore (Me.) 1917A-645.
- 23. The sureties of a guardian are not so directly interested in proceedings by the ward on reaching majority for the opening of the final settlement of the guardian and the disallowance of credits allowed and commissions, as will prevent the granting of relief merely because of delay by the ward in instituting proceedings. In re Moore (Me.) 1917A-645.

  (Annotated.)

24. Mere delay of a ward in petitioning, after reaching majority, to open the final settlement of his guardian and for the disallowance of items of credit therein allowed and for disallowance of commissions, does not bar relief where no testimony has been lost and where there has been no change of circumstances affecting the guardian. In re Moore (Me.) 1917A-645. (Annotated.)

25. Time for Application to Open Account. Where no time is specified by statute within which a guardian's settlement may be opened for fraud or mistake, the time within which the ward after attaining full age must apply for relief depends on the sound discretion of the court, considered with reference to the nature and extent of the account, the condition and situation of the parties, and the character and evidence of the fraud or mistake. In re Moore (Me.) 1917A-645.

(Annotated.)

26. Opening Account. The right of a ward to open the account of his guardian for the disallowance of items of credit

therein and the disallowance of commissions is unaffected by the fact that the succeeding guardian knew the facts and failed to take any action. In re Moore (Me.) 1917A-645.

27. The probate court decreeing the reopening of the account of a guardian may restate the account. In re Moore (Me.) 1917A-645.

#### Note.

Lapse of time, as affecting right to open guardian's account or settlement. 1917A-648.

#### 5. TRANSACTIONS BETWEEN GUARD-IAN AND WARD.

28. Duty of Guardian to Disclose Facts. A guardian in settling with his ward and in accounting to the court must make full disclosure of all facts necessary to a complete understanding of the transactions, and a failure so to do is a breach of trust. In re Moore (Me.) 1917A-645.

## 6. COMPENSATION OF GUARDIAN.

29. Mismanagement of Estate. Where a guardian has been guilty of wrongdoing in the management of his ward's estate or the ward has suffered by the guardian's neglect of duty, commissions to the guardian will be refused. In re Moore (Me.) 1917A-645.

30. Appointment of Person not Eligible. Since a trust company is not authorized to act as the guardian of an infant, the appointment of an officer of such a company as guardian of a minor heir as an incident to the appointment of the company as administrator of his ancestor is an evasion of the spirit of the law and no compensation will be allowed to him for his services as guardian. In re Rundle (Ont.) 1917A-139.

## GUESTS.

See Innkeepers.

Injury to guest, see Automobiles, 29-31. Liability of guest, see Automobiles, 33-35. Liability of landlord for injury to tenant's guest, see Landlord and Tenant, 18. Injury in dark hall, see Negligence, 83.

#### HABEAS CORPUS.

1. Nature and Scope of Remedy, 404.

2. Grounds of Remedy, 404.

3. Jurisdiction of Courts to Issue Writ, 404.

4. Application for Writ, 404.

5. The Return, 404.

6. Hearing and Determination, 405.

7. Appeal and Error, 405.

See Costs, 3.

To prevent deportation, see Allens, 23.
Review of proceedings, see Appeal and
Error, 39.

Jurisdiction not tested by, see Courts, 4.

Guilt not an issue, see Extradition, 1.
Burden of proof, legality of warrant, see
Extradition, 3, 5.

Sufficiency of extradition warrant, see Extradition, 4.

For release of enlisted minor, see Militia, 2.

To investigate detention of militiaman on criminal charge, see Militia, 19.

## 1. NATURE AND SCOPE OF REMEDY.

- 1. Review of Military Jurisdiction. The power to issue writ of habeas corpus under U. S. Rev. St. § 753 (3 Fed. St. Ann. 167, Comp. St. 1913, § 1281), is to be sparingly exercised, especially when directed toward release of members of the military accused of offenses against the peace of the state; the jurisdiction of the civil courts of the state over such offenses in time of peace being admitted. In re Wulzen (Fed.) 1917A-274.
- 2. Right to Release—Imprisonment Originally Illegal. In habeas corpus proceedings, so far as the right to the writ is concerned, it is immaterial whether the applicant was originally restrained by civil or criminal process, since the sole question to be determined on hearing is whether his restraint is now legal. Addis v. Applegate (Iowa) 1917E-332.
- 3. Persons Subject to Writ—Public Officers. The fact that one against whom habeas corpus issues is a public officer does not render him immune, and his official character neither enlarges nor abridges his rights. Addis v. Applegate (Iowa) 1917E-332.
- 4. Nature of Habeas Corpus Proceeding. Proceedings in habeas corpus are not adversary in character, are not in a technical sense a suit between applicant and officer, whose responsibility ceases when he brings the applicant into court, for the court to pass upon the ultimate question whether such applicant is or is not wrongfully restrained of his liberty. Addis v. Applegate (Iowa) 1917E-332.
- 5. Excessive Sentence. On habeas corpus by one fined for contempt of the district court for the violation of its injunction, when the court imposed a fine in excess of the limit permitted by Tex. Rev. Civ. St. 1911, art. 1708, the judgment of the court is not void except as to the excess, and the applicant will not be released until he has paid the fine that could be lawfully imposed. Ex parte Ellerd (Tex.) 1916D-361. (Annotated.)
- 6. Conviction Under Defective Information. That the information under which one was convicted was defective does not entitle him to discharge on habeas corpus; all that he could secure by a reversal on appeal, in view of Mo. Const. art. 2, § 23, being a remand for trial on a proper in-

formation. In re Siegel (Mo.) 1917C-684.

## 2. GROUNDS OF REMEDY.

7. Invalidity of Order in Bastardy Proceeding. As an order of the magistrate issuing a warrant in a bastardy proceeding, committing to jail a defendant arrested in another county, and not taken before the magistrate of that county indorsing the warrant, because of his failure to give an undertaking, was void, the invalidity of the order could be asserted by a writ of habeas corpus. People v. Snell (N. Y.) 1917D-222.

#### Note.

Right of prisoner who has received excessive sentence to be discharged on habeas corpus or appeal. 1916D-368.

## 3. JURISDICTION OF COURTS TO ISSUE WRIT.

8. Judge Remote from Place of Confinement. Under Iowa Code 1897, § 4419, providing that the district courts and their judges have jurisdiction to allow a writ of habeas corpus upon proper showing, and that the writ may be served in any part of the state, and under section 4420, providing that application for habeas corpus must be made to the judge most convenient in point of distance to the applicant, and the more remote judge, if applied to, may refuse the writ unless a sufficient cause be stated in the petition for not making the application to the more convenient court, where one who had been confined to a hospital for female inebriates applied to the judge of a remote district court for habeas corpus to secure her release, claiming that she was cured, and alleging convenience of witnesses in her application as a reason for not applying to a judge nearer the place of detention, such judge has jurisdiction under the statutes to grant the writ. Addis v. Applegate (Iowa) 1917E-332.

#### 4. APPLICATION FOR WRIT.

- 9. Prima Facie Showing of Illegality. An application for habeas corpus must at, least make prima facie showing that the applicant's confinement is unlawful. Addis v. Applegate (Iowa) 1917E-332.
- 10. Habeas corpus may be applied for by and secured upon the application of the person confined, or the application may be made on his behalf by another, or the court itself may issue the writ on its own motion in proper case. Addis v. Applegate (Iowa) 1917E-332.

## 5. THE RETURN.

11. Duty to Produce Applicant in Court. By whatever authority the original restraint of an applicant for habeas corpus was made, upon issuance of the writ the party against whom it runs must bring the applicant before the judge to explain and justify the present restraint, since the object of the writ is to give speedy and effective relief to those wrongfully deprived of their liberty, no matter by whom or under what claim. Addis v. Applegate (Iowa) 1917E-332.

## 6. HEARING AND DETERMINATION.

12. Confinement of Inebriate for Treatment. Where one confined in a hospital for female inebriates sought habeas corpus against the superintendent to secure her release, whether the court on hearing has the right to inquire whether petitioner was cured is a question of law. Addis v. Applegate (Iowa) 1917E-332. (Annotated.)

13. Iowa Const. art. 1, § 13, provides that the writ of habeas corpus shall be issued when application is made as required by law. Iowa Code Supp. 1907, § 2310a3 provides that if, after thirty days of treatment and detention as an inebriate in an insane hospital, a patient shall appear to be cured, and if the physician in charge and the superintendent of said institution shall so recommend, the governor shall parole such patient. Section 2310a12 provides that the board of control of state institutions may discharge any inebriate confined to the state hospital on recommendation of the superintendent, when satisfied that such person will receive no benefit from further hospital treatment, and further provides that the term of detention and treatment of an inebriate shall be until the patient is cured, not exceeding three years. Petitioner was committed as an inebriate by order of the court to the state hospital for the insane, to be confined "until cured, not exceeding three years." She sought habeas corpus against the superintendent of the institution to secure her release, claiming that she was cured. It is held that the court, on hearing, had the right to determine the issue of fact whether she was cured, since, if such was the case, the purpose of confinement was accomplished, and there was no longer any right under the order or statutes to confine her longer; habeas corpus being a proper means under the constitution, although the remedy was not given expressly by the statutes, to secure her release, when her right to liberty arose upon the occurrence of a cure. Addis v. Applegate (Iowa) 1917E-332.

(Annotated.)

14. Inferences on Habeas Corpus—Statute Under Which Conviction was Had. Petitioner's conviction of, and sentence to a term of two years for, voting twice at an election, being supported by Mo. Rev. St. 1909, § 4427, authorizing a term "not

exceeding five years," and it not appearing by the record proper, all that is before the court, that the information was not drawn, and the punishment assessed, thereunder, he will not be discharged on habeas corpus, even if sections 6155, 6177, under which the information might be drawn, and which require a term not less than two years nor more than five years, be invalid as special legislation. In re Siegel (Mo.) 1917C-684.

15. Sufficiency of Evidence. Where the testimony on habeas corpus shows that the court, before fining the applicant for contempt, heard the evidence as to his contempt, but that evidence is not before the court in habeas corpus proceedings, it will be presumed that it authorized a judgment of conviction. Ex parte Ellerd (Tex.) 1916D-361.

## 7. APPEAL AND ERROR.

16. Right of Appeal. Following the decision in Re Petitt, 84 Kan. 637, 114 Pac. 1071, it is held that, since the adoption of the amended Kan. Code, an appeal may be taken to the district court from a decision of the probate court discharging the petitioner in a habeas corpus proceeding. Miller v. Gordon (Kan.) 1916D-502.

(Annotated.) 17. The respondent in a habeas corpus proceeding appealed to the district court from an order of the probate court dis-charging the petitioner. The district court dismissed the appeal on the ground that it had no jurisdiction. The respondent then appealed to the supreme court. No supersedeas was granted and no stay was asked of the order discharging the petitioner. Held, that the questions raised are not moot, and that in case the district court upon a trial of the appeal on its merits remands the petitioner, the court in which the prosecution was commenced will have authority to issue a warrant for the petitioner if that is found necessary. Miller v. Gordon (Kan.) 1916D-502.

(Annotated.)

- 18. A chief of police, who is made the respondent in a habeas corpus proceeding, has such an interest therein that he may prosecute an appeal from an order of the probate court discharging the petitioner. The case of Cook v. Wyatt, 60 Kan. 535, 57 Pac. 130, is overruled. Miller v. Gordon (Kan.) 1916D-502. (Annotated.)
- 19. Scope of Review. Habeas corpus is assumed to be the proper remedy, without that question being decided, the court preferring to place its decision upon the merits. State v. Barnes (N. Dak.) 1917C-762.
- 20. On appeal from discharge on habeas corpus of one confined in a state hospital for female inebriates, the court cannot review the finding of the trial court, where there is evidence to support it, that such

patient was cured; the question being one of fact, not reviewable on appeal. Addis v. Applegate (Iowa) 1917E-332.

(Annotated.)

Note.

Finality of order in habeas corpus proceedings. 1916D-506.

HAIL INSURANCE.

See Insurance, 57, 59.

#### HAND CAR.

Use at night, contributory negligence, see Master and Servant, 33. Negligence in operating, see Railroads, 52,

#### HANDWRITING.

Expert testimony, see Evidence, 59, 63, Comparison, see Evidence, 112.

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HATCHWAY.

Meaning, see Streets and Highways, 30.

## HAWKERS AND PEDDLERS.

See Licenses, 3-15.

License of itinerant food venders, see Food, 8-12.

- Right of fruit stand in street, see Streets and Highways, 22.
- 1. Soliciting Orders by Sample. One who, by displaying samples, solicits orders for the sale of goods for future delivery, is not, as a general rule, a "peddler." Ideal Tea Co. v. Salem (Ore.) 1917D-684. (Annotated.)
- 2. An ordinance of a city, which imposes on peddlers a license, which defines a "peddler" as a person who, for himself or as the agent of another, goes from house to house selling or offering to sell for future delivery by sample, and which declares that the provisions shall not apply to any merchant or dealer having a regular place of business in the city in taking or soliciting orders for the sale and delivery of his merchandise, conflicts with Ore. Const. art. 1, \$ 20, prohibiting laws granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens; for it imposes a license on nonresident solicitors, but permits merchants of the city to have their employees visit the houses of their customers and take orders for goods without a license. Ideal Tea Co. v. Salem (Ore.) 1917D-684.

#### Note.

Sale by sample for future delivery as peddling. 1917D-686.

#### HAZARDOUS.

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#### HEADLIGHTS.

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## HEAD OF A FAMILY.

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#### HEALTH.

1. Boards of Health.

2. Health Regulations.

a. Regulation of Diseased Animals. b. Regulation of Bedding Materials.

Scope of police power, see Constitutional Law, 14-44.

Workmen's Compensation Act, as applying to disease, see Master and Servant, 110, 193-198, 200. Physical examination of pupils, see

Schools, 33-38.

Exclusion of pupils exposed to disease, see Schools, 42, 43.

## 1. BOARDS OF HEALTH.

1. Review of Decision of Board. As Ill. Laws 1915, pp. 3, 5, §§ 2, 8, authorizing the destruction of diseased cattle by the board of live stock commissioners, is valid, the remedy of a stockman whose cattle have been by the board determined to have a contagious disease and are about to be destroyed is at law, and not in equity, even though it is contended that the cattle are not afflicted with a contagious disease, and the evidence of experts is conflicting. Durand v. Dyson (Ill.) 1917D-84.

## 2. HEALTH REGULATIONS.

- a. Regulation of Diseased Animals.
- 2. Diseased Animal as Nuisance. Cattle afflicted with a dangerous or contagious disease are public nuisances at common law, which nuisance cannot be legalized, as it invades the peace and safety of the people. Durand v. Dyson (Ill.) 1917D-84.
- 3. Validity of Statute Providing Compensation to Owner. Ill. Laws 1915, p. 3, § 2, declares that it shall be the duty of the board of live stock commissioners to investigate all cases of communicable diseases among domestic animals, and to use all proper means to prevent the spread of such diseases, and provides for the extirpation thereof, authorizing the destruction of the deceased animals, as well as the premises in which they are housed. The section also authorizes the board to make agreements with the owner as to the value of the animals, and, in case such an agreement cannot be made, provides for the appraisement thereof. Section 8 declares that all claims arising from the slaughter of animals shall in no event ex-

ceed \$300 for any registered animal of the bovine species, or \$150 for any unregistered animal, and that the average shall not exceed \$250 per head for a herd of registered cattle, nor \$125 for unregistered cattle. It is held that as diseased cattle constitute a nuisance, and as Const. U. S. amend. 14 is not intended to deprive states of their police power, the statute is valid, for in such case the determination of whether cattle are diseased, as well as whether they should be slaughtered, is properly left to an administrative board, as the board of live stock commissioners. Durand v. Dyson (III.) 1917D-84.

(Annotated.)

4. Delegation of Power to Board. Ill. Laws 1915, pp. 3, 5, §§ 2, 8, authorizing the destruction of diseased cattle, and providing for compensation of owners, is not an abuse of legislative discretion, though the determination of the question of disease be left to the board of live stock commissioners. Durand v. Dyson (Ill.) 1917D—84. (Annotated.)

Note.

Validity of statute providing for destruction of diseased animals with compensation to owner. 1917D-89.

## b. Regulation of Bedding Materials.

- 5. Ill. Act July 1, 1915 (Laws 1915, p. 375), relative to the use of second-hand material in the manufacture of mattresses, quilts, or bed comforters, but containing no similar provision with respect to pillows, discriminates between manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters, and quilts, and is class legislation. People v. Weiner (Ill.) 1917C-1065. (Annotated.)
- 6. III. Act July 1, 1915 (Laws 1915, p. 375), § 3, providing that, when any person shall remake or renovate or employ others to remake or renovate any mattress, quilt, or bed comforter for his own use, the material used for filling, together with the cover, shall be sterilized, is a proper exercise of the police power, and the same requirement could be made with reference to the manufacture and sale of mattresses, etc. People v. Weiner (III.) 1917C-1065. (Annotated.)
- 7. Ill. Act July 1, 1915 (Laws 1915, p. 375), relative to the use of second-hand material in mattresses, quilts, or bed comforters manufactured for sale, cannot be upheld as passed to prevent fraud or deceit in the sale of goods, as regulations to prevent fraud and deceit could be readily provided without prohibiting the use of second-hand material if properly renovated and sterilized. People v. Weiner (Ill.) 1917C-1065. (Annotated.)
- 8. Use of Second-hand Material in Bedding. Ill. Act July 1, 1915 (Laws 1915, p. 375), prohibiting the use of cotton or

other material made second-hand by use about the person in the making of mattresses, quilts, or bed comforters, and the sale of mattresses, etc., in which any such second-hand material is used is void, as depriving citizens of the lawful use of their property in a manner not injurious or dangerous to others, since, while it would be proper to require that material be free from germs of contagion and infection, the possible danger to health or safety does not justify the absolute prohibition of a useful industry or practice where the danger can be dealt with by regulation, and the evidence shows that second-hand bedding does not necessarily convey infectious or contagious diseases, and that a lawful business of selling or dealing therein may be carried on without danger to the public health, and the legislature itself recognizes this by permitting persons to remake or renovate or employ others to remake or renovate for their own use any mattress, quilt, or bed comforter, provided the material is sterilized, and it is the fundamental right of every person under the federal and state constitutions to pursue, without let or hindrance, all such callings or pursuits as are innocent in themselves, and not injurious to the public. People v. Weiner (Ill.) 1917C-(Annotated.)

Note.
State or municipal regulation of use or sale of second-hand clothes, bedding or the like. 1917C-1068.

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#### HIGHEST BIDDER.

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## HOMESTEAD.

- 1. Nature of Homestead Rights, 408.
- 2. Acquisition and Selection, 408.
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- Conveyance and Incumbrance, 409.
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As subject to lien for improvements, see Mechanics' Liens, 14.

Conveyance reformed, see Rescission, Cancellation and Reformation, 10.

#### 1. NATURE OF HOMESTEAD RIGHTS.

1. Presumption in Favor of Homestead Right. The homestead right of exemption is a constitutional right guaranteed the family, and all reasonable presumptions in its favor will be indulged, where the facts

- appear consistent with a good-faith claim of homestead right. Mandan Mercantile Agency v. Sexton (N. Dak.) 1917A-67.
- 2. Retroactive Effect of Statute. N. Car. Revisal 1905, § 686, provides that an allotted homestead shall be exempt from levy so long as owned and occupied by the homesteader or by anyone for him, but that, when conveyed by him in the mode authorized by the constitution, the ex-emption ceases as to liens attaching prior to the conveyance; that, the homestead right being indestructible, the homesteader who has conveyed his allotted homestead can have another allotted as often as may be necessary, provided, this shall have no retroactive effect. It is held that this does not apply where judgments were rendered and the homestead allotted and subse-quently conveyed by the judgment debtor long before the section in question was enacted, and, upon the enactment of that section, limitations did not commence to run against the judgment creditor's right to enforce the lien of the judgments against the homestead. Brown v. Harding Harding (N. Car.) 1917C-548.

## 2. ACQUISITION AND SELECTION.

- Declaration. Under 3. Sufficiency of Rem. & Bal. Wash. Code, §§ 558-560, providing that in order to select a homestead the husband or other head of a family must execute and acknowledge a declaration of homestead, and file the same for record, which must contain a statement showing certain required matters, and that such declaration must be recorded in the office of the auditor of the county in which the land is situated, there can be no homestead right in any specific property until it is selected and such selection evidenced in writing and recorded as provided. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 4. Intent to Occupy. Property purchased and improved in pursuance of a goodfaith intent to build the family dwelling thereon, and to reside therein, is impressed with homestead characteristics, entitling the possessors to the homestead exemption in advance of the establishment thereon of actual residence of the claimant and family, where, pursuant to a previous goodfaith intent, the actual residence is established within a reasonable time after completion of the dwelling. Mandan Mercantile Agency v. Sexton (N. Dak.) 1917A-67.
- 5. The time so elapsing here before residence began is sufficiently explained and excused. Mandan Mercantile Agency v. Sexton (N. Dak.) 1917A-67.
- 6. Interest of Tenant in Common. Under the Iowa statutes and decisions, the homestead claim attaches to the undivided interest of a tenant in common. Sieg v. Greene (Fed.) 1917C-1006.

7. Sufficiency of Occupancy. A debtor, who had a family and sometimes kept house, and who was staying at his father's, as to land which he had fraudulently conveyed to his father, and which was in turn conveyed to the debtor's children, who did not show any interest in his father's land or that it could be regarded as his own homestead, and who was living with his father and cultivating it, has no such occupancy as to be entitled to a homestead therein exempt from execution sale at the suit of his creditors. Hall v. Casebolt (Ky.) 1917C-1012.

## 3. EXTENT OF EXEMPTION.

- 8. Two Houses on Same Tract. The Iowa statutes (Code 1897 and Code Supp. 1907, §§ 2972-2978) provide that the homestead embraces the house used as a home by the owner, that if he has two or more houses he may select which he will retain, and that if not within a city or town plat it must not contain more than 40 acres or embrace more than one dwelling house. S owned an undivided half interest in about 97 acres of land, 10 acres of which was within the corporate limits of a municipality, but had not been platted. There were two houses on the land, one of which S occupied with his family, and also a brick manufacturing plant occupying about 2 acres; the rest of the land being farm land. It is held that the homestead right was confined to the undivided half interest . in 80 acres, including the dwelling house occupied by S and excluding the brick plant and appurtenances and the other dwelling house. Sieg v. Greene (Fed.) 1917C-1006.
- 9. Priority of Mechanic's Lien. The rule that a homestead exemption may be claimed at any time before execution, though applicable to sales under execution to satisfy personal judgments, which are general liens, has no application to a sale of property to satisfy specific mechanics' liens against it, foreclosure and sale in such cases being in rem; and, where mechanics' liens against a house accrued upon the furnishing of materials, they cannot be precluded by the owner's subsequent declaration of homestead. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.

(Annotated.)

10. An owner cannot, by filing a homestead declaration, cut off the right of a
materialman, whose material is then in the
building, to perfect his lien subsequently
by filing the required notice within the
statutory time. Brace, etc. Mill Co. v.
Burbank (Wash.) 1917E-739.

(Annotated.)

## 4. CONVEYANCE AND INCUM-BRANCE.

11. Joinder in Husband's Deed—Acknowledgment. Under Ark. Act March 18, 1887 (Laws 1887, p. 90), providing that no

mortgage affecting the homestead of any married man shall be valid unless his wife joins in its execution, the wife must not only join in the execution of a deed of trust covering a homestead, but must also acknowledge that she executed it, in order to render it a valid incumbrance. Davis v. Hale (Ark.) 1916D-701.

- 12. Validity as to Creditors. The conveyance of a homestead is not fraudulent as to creditors. Hall v. Casebolt (Ky.) 1917C-1012. (Annotated.)
- 13. It is not a fraudulent act for a debtor to transfer to his wife or daughter a homestead to which his creditors could not have looked for the satisfaction of their claims. McKillip v. Farmers' State Bank (N. Dak.) 19170-993.

(Annotated.)

14. Under the Iowa statutes and decisions, a voluntary conveyance of the homestead is not fraudulent as to creditors, and the grantor need not receive full value, as his creditors cannot take it and have no concern about what he gets. Sieg v. Greene (Fed.) 1917C-1006.

(Annotated.)
15. As against creditors, a deed conveying both the homestead and unexempt land is valid as to the homestead, even if fraudulent as to the unexempt land. Thysell v. McDonald (Minn.) 1917C-1015.

(Annotated.)
16. Creation of Easement Against Homestead. A deed granting a perpetual right of way over a homestead is invalid unless signed by both husband and wife. Lindell v. Peters (Minn.) 1916E-1130.

17. Mortgage by Husband Alone. Defendant and wife purchased a vacant city block, improved the same for three seasons, finally erecting a dwelling house and other buildings thereon. Immediately on completion of the house, plaintiff took a mortgage on the tract, signed only by the husband, who declares in the mortgage that the tract "does not now and never has constituted any part of his homestead." The wife refused to sign the mortgage. They owned no other real estate, but had rented in the same city since long before the purchase of this tract, which they testified to have bought "to make a home of it." The wife paid part of the purchase price. To clear the land of a \$200 mortgage a lease for a term of one year was given codefendant W., and immediately on completion of the house he and family moved in. Four months afterward defendants moved their furniture into three rooms of the house not rented, intending to reside in it, but because of inconvenience from the occupancy of the W. family did not actually take up their residence therein, but attempted to oust W., but did not succeed. A cow and some chickens were moved on the tract at the same time the furniture 1916C-1918B.

was moved into the house, and remained there several months until feed on the place gave out. A year and four months after the mortgage was taken, and about two months after vacation by W., defendants established actual residence, since maintained continuously in said dwelling. W. had signed the notes as a joint maker with S. The husband and wife defend, claiming the mortgage to be void, and that the premises at the time it was taken was their homestead, which could not be legally encumbered, except the wife join therein. Held, the mortgaged premises was the homestead and the mortgage is void. Mandan Mercantile Agency v. Sexton (N. Dak.) 1917A-67. (Annotated.)

18. The recitals in the mortgage that the premises are not a homestead is not a covenant. It falls with the mortgage and amounts to but a statement of the husband, which cannot of itself operate to validate the mortgage. Mandon Mercantile Agency v. Sexton (N. Dak.) 1917A-(Annotated.)

#### Notes.

Validity and effect of alienation or incumbrance of homestead without joinder or consent of wife. 1917A-71.

Validity as against creditors of conveyance of homestead, 1917C-994.

#### 5. WAIVER AND FORFEITURE.

19. Involuntary Absence. Under Tenn. Const. art. 11, § 11, and Shannon's Tenn. Code, § 3798, providing that the homestead shall not be aliened save by the joint consent of the husband and wife where that relation exists, a husband, though incarcerated in the penitentiary, did not, where he maintained his family relations, sending his wife money from the institution and resuming his position as head of the family on his release, lose that status by reason of his incarceration, so that separate property of the wife upon which she lived did not constitute the family homestead, which could not be aliened without joint consent of the spouses. Bryant v. Freeman (Tenn.) 1917E-111.

(Annotated.) Note.

Abandonment or forfeiture of homestead by involuntary or compulsory absence. 1917E-112.

## 6. DEVOLUTION OF RIGHTS.

·20. Death of Spouse. The fee of the homestead vested in the children subject only to the life estate of the surviving husband, and the title of the children to such remainder in fee cannot be waived, impaired or burdened by the surviving husband either as life tenant or as administrator. Nordlund v. Dahlgren (Minn.) 1917B-941.

21. Rights of Surviving Spouse. The rights of the surviving spouse in the homestead vest and become absolute at the death of the deceased spouse. The statutory provisions for setting it apart to him merely prescribe the procedure for segregating it from the remainder of the estate, and the administrator does not become entitled to possession of the home-stead although it has not been so set apart. The homestead of Carrie Walberg, at her death, descended to her husband for the term of his natural life, and his possession thereof was as such tenant for life and not as administrator. Nordlund v. Dahlgren (Minn.) 1917B-941.

#### HOMICIDE.

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## 1. INVOLUNTARY MANSLAUGHTER.

- 1. Effect of Statute. The Oregon statute, making homicide from unlawful abortion manslaughter, has not created a new crime, but merely reduced the grade of the offense at common law by changing the punishment from death to imprisonment in the penitentiary. State v. Farnam (Ore.) 1918A-318.
- 2. JUSTIFIABLE AND EXCUSABLE HOMICIDE AND OTHER DEFENSES.

#### a. Defense of Habitation.

2. Duty to Retreat. The owner of a dwelling attacked therein is not bound to flee, but may stand his ground and kill his assailant; this being the rule both at common law and under N. Y. Penal Law (Consol. Laws, c. 40) § 1055. People v. Tomlins (N. Y.) 1916C-916.

(Annotated.)

## b. Intervening Causes.

3. Cause of Death. Defendant was guilty of causing decedent's death, if his shooting her caused a miscarriage followed by blood poisoning, resulting in her death, notwithstanding any intervening medical negligence; it being only when the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense. People v. Kane (N. Y.) 1916C-685. (Annotated.)

#### Note.

Fact that death resulted from supervening cause as defense to charge of homicide. 1916C-692.

## 3. INDICTMENT OR INFORMATION.

## a. In General.

4. Sufficiency of Indictment. An indictment for murder by means unknown

- to the grand jury is good. State v. Farnam (Ore.) 1918A-318.
- 5. In a prosecution for involuntary manslaughter, it is not necessary that the indictment should describe the particular character or kind of motor vehicle with which the killing was accomplished, as accused is presumed to know the provisions of the statute defining the term "motor vehicle," and that a Ford automobile comes clearly within the statutory definition. People v. Falkovitch (Ill.) 1918B-1077.
- 6. An indictment for involuntary manslaughter committed by the reckless driving of an automobile, alleging that the act was done feloniously, unlawfully, and recklessly, is sufficient, although it does not charge that the killing was "wilful," as an act done feloniously is done with the deliberate purpose of committing a crime. People v. Falkovitch (III.) 1918B-
- 7. Negligent Manslaughter Reckless Driving of Automobile. In a prosecution for involuntary manslaughter committed by reckless driving of an automobile, indictment is held to set forth sufficiently the specific acts relied on as constituting the crime. People v. Falkovitch (III.) 1918B-1077.
- 8. Included Offenses. An indictment for murder in the first degree is sufficient to sustain a conviction for homicide, committed in an attempt to procure an abortion. State v. Farnam (Ore.) 1918A-318.
- 9. Averment of Death from Wound. An information charging that there was inflicted upon and in the body of deceased one mortal wound, from which mortal wound deceased languished a short time, and then on a certain day, at the county and state, etc., died, is not defective in failing to charge that deceased languished and died from the wound inflicted. State v. Inlow (Utah) 1917A-741.
- 10. Failure to Allege Mortal Wound or Injury. An indictment for murder in the first degree is not defective for failure to allege that the defendant administered to the deceased "a mortal wound" or "mortal injury" or "mortal sickness," where the language of the indictment sets up a plain, direct, and certain state of facts constituting the crime, from which the connection between the facts alleged as the cause of death and the death itself appears. Robinson v. State (Fla.) 1917D-506.
- 11. Grammatical Error. An information, charging that accused with a deadly weapon, to wit, a pistol, did feloniously shoot off, at, against, and upon another, is sufficient to charge an assault with intent to kill, even though the use of the word "with" before "a deadly weapon" is bad

grammar. State v. Gould (Mo.) 1916E-855.

#### b. Charge of Murder as Including Manslaughter.

12. Included Offenses. The general rule is that an indictment for murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish. State v. Farnam (Ore.) 1918A-318.

#### c. Issues and Variance.

13. An indictment for murder by means unknown to the grand jury will sustain conviction in a case where accused was conclusively proved to have either murdered a girl outright or killed her in an attempt to procure an abortion. State v. Farnam (Ore.) 1918A-318.

## 4. CONDUCT OF TRIAL.

14. Taking Jury to Revival Meeting. In a prosecution for murder, where the jury were present at a revival meeting during the trial, a mere theoretical discussion of sin and its punishment, considered solely from the angle of divine government, is not prejudicial to the rights of the defendant. Chilton v. Commonwealth (Ky.) 1918B-851. (Annotated.)

15. Custody and Conduct of Jury. The members of a jury impaneled to try a homicide case should not be subjected to any outside influence, but their conclusion should be the result of an unbiased judgment, based on the evidence heard in the courtroom and the law as expounded by the court, considered in the light of proper arguments by counsel for the prosecution and defense. Chilton v. Commonwealth (Ky.) 1918B-851.

#### 5. EVIDENCE.

#### a. Presumptions.

16. Where it appears that a son of the deceased who was in the house when the murder was committed, is deficient in understanding and not able to talk intelligently, no inference adverse to the state can be drawn from the district attorney's failure to call him as a witness, especially in view of the fact that such son was in court and might have been called by defendant. People v. Roach (N. Y.) 1917A-410.

#### b. Admissibility of Evidence.

#### (1) In General.

17. In a prosecution of a wife for the murder of her husband, who died of arsenical poisoning, the fact that one theory of the defense was that the husband committed suicide pursuant to an intention formed to kill himself and his children,

does not authorize the admission of evidence relative to the illness and death of a daughter long after his death. People v. Buffom (N. Y.) 1916D-962.

## (2) Other Crimes.

18. As Bearing on Motive. Where the state contended that accused killed deceased to prevent the latter from testifying against him in a prosecution for burglary, evidence by police officers as to a conversation with accused, wherein they informed him that deceased would be a witness against him, is admissible to show motive, although the state should not go into the particulars of the other offense. State v. Inlow (Utah) 1917A-741.

19. Proof of Other Homicides. In a prosecution of a wife for the murder of her husband, who died of arsenical poisoning, the admission of evidence of the illness and death of their daughter, apparently from poisoning, long after the death of the husband, is in violation of the rule forbidding proof of any crime not alleged in the indictment. People v. Buffom (N. Y.) 1916D-962.

20. Premeditation. Premeditation is an essential element of the crime of murder. Its existence may be inferred from the circumstances of the case. Where a woman is charged with the murder of her infant child, and the evidence tends to show that it was destroyed immediately upon its birth, evidence of the woman's intention or desire before the birth of the child to produce an abortion is admissible as tending to show the existence of a motive for the destruction of the infant and of a premeditated design to destroy it. Robinson v. State (Fla.) 1917D-506.

## (3) Instruments of Crime.

21. Bloodstain from Weapon. Where a witness testified that he had gone to accused's room shortly after the infliction of fatal wounds on decedent and had seen a razor between the mattress and the pillow, and that in the morning he saw the razor in the hands of the landlady, who was making the bed, the testimony of the landlady that on the morning following the killing she saw a third person take the razor and walk out, and that she examined the pillow slip and there was a stain of blood, is, together with the pillow slip, admissible. State v. Giudice (Iowa) 1917C-1160.

22. As to Allegation that Manner of Killing was Unknown. Where an indictment for homicide charged that deceased was killed with some sharp instrument to the grand jury unknown, it is not error for the district attorney to testify as to the efforts of the grand jury to ascertain the character of instrument used. Mason v. State (Tex.) 1917D-1094.

- 23. As to Footprints of Animal. In a trial for murder, alleged to have been committed in conspiracy with other parties, evidence that witness had examined mule tracks in the woods near where the killing occurred, that they were fresh shod foot impressions, showing a rough calk not wedged at the end as usual, and that he saw some of the tracks of the mule made in town which were the same as those seen near where the killing occurred, and that the mule whose tracks he saw in town was brought to the barn by one of the alleged conspirators, is admissible. Brindley v. State (Ala.) 1916E-177.
- 24. Where a witness testified that he saw fresh mule tracks in the woods near the place of the homicide, and stated that the calk of one shoe was larger than the other, and that he afterwards saw a mule in town driven by one with whom defendant was charged to have been in conspiracy, which was the mule whose tracks he had examined, there is no error in allowing him to be asked by the solicitor what was the measurement of the mule track, nor in permitting an answer that the track witness had measured was not as plain as where he found it out there. that he could not get the exact measurement of the heel, but the length of it was the same. Brindley v. State (Ala.) 1916E-177.

## (4) Fruits of Crime.

25. Articles Taken from Accomplice. In a prosecution for murder in the first degree, committed within and as a part of an attempted 10bbery, articles of wearing apparel and other article found on or taken from defendant's accomplice after the attempted robbery are admissible. State v. Mewhinney (Utah) 1916C-537.

## (5) Clothing.

- 26. Examination of Blood Stains. Where the state introduced in evidence a coat worn by accused on the night of the murder, and the state chemist testified that blood stains on the coat were from the blood of mammals, but refused to give an opinion whether it was human blood, the chemist may also testify that, in making the test, he compared it with his own blood, for, in making such tests, a comparison with mammalian blood is always made. State v. Inlow (Utah) 1917A-741.
- 27. In a prosecution for homicide, where there was sufficient evidence to show that accused and his wife were co-conspirators, a coat worn by the wife on the evening of the homcide, and which was spattered with blood, is admissible in evidence. State v. Inlow (Utah) 1917A-741.
- 28. To render accused's blood-stained clothing admissible in evidence in a murder trial, there must be preliminary proof

- that the clothing was worn by accused at the time of the homicide, and that there had been no change in the condition thereof between that time and the time of the test for blood stains or the time when the clothing is admitted in evidence, and, while the preliminary proof need not be shown by direct evidence, the proof must justify the inference, that the clothing was worn at the time of the killing and that the blood stains were then received. State v. Ilgenfritz (Mo.) 1917C-366.
- 29. Where tests for blood stains on clothing of accused charged with murder were not made until six months after the murder, and the evidence did not show the condition of the clothing during the interval or that it had not been interfered with, but showed that it had passed through the hands of several persons during the interval, it was error to admit in evidence the clothing and the testimony of a physician that, on making scientific test, he found human blood stains thereon. State v. Ilgenfritz (Mo.) 1917C-366.
- 30. Comparison of Footprints—Shoe Furnished by Accused. Where one under arrest hands his shoe to the officer in charge, who places the shoe in a track near the scene of the homicide, the latter may testuy that the shoe fitted the track exactly, even though he did not warn the former against incriminating evidence. Lee v. State (Fla.) 1917D-236. (Annotated.)

#### (6) Letters.

31. Matters Explanatory of Relevant Document. Where in a prosecution for murder the theory of the state was that defendant, a police lieutenant, instigated the crime because deceased, a professional gambler, angry because defendant raided his place, threatened to disclose defendant's connection with gamblers, anonymous letters sent to a police commissioner charging defendant with protecting gamblers are admissible, not as evidence of the facts stated therein, but to aid a memorandum of defendant sent to the police commissioner in answer to such charges. People v. Becker (Kan.) 1917A-600.

#### (7) Intoxication.

- 32. Intoxication as Bearing on Intent. Accused, charged with murder in the first degree, may show that he was so intoxicated at the time of the killing as to be incapable of understanding that he was committing a crime, to disprove existence of specific intent essential in murder in the first degree. James v. State (Ala.) 1918B-119.
- 33. As Bearing on Capacity. That accused, relying on intoxication at the time of the killing, had been drinking at other times, does not show incapacity to com-

mit murder at the time of killing, and questions as to his condition as to drinking on prior occasions are properly excluded. James v. State (Ala.) 1918B-119.

34. Conviviality. That accused, relying on intoxication at the time of the killing, offered a witness a drink shortly before the killing, is immaterial. James v. State (Ala.) 1918B-119.

## (8) Dictaphoned Conversations.

35. Evidence Procured Through Dictaphone. In a prosecution for murder, testimony of a witness that, with interruptions, he overheard a conversation through a detectaphone installed in the room of the jail where the defendant and two other parties, who had been jointly indicted for the murder, were confined, to the effect that defendant asked one of the other parties if he knew what a certain named person had done, and that such other party replied that he had heard that the person named had turned state's evidence, that such other defendant said he could prove an alibi if he could find the right man, that defendant replied, "They all know I was up there at the saloon," that defendant asked the other party what he did with the guns, and why he did not get the father of the deceased, and was told that the guns were hid under a rail fence and that he "had to leave there too quick," is admissible, when accompanied by the witness' exhibition of a detectaphone and his explanation of its operation. Brindley v. State (Ala.) 1916E-177.

(Annotated.)

# (9) Acts and Declarations by Deceased.(a) In General.

36. Statement of Deceased as to Intended Movements. A statement made by decedent immediately before he returned to a railroad roundhouse with his throat cut, that he was going out an avenue and so would pass a woodpile where the crime was alleged to have been committed, is admissible as part of the res gestae. State v. Giudice (Iowa) 1917C-1160.

37. Intention to Commit Suicide. Where the state's circumstantial evidence showed that accused shot deceased and accused's circumstantial evidence showed that deceased committed suicide, evidence that deceased on the day of the shooting, or shortly before, stated that he intended to commit suicide, is admissible. State v. Ilgenfritz (Mo.) 1917C-366.

(Annotated.)

#### (b) Threats by Deceased.

38. Uncommunicated Threats by Deceased. Where accused does not rely on self-defense, evidence of uncommunicated threats of deceased to kill accused is inad-

missible. State v. Ilgenfritz (Mo.) 1917C-366.

## (c) Dying Declarations.

39. Statement of Convict Immediately Before Execution. The declaration of one convicted of murder, made just before execution, that defendant on trial as instigator of the murder had nothing to do with it as far as he knew, is inadmissible. People v. Becker (Kan.) 1917A-600.

(Annotated.)

#### Note.

Dying declaration as admissible only when death of declarant is under inquiry. 1917A-612.

## (10) Acts and Declarations of Third Person

- 40. Acts of Co-conspirator. In a prosecution for homicide, evidence held sufficient to show that accused and his wife were co-conspirators, and hence evidence of the acts of his wife was admissible. State v. Inlow (Utah) 1917A-741.
- 41. Conversation of Accessory. Conversation of a third person in absence of defendant, with the gunman who did the killing, is admissible when there is evidence of such person's general authority from defendant to bring about the killing. People v. Becker (Kan.) 1917A-600.
- 42. After Crime Committed. The declarations of a codefendant and alleged conspirator, together with his manner and appearance after the homicide, do not constitute evidence against defendant. Brindley v. State (Ala.) 1916E-177.
- 43. Declaration of Infant at Time of Homicide. The exclamation of a boy four years of age that "the bums killed pa with a broomstick," which was made from 10 to 30 seconds after a fatal assault upon his father, made in the boy's presence, is competent evidence to go to the jury as explanatory and illustrative of the manner and means by which the father was assaulted. The utterance of the boy under such circumstances, made at the earliest opportunity to make an outcry in the presence and hearing of others, was the spontaneous and impulsive language of the situation, free from any subterfuge, artifice or motive to fabricate. Its weight, however, is purely a question for the jury. State v. Lasecki (Ohio) 1916C-1182. (Annotated.)
- 44. Conversation Connecting Defendant With Crime. To prove that conversations in absence of defendant, connecting him with the crime charged, were authorized by him, the sworn testimony of one of the parties holding such conversation is admissible, though its weight was for the jury. People v. Becker (Kan.) 1917A-600.

- 45. Declarations of Third Person. In a prosecution for murder, conversations had between third persons subsequently repeated to defendant, connecting defendant with the crime, are admissible. People v. Becker (Kan.) 1917A-600.
- 46. Acts after Commission of Crime. Where, on a trial of defendant for instigating a murder, one of the conspirators testified that he, at the direction of defendant, had been given money to pay the gunmen who actually did the killing, testimony of the wife of one of the gunmen that her husband brought a package of money to her apartment and divided the money with the other gunmen is admissible. People v. Becker (Kan.) 1917A-600.

47. Declaration of Co-conspirator. Where there is evidence of a conspiracy to kill, testimony of the chauffeur driving the men who actually did the shooting to the place of crime that one of the men said that the defendant "had the cops fixed" is admissible. People v. Becker (Kan.) 1917A-600.

#### Note.

Declarations of infant at time of assault or homicide as part of res gestae. 1916C-1187.

## (11) Testimony at Coroner's Inquest.

48. In a prosecution for murder, where defendants objected generally to the admission in evidence, to impeach their testimony on cross-examination, of a stenographer's transcript of portions of their testimony before the coroner's jury, and parts, at least, of such transcript were admissible, the whole is admissible, since the duty to separate by specific objection the inadmissible from the admissible parts rests upon the defendants alone, not upon the court. Patterson v. State (Ala.) 1916C-968.

## e. Weight and Sufficiency of Evidence.

#### (1) In General.

- 49. Evidence in a murder case held to make a question for jury whether the shooting was intentional or accidental. People v. Kane (N. Y.) 1916C-685.
- 50. In a prosecution for homicide the evidence is held to sustain the verdict. Lee v. State (Fla.) 1917D-236.
- 51. Evidence Sufficient. In a prosecution for murder, evidence held sufficient to show that defendant instigated the murder, which was committed by others. People v. Becker (Kan.) 1917A-600.
- 52. In a prosecution for murder, evidence of corroboration of the accomplices of defendant, who, on grant of immunity, testified that defendant instigated them to hire gunmen to do the killing held suf-

- ficient to go to the jury. People v. Becker (Kan.) 1917A-600.
- 53. Evidence considered and held to be sufficient to sustain a conviction for murder. Belcher v. Commonwealth (Ky.) 1917B-238.
- 54. Evidence Held Insufficient as to One Defendant. On the trial of a wife and her alleged paramour for the murder of her husband, evidence held to be sufficient to present to the jury the issue of the paramour's guilt, but not sufficient to present the issue of the guilt of the wife. State v. Ilgenfritz (Mo.) 1917C-366.
- 55. Murder in First Degree. The evidence is held to be sufficient to warrant a conviction of murder in the first degree. Woods v. State (Ark.) 1918A-348.

## (2) Necessity of Proving Motive.

56. Proof Only of Motive. On the trial of a wife and her alleged paramour for the murder of her husband, evidence of motive alone does not make a prima facie case of guilt. State v. Ilgenfritz (Mo.) 19170-366.

## (3) Self-defense.

57. Self-defense not Shown. In a prosecution for murder, where it appeared that accused had left his barn carrying his shotgun at a time when he was in no immediate danger, and approached the pike upon which the decedents with whom he had had trouble were walking, evidence is held to be sufficient to sustain a verdict of guilty. Chilton v. Commonwealth (Ky.) 1918B-851.

## (4) Identity of Deceased.

58. Evidence of the identity of deceased, whose remains were found burned in a barn, of previous preparation by accused for abortion and of footprints of accused and the horse he was riding, etc., is held to sustain a conviction for manslaughter by direct killing or producing an abortion on deceased. State v. Farnam (Ore.) 1918A-318.

#### (5) Finger Prints.

59. The weight to be given such evidence as finger prints is for the jury. People v. Roach (N. Y.) 1917A-410.

(Annotated.)

#### 6. INSTRUCTIONS.

#### a. In General.

60. What Constitutes "Lying in Wait." Under Ala. Code 1907, \$ 7084, providing that every homicide perpetrated by lying in wait is "murder in the first degree," an instruction in a prosecution for murder, that if the defendants lay in wait for the

deceased, and killed him with a gun while lying in wait, they were guilty of murder in the first degree, is proper; "lying in wait" meaning being in ambush for the purpose of murdering another. Patterson v. State (Ala.) 1916C-968.

(Annotated.)

#### b. Intent.

61. Inference of Intent from Act. An instruction that one who takes the life of another with a deadly weapon must, in the absence of qualifying acts, be presumed to have intended death is not erroneous, where it is qualified by a statement that there must be a sufficient time to deliberate and form the conscious purpose of killing. Commonwealth v. Boyd (Pa.) 1916D-201.

## c. Criminal Responsibility.

- 62. A charge requiring an acquittal of murder in the first degree, if accused was so drunk or mentally unbalanced as to cause him to turn a deaf ear to reason, is properly refused. James v. State (Ala.) 1918B-119.
- 63. An instruction that evidence that accused, relying on the defense of intoxication at the time of killing decedent, was intoxicated at the time, was admitted as bearing on the question of premeditation and deliberation, and if, after consideration of the facts, the jury have a reasonable doubt of the guilt of accused, they must acquit him, is properly refused, because misleading in its suggestion of acquittal because of accused's intoxication, while on the evidence there could be no acquittal on the plea of not guilty. James v. State (Ala.) 1918B-119.
- 64. Mental Capacity as Affecting Degree. Where the jury were instructed that defendant, a deaf mute, could not be convicted unless he was of sound mind and had sufficient reason to know what he was doing, thus authorizing acquittal for mental incapacity, it is not error prejudicial to defendant that the court did not instruct on voluntary manslaughter in relation to mental incapacity. Belcher v. Commonwealth (Ky.) 1917B-238.

## d. Facts not in Evidence.

65. Intent of Accused. On a trial for murder in the first degree, on the theory of its commission during an attempt to rob, where there is no evidence that defendant had voluntarily abandoned the attempted robbery before firing the fatal shot, an instruction that, if defendant had abandoned the intention to rob before he shot deceased, the killing would not have been in an attempt to rob, and unless wilful and premeditated, the killing would not have been murder in the first degree,

is properly refused. State v. Mewhinney (Utah) 1916C-537.

66. Offenses to be Submitted. Under the evidence in this case, voluntary and involuntary manslaughter were not involved, and the court did not err in failing to charge the jury the law applicable thereto. Bird v. State (Ga.) 1916C-205.

#### e. Self-defense.

- 67. It furnishes no ground for reversal that the court, when charging on the doctrine of reasonable fears, used the expression, "if the facts and circumstances were sufficient to excite in the mind of the person killing, as a reasonably self-possessed and courageous man, the fear that his life was in danger," instead of employing the statutory expression, "the fears of a reasonable man." Graham v. State (Ga.) 1917A-595.
- 68. In a prosecution for murder an instruction on self-defense must leave the question to be determined by the jury in the light of all the facts and circumstances in the case, rather than in the light of certain particular facts, whether relied on by the commonwealth or by the accused. Chilton v. Commonwealth (Ky.) 1918B-851.

## f. Charge as to Degree of Crime.

- 69. In a prosecution for homicide, the refusal of the trial court to instruct the jury as to the punishment imposed for the various degrees of homicide is not error, for the punishment is assessed by the court and not by the jury, although the court may, in its discretion, charge the jury on such matter. State v. Inlow (Utah) 1917A-741. (Annotated.)
- 70. On a trial for murder, under an information framed upon the theory of a deliberate and premeditated murder, and under the statute providing that murder committed in an attempt to commit robbery is murder in the first degree without deliberation or premeditation, where the evidence requires a finding that the murder was committed in an attempt to rob, and the court submits the case upon each theory of the information, there is no error in refusing to charge as to second degree murder; since the statute defines the crime shown by the evidence to be first degree murder, and the court is not required to charge on second degree murder so as to empower the jury to disregard the evidence and return a verdict contrary to law. State v. Mewhinney (Utah) 1916C-537. (Annotated.)
- 71. In such case, the court might have submitted the question of second degree murder without committing error against accused. State v. Mewhiney (Utah) 1916C-537. (Annotated.)

#### Note.

Propriety of instruction as to punishment imposed for various degrees of homicide. 1917A-752.

#### g. Recommendation of Mercy.

72. Instructions Relating to Power of Jury. In a trial for murder in the first degree, where the court, after calling attention to the statute enabling the jury to recommend life imprisonment in case they found defendant guilty of that degree of homicide, charged that in considering the question they were not restricted by any rule of law or public policy, but were entitled to decide the question from such considerations as might appeal to them, as reasonably entitled to be weighed in determining such recommendation, is not objectionable as in any way directing or controlling, or attempting to control or direct, the judgment of the jury on the question of recommendation. State v. Mewhinney (Utah) 1916C-537.

#### 7. VERDICT.

73. Homicide—Conviction of Lower Degree—Degree Fixed by Statute. A jury in any homicide case has the power, though not the legal or moral right, to disregard the evidence, and find one, who is clearly guilty of first degree murder, guilty of manslaughter, or acquit him. State v. Mewhinney (Utah) 1916C-537.

(Annotated.)

## Notes.

Right of jury to convict for lesser degree under indictment or information charging act declared by statute to be murder in first degree. 1916C-556.

What constitutes "lying in wait" within statute relating to homicide. 1916C-969.

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Liability of lunatic's estate for maintenance, see Insanity, 18.

Exemption from taxation, see Taxation, 76.

- 1. Liability for Malpractice by Surgeon. Where the medical and surgical treatment of a patient in an infirmary and an operation were prescribed and performed by a surgeon under an independent employment by the patient, the infirmary corporation is not liable for his negligence, unskillfulness, or other wrong, though he was a shareholder and officer of the corporation. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.
- 2. Remedy for Patient's Disobedience. Where a patient does not abide by the rules of a private hospital according to

her agreement, the remedy for those in charge is to discharge her. Cook v. Highland Hospital (N. Car.) 1917C-158.

(Annotated.)

3. Duty Toward Patient on Becoming Insane. Should a patient in a private hospital become insane after going there for treatment, it is the duty of those in charge to notify her relatives, and not to imprison the patient. Cook v. Highland Hospital (N. Car.) 1917C-158.

(Annotated.)

- 4. Good Faith No Defense to False Imprisonment. That the head of a private hospital in good faith believed he was entitled to imprison a patient, who desired to leave, is no defense to an action for compensatory damages. Cook v. Highland Hospital (N. Car.) 1917C-158.
  - (Annotated.)
- 5. Wrongful Detention of Patient. Where a patient in a sanatorium, who is not in such condition that she would be likely to imperil her health or safety, desired to leave, those in charge of the sanatorium cannot lawfully compel her to remain. Cook v. Highland Hospital (N. Car.) 1917C-158. (Annotated.)
- 6. A patient, by agreeing to abide by the rules of a private hospital and to remain there for a fixed time, does not thereby surrender control of herself. Cook v. Highland Hospital (N. Car.) 1917C-158.

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#### 1. DISABILITIES OF MARRIED WO-MEN.

#### a. Contracts in General.

1. Authority of Wife to Pledge Credit for Necessaries. A wife is held not to have exceeded her authority in pledging her husband's credit for provisions where, for 12 years, he made payments on the account, notwithstanding he also advanced her large sums for household expenses. Mettler v. Snow (Conn.) 1917C-578.

2. Household Expenses. Under Ore. L. O. L., § 7039, providing that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and that in relation thereto they may be sued jointly or sepa-rately, although an action at law may be maintained against a married woman for the value of goods purchased by her husband and used as family necessaries, yet the realty of a wife cannot be subjected to the payment of a note given by her husband to evidence his liability to a tradesman for household supplies; her liability under the statute being only upon the original account for goods sold and delivered. Dale v. Marvin (Ore.) (Annotated.) 1917C-557.

3. Power of Wife to Contract. Prior to the passage of Vt. Acts 1884, No. 140, relating to the property of married women (P. S. 3037-3051), a note executed by a married woman was void at law, but by such statute the disability of a married woman to contract with others than her husband is removed so far as her separate property is concerned, with a special limitation that nothing contained therein shall authorize her to become surety for her husband's debts except by way of mortgage duly executed, etc. First National Bank v. Bertoli (Vt.) 1917B-590.

## b. Suretyship for Husband.

- 4. Where a wife signed a note as surety for her husband, the fact that he induced her through false representations cannot be shown in defense; the note being given for a good consideration and the creditor not being a party to the fraud. Royal v. Southerland (N. Car.) 1917B-623.
- 5. N. Car. Const., art. 10, § 6, declaring that the real and personal property of any woman acquired before marriage shall be and remain her sole and separate property, not liable for the debts of her husband, does not inhibit a wife from becoming the surety of her husband; the purpose being merely to protect the estate of the wife from liability for her husband's debts arising by reason of the coverture. Royal v. Southerland (N. Car.) 1917B-623.

(Annotated.)

- 6. A contract of suretyship being primarily a contract between the surety and creditor, a wife may, under N. Car. Laws 1911, c. 109, authorizing married women to contract and deal as femes sole, become surety for her husband. Royal v. Southerland (N. Car.) 1917B-623. (Annotated.)
- 7. Under Ky. St., § 2127, providing that no part of a married woman's estate shall be subjected to the payment for the debt of another, including her husband, unless set apart for that purpose by deed or mortgage a wife's separate property may be mortgaged by her and her husband to secure the debt of the husband or another, regardless of whether her property is a homestead. Hite v. Reynolds (Ky.) 1917B-619. (Annotated.)
- 8. Where certain sureties on the bond of a tax collector borrowed money from a bank and loaned it to the wife of the tax collector, who paid it to the county in settlement of a shortage due the county by the collector, and the wife executed a mortgage to the sureties on her land to secure the payment of the money thus loaned, such a transaction would come within the provisions of the statute, which declares that a wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and that any sale of her

separate estate, made to a creditor of her husband in extinguishment of his debts, shall be absolutely void.

(a) In such a case the sureties on the husband's bond are his creditors within

contemplation of law.

(b) It follows that a mortgage executed and delivered by the wife, on land belonging to her individually, to the sureties on her husband's bond, as set out in the first head-note, is absolutely void, and, on fore-closure proceedings in behalf of the sureties, the wife can defend on such ground and defeat the proceedings. Sharpe v. Denmark (Ga.) 1917B-617.

(Annotated.)

- 9. Act Tex. March 21, 1913 (Acts 33d Leg., c. 32), amending Rev. St. 1911, arts. 4621, 4622, 4624, governing a married woman's liability on contracts, evidences the establishment, or the continuance, with the modifications thereby made, of a well-defined public policy of preventing the diminution of the estates of married women by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations; and a contract made in Illinois by a married woman residing in Texas, whereby she became a surety for her husband, being contrary to this public policy, cannot be enforced in the courts of Texas, or in courts administering the laws of Texas. Grosman v. Union Trust Co. (Fed.) 1917 D-(Annotated.)
- 10. Rev. St. Tex. 1911, art. 4621, as amended by Act March 21, 1913 (Acts 33d Leg., c. 32), provides that neither the separate property of the wife, nor the rents from her real estate, nor the interest on bonds and notes belonging to her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband. Article 4624, as amended by the same act, after providing that the separate property of the husband and certain community property shall not be subject to the payment of debts contracted by the wife, except for necessaries, contains a proviso that the wife shall never be the joint maker of a note, or a surety on any bond or obligation of another, without the joinder of her husband with her in making such contract. It is held that a contract made by the wife alone, by which she undertakes to become a surety on a bond or obligation on which her husband is a principal is forbidden by the statute, as the word "another" cannot reasonably be given such a meaning as would prevent the husband from being regarded as "another" than his wife, and the wife may not become a surety on bonds and obligations in which the husband cannot join. Grosman v. Union Trust Co. (Fed.) 1917B-613.

(Annotated.)

11. A husband, being indebted to plaintiff bank for \$14,500 and being requested to change the indebtedness, procured his wife to execute a note to the bank for \$5.000 after one of the bank's officers had informed her that it was desired only as security for her husband's indebtedness and that the first money received on his collections would be applied in payment of the note. The husband was given credit on other notes for the amount of the wife's note, which was renewed from time to time until after the husband's death, when she was induced to pay a large portion thereof and give a new note for the balance, having proved the last renewal note as a claim against her husband's estate. It is held that the transaction showed that the wife executed the note as surety for her husband only, and that the notes as renewed were therefore void as violating Vt. P. S., c. 147, providing that a married woman may not become surety for her husband, and hence the note given in partial surrender of the last renewal note was without consideration and unenforceable. First National Bank v. Bertoli (Vt.) 1917B-590.

(Annotated.)

Right of married woman to become surety for husband. 1917B-597.

## c. Conveyances.

12. Mortgage—Necessity of Joinder by Husband. A wife's mortgage is in the same category as her deed, as to which Me. Rev. St., c. 63, § 1, provides that realty directly conveyed to her by her husband cannot be conveyed by her without his joinder, so that the husband's inheritance right to one-third of her absolute property is not conveyed by her mortgage thereof, in which he does not join. Gato v. Christian (Me.) 1917A-592.

#### d. Right to Sue and be Sued.

13. Services of Wife—Right to Recover in Own Name. Where a husband has consented that his wife might render services and nursing to a person since deceased, the wife may maintain an action for compensation in her own name under Iowa Code, § 3162, providing that a wife may receive the wages of her personal labor and maintain an action therefor in her name as if unmarried. Tucker v. Anderson (Iowa) 1918A-769.

14. Alienation of Affections — Wife's Right of Action. Under Kirby's Ark. Dig., § 6017, authorizing a wife to sue alone as to any separate property or for damages for any injury, a wife may maintain an action for damages for the alienation of the affections of her husband, whether the cause of action is de-

nominated a personal or a property right. Weber v. Weber (Ark.) 1916C-743.

(Annotated.)

## 2. ANTENUPTIAL CONTRACTS.

## a. Validity.

15. Release of Dower. A contract between parties about to marry that the marriage shall not affect the rights of either in the property of the other or his own property is not contrary to public policy, so that any reasonable provision which an adult previous to marriage agrees to accept in lieu of dower will bar a subsequent claim thereto. Dickason v. English (III.) 1918A-1165.

16. Agreement to Live With Husband's Parents. An agreement between parties about to be married that the wife should live with her husband at the home of his parents is an antenuptial contract which merges into the marriage contract and is of no binding force. Marshak v. Marshak (Ark.) 1916E-206.

17. Provision Contemplating Divorce. A stipulation in an antenuptial settlement providing for a fixed sum for alimony in the event of divorce or separation is void, as providing for a future separation after marriage. Stratton v. Wilson (Ky.) 1918B-917.

18. Signing Without Advice. An antenuptial settlement as to which all the facts were fully stated to the bride before the marriage is not invalidated because she signed it before being so advised. Stratton v. Wilson (Ky.) 1918B-917

19. Concealment of Facts. To be bound by the terms of an antenuptial settlement, the prospective wife, before entering into the contract, and at the time, must have been apprised without misrepresentation or concealment of the nature and extent of her prospective husband's estate and the value of her marital rights therein which she by its terms is surrendering. Stratton v. Wilson (Ky.) 1918B-917.

#### b. Construction.

20. Contract Favored in Law. Contracts for antenuptial settlements are favored by the law, and will not be held invalid for trifling or technical reasons. Stratton v. Wilson (Ky.) 1918B-917.

21. Effect of Testamentary Provision. An antenuptial agreement to cause to be paid to a woman \$250 per month if the parties married and she survived, is not abridged by a codicil providing the annuity out of the remainder of the estate after the provisions of three paragraphs of the will. Estate of Cutting (Cal.) 1917D-1171.

22. Partial Failure of Consideration for Antenuptial Agreement. Where parties about to marry agreed each on his part to release all claims to the property of the other, the wife to receive \$5,000 to be paid from her husband's estate on his death, and to be in full satisfaction and discharge of her claims as widow or heir at law, it being mutually declared to be the intention that neither should have nor acquire any right, title, or claim to the real or personal estate of the other, but that the estate of each should descend or vest in his or her heirs at law, legatees, or devisees as though no marriage had ever taken place, and each agreeing that, in case either decided to mortgage or sell his property, the other would join in the conveyance or mortgage, after which the husband mortgaged his real estate without joining his wife, and the mortgage was foreclosed, the heirs of the mortgagee have title and can have the cloud of the wife's claim to \$5,000 from the estate removed; the marriage and mutual covenants alone being sufficient to support the antenuptial agreement, and the payment of the money not being a condition precedent to the relinquishment. Dickason v. English (Ill.) 1918A-1165. (Annotated.)

#### Notes.

Effect of partial invalidity of antenuptial contract. 1918B-925.

Effect on antenuptial agreement for release of dower or like interest of failure of consideration for agreement. 1918A-1168.

#### c. Enforcement.

23. An antenuptial settlement of \$25,000 to the wife as widow and \$10,000 to her if divorced or separated, where the marriage is consummated, will be enforced on the death of the husband as to the \$25,000 settlement, notwithstanding the illegal promise to pay alimony. Stratton v. Wilson (Ky.) 1918B-917.

(Annotated.)

- 24. Fault of Wife. Where a wife separated from her husband and sued for a divorce, which was refused, it does not necessarily follow that the wife was so much to blame for the separation that an antenuptial agreement between the parties cannot be enforced at her instance. Schnepfe v. Schnepfe (Md.) 1916D-988.
- 25. Effect of Separation. Where husband and wife entered into an antenuptial agreement providing for the payment of \$12,000 by him to her, she relinquishing all other rights in his estate, this agreement will be enforced in equity after his death, although the wife after marriage separated from him. Schnepfe v. Schnepfe (Md.) 1916D-988.

#### 3. WIFE'S SEPARATE PROPERTY.

- 26. Separate Interest in Husband's Property. While a wife may convey her separate interest in land as though unmarried if the deed she executes with her husband is a suitable instrument for release of dower or alienation of homestead, no purpose to affect her independent interest can be implied. Agar v. Streeter (Mich.) 1916E-518.
- 27. Right of Husband to Attack Conveyance. Where a wife sells her separate property, representing herself to be a widow, when, in fact, her husband is living and entitled to his estate by the curtesy initiate, the purchaser having entered into possession, a joint disseisin is effected, so that a joint suit by the husband and wife is necessary; hence, if the wife is estopped from asserting her rights, there can be no relief, the wife not having effected a fraud on her husband. Bryant v. Freeman (Tenn.) 1917E-111.
- 28. Conveyance by Wife—Estoppel of Wife to Repudiate. Where a married woman whose husband has been sentenced to the penitentiary for life disposes of her property, representing herself to be a widow, her fraud estops her from questioning the conveyance on the ground that her husband did not join, and her privy examination was not taken in the form prescribed for deeds of married women. Bryant v. Freeman (Tenn.) 1917E-111.
- 29. Ratification by Husband. Where a wife after the birth of heirs sold her separate property while her husband was in the penitentiary, and after his release he joined with her in disposing of property purchased with the proceeds thereof, he ratifies the original sale and estops himself from setting up any rights in the first property which he might have under his curtesy initiate. Bryant v. Freeman (Tenn.) 1917E-111.

## 4. RIGHTS AND LIABILITIES INTER SE.

#### a. In General.

- 30. Power of Husband to Dispose of Personalty. The general rule is that the law has placed no restriction or limitation on the husband's right to make such disposition of his personal property during his lifetime as he may elect. Poole v. Poole (Kan.) 1918B-929. (Annotated.)
- 31. A widow sued as an heir of her deceased husband to set aside gifts and transfers of personal property made by him to the defendants, who are his sons by a former marriage. The transfers were made without the wife's knowledge, when the husband was eighty-three years

of age and possessed of no other property, and immediately following the dismissal of an action brought by her for separate maintenance, that action having been settled upon his conveying to her certain real estate and agreeing to pay monthly allowance. The court found that he made the gifts and transfers to his sons in anticipation that he would not live long and to prevent the plaintiff from inheriting a share in the property as his widow, and in the further anticipation of the probability that the resumption of the marriage relation with plaintiff would not last long or be permanent, and that she might separate from him and bring another action for alimony or divorce, and to defeat her right to a division of his property, held, following Small v. Small, 56 Kan. 1, 54 Am. St. Rep. 581, 30 L. R. A. 243, 42 Pac. 323, that the gifts to the sons not being colorable but absolute transfers of the title to the property, binding upon the grantor, are binding upon the heirs, and cannot be attacked by the widow as made in bad faith because of the intent thereby to deprive her of an interest in the property either as wife or widow. Poole v. Poole (Kan.) 1918B-929. (Annotated.)

32. Where the transfer or gift is colorable and there is a voluntary transfer or conveyance by which the husband reserves to himself an interest in or a power to dispose of the property, it may be declared void as against the widow and she may participate in its distribution upon the theory that the title still remained in the husband at his death. Poole v. Poole (Kan.) 1918B-929.

(Annotated.)

#### Notes.

Right of husband, as against wife, to dispose of his personalty during coverture. 1918B-934.

Right of wife to leave marital home because of conduct of husband's relatives. 1916E-209.

#### b. Actions Between Husband and Wife.

33. Action by Wife Against Husband. Neither Shannon's Tenn. Code, § 6470. making one committing an assault and battery upon his wife for any cause whatsoever guilty of a misdemeanor, nor Pub. Acts 1913, c. 26, providing that mar-ried women are thereby fully emancipated from all disability on account of coverture, that marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property, or as to her capacity to make contracts, and do all acts in reference to property which she could lawfully do if she were not married, but that every married woman shall have the same capacity to acquire, hold, control, and dispose of property and to make any con-

tract in reference thereto and to bind herself personally, and to sue and be sued as if she were not married, abrogates the common-law rule that one spouse cannot sue the other for an assault committed during the marriage, as it must be assumed that, if it had been the purpose of the legislature to change this rule, such purpose would have been clearly expressed, or would have appeared by necessary implication. Lillienkamp v. Rippletoe (Tenn.) 1917C-901. (Annotated.)

#### 5. RIGHTS AGAINST THIRD PER-SONS.

## Actions for Injuries to Husband.

34. Imprisonment of Husband. Defendant C., believing that plaintiff's husband was immorally intimate with C.'s wife, with certain others carried out a scheme to take the husband in flagrante delicto with another woman, that he might be imprisoned for adultery. Held that, defendants' wrongful act being leveled at the husband only, and not at plaintiff, she could not recover damages from defendants because of the loss of her husband's affections, society, support, etc., due to his incarceration for such offense. Nieberg v. Cohen (Vt.) 1916C-476.

(Annotated.)

Note.

Right of wife to recover damages for imprisonment of husband. 1916C-481.

## b. Actions for Injuries to Wife.

35. Recovery for Loss of Consortium. A husband cannot recover against a person responsible for injuries to his wife for the loss of the undefined influence of the wife in the family relation and the pleasure of the relationship or for the loss of "consortium," defined as a person's affection, society, or aid, or the right to the conjugal fellowship of the wife and to her company, co-operation, and aid in every conjugal relation. Blair v. Seitner Dry Goods Co. (Mich.) 1916C-882.

(Annotated.)

36. Right of Wife to Sue for Injuries. A wife may sue for injuries to her person without joining her husband as plaintiff. Blair v. Seitner Dry Goods Co. (Mich.) 1916C-882.

#### Note.

Right of husband to recover for loss of consortium in action for personal injuries to wife where statute gives wife right of action for such injuries. 1916C-886.

## c. Actions for Services of Wife.

37. Recovery by Husband for Loss of Services. While the legislature has re-lieved married women of certain disabilities and has denied to the husband the

right to her earnings and the profits of any business she may carry on, it has not put her domestic duties and labor performed in and about her home for her family upon a pecuniary basis, nor classified such duties as services, nor permitted her to recover for the loss of ability to perform them, and the husband may recover the pecuniary value of a service habitually rendered by the wife which he has lost on account of her injuries. Blair v. Seitner Dry Goods Co. (Mich.) 1916C-882.

## 6. LIABILITY TO THIRD PERSONS.

#### Necessaries.

38. Attorney's Fees in Divorce Suit. Where an attorney brought an action for a wife for divorce, and the husband filed a cross-petition containing allegations reflecting on the character of the wife, who thereafter withdrew from the case, and the court granted a divorce to the husband on the cross-petition, the attorney cannot, by independent action, recover from the husband for the services rendered the wife on the theory that they were "necessaries." Wick v. Beck (Iowa) 1917A-691. (Annotated.)

39. Household Expenses. Under the New York law, a wife is not liable for provisions furnished the family, unless she expressly agreed to pay for them or exceeded her authority as her husband's agent in ordering them. Mettler v. Snow (Conn.) 1917C-578. (Annotated.)

40. Funeral Expenses. At common law neither a wife nor her estate is liable for necessaries furnished to her or for her funeral expenses, though courts at times enforce such claims against her estate on equitable principles. Bowen v. Daugherty (N. Car.) 1917B-1161.

(Annotated.)

Note.

Liability of wife for household expenses. 1917C-561.

#### b. Liability on Contracts.

41. Attorney's Fees in Divorce Suit. A husband is not liable for the services of an attorney, who at the request of the wife consulted with merchants relative to their furnishing necessaries to the wife pending divorce proceedings by the husband. Meaher v. Mitchell (Me.) 1917A-688. (Annotated.)

42. Since Me. Rev. St. c. 62, § 6, authorizes the court in a libel for divorce to order the husband to pay the wife's attorney's fees, there is no necessity for the wife pledging her husband's credit for such fees, and her attorney cannot, after a divorce has been denied to the husband, recover from the husband for his services

in an independent action. Meaher v. Mitchell (Me.) 1917A-688.

(Annotated.)

43. Note for Household Goods. Where a creditor, to whom a husband had given a note representing his liability for household goods, sought to enforce against the wife her joint liability with the husband for such expenses under Ore. L. O. L. § 7039, by levying execution upon the wife's homestead estate under judgment against the husband alone in an action on his note, the attempt is in contravention of the organic law, which guarantees to a citizen the right of trial by jury before he or she may be deprived of property, unless the wife's realty was fraudulently conveyed to her by her husband. Dale v. Marvin (Ore.) 1917C-557.

(Annotated.)

44. Household Expenses. Where a married woman personally applies to a tradesman for the purchase of groceries, stating that she wishes to open an account in her own name, and directs the plaintiff to charge the goods to her, and where in pursuance of this arrangement the goods are delivered at her home and charged to her, she will be personally liable therefor, notwithstanding the legal obligation of the husband to support his wife, and the groceries being such as would be a proper support to be provided by the husband for the family. Bell v. Rossignal (Ga.) 1917C-576. (Annotated.)

45. Effect on Wife of Covenants. Usually when a wife joins in the deed of her husband of his property, the covenants in the deed being in form the joint covenants of both of them, the covenants are not hers, but are his only; but, if it appears that the sole consideration for the deed was received by her and was by her husband so intended, the covenants will be treated as the joint covenants of husband and wife. Agar v. Streeter (Mich.) 1916E-518.

## Note.

Liability of husband for counsel fees incurred by wife in divorce action. 1917A-689.

#### c. Wife's Funeral Expenses.

46. Liability of Husband for Wife's Funeral Expenses. At common law a husband is liable for the funeral expenses of his deceased wife and for necessaries furnished to her during their married life, including the cost of clothing, food, ordinary household supplies, medical attendance, expenses of sickness, and articles of comfort suitable to the condition and style in which the parties were accustomed to live. Bowen v. Daugherty (N. Car.) 1917B-1161. (Annotated.)

47. Under Laws N. Car. 1911, c. 109, authorizing a married woman to contract as if she were unmarried, a married woman or her estate after her death is liable for her express contract, or in the common counts in assumpsit when goods are furnished on her credit, but where there is no express promise by a wife or circumstances showing that the expenses of her last sickness and her funeral expenses were furnished on her credit, or that of her estate, the husband is primarily liable therefor, and the estate of the wife cannot be charged with claims for such expenses if they can be collected from the husband. Bowen v. Daugherty (N. Car.) 1917B-1161. (Annotated.)

#### Note.

Liability of husband for wife's funeral expenses. 1917B-1164.

#### 7. ALIENATION OF AFFECTIONS.

- a. Nature and Right of Action.
- 48. Liability of Relative. Where a parent, brother, or sister acts in good faith and is prompted by worthy motives in advising a wife or husband to separate from the other spouse, even though such advice results in separation and estrangement, the advising relative is not liable as for alienation; but, if it be made to appear that such relative was actuated by malice, and wilfully interfered for such reason, not for the welfare of the related spouse, an action will lie on behalf of the injured spouse for alienation. Ratcliffe v. Walker (Va.) 1917E-1022.

(Annotated.)

49. Duty of Parents. Parents are justified in giving counsel and advice to a daughter, who has contracted a marriage with a man who is believed by them to be wholly unfitted to make her happy and to support her properly, and if they act without malice, and are prompted by affection for their daughter and solicitude for her health and happiness, they cannot be held liable for alienation. Kleist v. Breitung (Fed.) 1917E-1014.

(Annotated.)

50. Necessity of Separation of Spouses. An action by a married woman against an unmarried woman for alienation of her husband's affections will lie even though plaintiff's husband has not completely and in a literal sense abandoned her. Rott v. Goehring (N. Dak.) 1918A-643.

(Annotated.)

.51. Loss of Consortium. If through defendant's alleged wrongful acts the plaintiff's husband was induced and persuaded to deprive plaintiff of the conjugal affection and society which the marriage contract entitled her to enjoy, she has a right to recover for the injury thus in-

- flicted. Rott v. Goehring (N. Dak.) 1918A-643. (Annotated.)
- 52. Right of Wife to Sue. Section 4355, Comp. Laws N. Dak. 1913, which prescribes what is forbidden by the rights of personal relation, was not intended to prescribe the only rules of conduct as to the violation of the wife's conjugal rights. Held, further, following King v. Hanson, 13 N. D. 85, that subdivision 1 of said section gives to the wife the same protection as subdivision 2 gives to the husband. Rott v. Goehring (N. Dak.) 1918A-643.
- 53. What Constitutes Alienation. Defendant will not be exonerated from all liability merely because the plaintiff's husband may have been more blamable than defendant. Rott v. Goehring (N. Dak.) 1918A-643.
- 54. Prior Estrangement. The fact that plaintiff was estranged from her husband prior to his illicit relations with defendant will not defeat the action. Rott v. Goehring (N. Dak.) 1918A-643.
- 55. Single Act of Unfaithfulness. A single act of sexual intercourse by a man accustomed to marital infidelities, with a prostitute, on a chance occasion, does not constitute the "enticement" and "alienation" essential to a recovery by the wife in a suit for alienation of affections. Nieberg v. Cohen (Vt.) 1916C-476.
- 56. Paramour Solely Liable. The ordinary right of action of a wife for the alienation of affections and loss of society of her husband through criminal conversation is against the husband's paramour alone. Nieberg v. Cohen (Vt.) 1916C-476.
- 57. Right of Recovery. A wife at common law had no remedy for alienation of her husband's affections and consequent loss of his society and aid; such right being conferred on her by modern statutes empowering her to sue alone and to hold separate property. Nieberg v. Cohen (Vt.) 1916C-476.

#### Notes.

Action by wife for alienation of affections or for criminal conversation. 1916C-748.

Liability of parent or guardian for alienation of affections. 1917E-1017.

Liability of relative other than parent or guardian for alienation of affections. 1917E-1027.

Actual separation or abandonment as prerequisite to action for alienation of affections. 1918A-647.

#### b. Burden of Proof.

58. In an action for alienation of the affections of plaintiff's husband, the bur-

den is on plaintiff to show that defendant was the pursuer, not merely the pursued, and that she deliberately influenced plaintiff's husband to withdraw his care, protection, comfort and companionship. Stewart v. Hagerty (Pa.) 1917D-483.

## c. Admissibility of Evidence.

59. Acts After Separation. In an action by a wife against another woman for alienation of the affections of plaintiff's husband, where there is no evidence of improper relations between defendant and the husband before the separation of plaintiff from her husband, evidence of such improper relations thereafter is inadmissible. Stewart v. Hagerty (Pa.) 1917D-483. (Annotated.)

#### Note.

Admissibility in action for alienation of affections of evidence of acts committed after separaton of spouses. 1917D-484.

## d. Sufficiency of Evidence.

- 60. In an action by a husband against the relatives of his wife for a conspiracy to alienate her affections, the questions whether the defendants or any of them gave advice to the wife to induce a separation, indulged in solicitation, used any compulsion, or made any threats to that end, or entertained any malice toward the plaintiff, are held to be for the jury under the evidence. Ratcliffe v. Walker (Va.) 1917E-1022.
- 61. In an action for alienation against the parents, brothers, and sister of a wife who had separated from her husband, the evidence is held to be sufficient to sustain a verdict against all the defendants on the ground that there was a common understanding and design to procure a separation. Ratcliffe v. Walker (Va.) 1917E-1022. (Annotated.)
- 62. Liability of Parent. The evidence is held to be insufficient to show that the defendants, who were the parents of the plaintiff's wife, through malice or other improper motives, alienated her affections from the plaintiff, or that they tried in any way so to alienate her affections. Kleist v. Breitung (Fed.) 1917E-1014.
- 63. Circumstantial Evidence. Direct proof of illicit relations is not required, circumstantial evidence being sufficient. Rott v. Goehring (N. Dak.) 1918A-643.
- 64. Evidence Insufficient. In an action for alienation of the affections of plaintiff's husband, the evidence is held to be insufficient to show that defendant was the active cause of the alienation of plaintiff's husband's affections. Stewart v. Hagerty (Pa.) 1917D-483.

#### 8. CRIMINAL CONVERSATION.

- 65. Evidence. In a trial, without a jury, of a husband's action for criminal conversation, the admission in evidence of letters to plaintiff from his wife containing matters competent and matters incompetent is not error, where the court stated that the letters were admitted merely to contradict any inference that the husband and wife were living together, and there was other and competent evidence relative to the adultery relied on as the basis of the action. Rehling v. Brainard (Nev.) 1917-656.
- 66. Question not Decided Right of Wife to Sue for Criminal Conversation. Whether an action will lie by a married woman for criminal conversation, and also whether such a cause of action is alleged in the complaint, not decided for reasons stated. Rott v. Goehring (N. Dak.) 1918A-643.
- 67. Measure of Damages. In a husband's action for criminal conversation, lack of consortium is an element of the damages, but the fact that the breaking up of the home or the destruction of the marital relation has been only partial, and that there has been a reconciliation, may be considered in mitigation of damages. Behling v. Brainard (Nev.) 1917C-656.
- 68. Scope of Issue. In a husband's action for criminal conversation, the issue is whether the wife has been guilty of adultery without his consent or connivance. Rehling v. Brainard (Nev.) 1917C-656.
- 69. Evidence Sufficient. Evidence in a husband's action for criminal conversation, tried without a jury, is held to sustain a judgment for plaintiff. Rehling v. Brainard (Nev.) 1917C-656.
- 70. Right to Punitive Damages. In actions for criminal conversation, the jury, in their discretion, may award punitive or exemplary damages. Jowett v. Wallace (Me.) 1917A-754.
- 71. Marriage—Proof. In an action for criminal conversation, the husband was a competent witness as to the performance of a marriage ceremony. Jowett v. Wallace (Me.) 1917A-754.
- 72. To support an action for criminal conversation, there must be proof of a marriage ceremony performed by a person authorized by law to solemnize marriages. Jowett v. Wallace (Me.) 1917A-754. (Annotated.)
- 73. In actions for criminal conversation, the production of record proof of the marriage from the proper public records, with proof of the identity of the parties, is sufficient prima facie proof of the authority of

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the person officiating to solemnize marriages; since, while the marriage must be strictly proved, the record affords presumptive evidence of regularity and authority. Jowett v. Wallace (Me.) 1917A-754.

(Annotated.)

74. Proof Requisite to Recovery. In an action for criminal conversation, plaintiff must prove a legal marriage in fact, and carnal intercourse between his wife and defendant. Jowett v. Wallace (Me.) 1917A-754.

Note.

Proof of marriage in action for criminal conversation. 1917A-755.

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IMPRISONMENT FOR DEBT AND IN CIVIL CASES.

1. What Constitutes Debt. Comp. Laws N. Dak. 1913, § 10941, which authorizes imprisonment in case of the nonpayment of

the costs of a criminal prosecution, does not violate either the constitution of the state of North Dakota or that of the United States. State v. Kilmer (N. Dak.) 1317E-116.

2. Rem. & Bal. Wash. Code, § 749, providing that a defendant may be arrested in civil cases, in actions for damages, on a cause of action not arising out of contract, where defendant is a nonresident, or is about to remove from the state, where the action is for any injury to person or character, for wrongfully taking, detaining, or converting property, in an action for fines or penalties, on promise to marry, for money received, property embezzled, fraudulently misapplied or converted by a public officer, an attorney or a corporation's agent, or other person in fiduciary capacity, for professional mis-conduct, for a recovery of possession of personal property unjustly detained and concealed, removed, or disposed of, when defendant has been guilty of a fraud in contracting a debt, or in concealing or disposing of property sought to be taken by suit, when the action is to prevent threatened injury to or destruction of property, when a defendant refuses to apply money to payment of judgments with intent to defraud plaintiff, or when he refuses to comply with the legal order of the court to defraud plaintiff, is unconstitutional, under Const. art. 1, § 17, providing there shall be no imprisonment for debt except in case of absconding debtors; a judgment founded on tort being a within the meaning of the consti-"debt" tution. Bronson v. Syverson (Wash.) 1917D-833. (Annotated.)

#### Note.

Civil liability for tort as debt within constitutional provision against imprisonment for debt. 1917D-841.

## IMPROVEMENTS.

Care required in excavating, see Adjoining Landowners, 9.

Effect on compensation, see Eminent Domain, 37, 38.

Right to lien for improvements by tenant, see Mechanics' Liens, 8.
Street and highway improvements, see

Streets and Highways, 5-15.

Defaulting vendee's right to recover for improvements, see Vendor and Purchaser, 20.

1. Recovery by Occupying Claimant. Where, in a suit to recover the possession of land condemned by a railroad company, defendant in addition to pleading an abandonment of the railroad company's easement also made claim for improvements made upon the property in good faith, believing that he had an absolute title, evidence as to the length of time that defendant was engaged in constructing a

building on the property and the amount expended in its erection is admissible under the claim for improvements. New York, etc. R. Co. v. Cella (Conn.) 1917D-

#### IMPUTATION OF FRAUD.

See Libel and Slander, 30.

#### IMPUTATION OF CRIME.

See Libel and Slander, 24, 25.

#### IMPUTATION OF UNCHASTITY.

To male, see Libel and Slander, 36.

## IMPUTED NEGLIGENCE.

See Automobiles, 26, 32-35, contributory negligence, Imputed Negligence, 55-57.

#### INADEQUACY.

Of gift, effect on validity, see Charities,

INADEQUACY OF CONSIDERATION. Defense of, see Bills and Notes, 13.

#### INCEST.

- 1. Marriage of Accused. In a prosecution for incest alleged to have been committed by defendant with his daughter, a girl of 18, the state introduced a marriage certificate showing that defendant had married E. in Kansas on August 25, 1895, and E.'s sister testified that the woman mentioned in the marriage certificate was her sister and defendant's wife; that she was alive at the time of the trial; and that defendant had lived with her as his wife for the past 20 years. Held, sufficient to establish that defendant was a married man at the time of the commission of the crime. Knowles v. State (Ark.) 1916C-568.
- 2. Cohabitation After Statute Forbidding Marriage. Where defendant in 1882 married the daughter of his half-sister when incest was not a crime, and such marriage was not void, but voidable, his cohabitation with her after the passage of the Act of Dec. 24, 1884 (18 Stat. 857), S. Car. Criminal Code, § 388, making incest a crime, cannot be punished as incest, for as to him the statute would be ex post facto. State v. Smith (S. Car.) 1917C-149.

#### INCIDENTAL POWERS.

See Corporations, 14-16.

#### INCLUSION BY REFERENCE.

In bill of exceptions, see Appeal and Error, 67-70.

#### INCOME TAX.

See Taxation, 180-199.

#### INCOMING PARTNER.

Liability for firm debts, see Partnership, 26, 32-36.

#### INCOMPETENT.

See Insanity.

INCONSISTENT DEFENSES.
Right to plead, see Pleading, 20, 25-30.

INCONTESTABLE CLAUSE. See Life Insurance, 26-37.

#### INCREASE.

See Chattel Mortgages, 21-24.

#### INCREASE OF CAPITAL STOCK.

Preferential rights of stockholders in new issue, see Corporations, 73.

#### INCUMBRANCES.

Effect of bankruptcy, see Bankruptcy, 16. Avoidance of policy by, see Fire Insurance, 18.

Waiver of provision against, see Fire Insurance, 24.

#### IN CUSTODIA LEGIS.

Control of bankruptcy trustee, see Bankruptcy, 14.

#### INDEMNITY.

Action by beneficial obligee, see Bonds, 1.

#### INDEPENDENT CONTRACTORS.

Authorized unlawful act, see Torts, 5.

1. Mode of Payment as Affecting Independence. Defendant made an agreement with J. & Son relative to the construction of a building on its property, by which J. & Son were to erect the brick walls and the foundations according to plans and specifications drawn by defendant's architect, defendant was to furnish all building material, while J. & Son were to supply all scaffolding, etc., used in the construction of the building, J. & Son were to employ their own men, and for their services in the supervision, construction, and general erection of the brick and cement work were to receive a specified sum per week. J. & Son hired all the bricklayers, including plaintiff, and all laborers, and gave the orders to the men as to what they should do, and how it should be done, and one of the members kept the time of the men, and made out the weekly pay roll, which he presented to defendant, from whom he received the money to meet it. Defendant's president was about the building practically every day, and conferred with J. & Son regarding the plans and specifications, and on one occasion told a workman that certain window frames should be changed, but did not tell him to make the change, and it was not made until J. & Son so directed. He also laid off another workman, but in doing so acted under the direction of J. & Son. Held, that J. & Son were "independent contractors," and alone had control over plaintiff and the methods to be used in constructing the building, and hence defendant was not liable for plaintiff's injury caused by the falling of a defective scaffold which was the property of J. & Son, and had been used by them on other buildings, and was placed in position by their employees. Marion Shoe Cov. Eppley (Ind.) 1916D-220.

(Annotated.)

- 2. Control of Work as Affecting Independence. Where a building contract provided that the owner, through an inspector representing him, should have authority to examine the materials furnished, and to condemn that not conforming to a prescribed standard, and the inspector was authorized to arrest the progress of the work if it did not conform to such standard, but he had power only to see that the standard was lived up to as the work progressed, and had no control of the means and methods of attaining the standard, the contractor was an independent contractor, and not an employee, for whose negligence the employer was liable. Prestolite Co. v. Skeel (Ind.) 1917A-474.
- 3. Definition. An "independent contractor" is one exercising an independent employment under a contract to do certain work by his own methods, without subjection to the control of his employer, except as to the product or result of the work. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 4. What Constitutes Independent Contractor. Where an agreement provides for a result to be accomplished, but leaves to the person employed to accomplish it the means and methods by which it is to be accomplished, the person so employed is a contractor, and the relation is not that of master and servant, and the employer is not liable for the contractor's negligence. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 5. Dangerous Employment—What Constitutes. The Ind. Dangerous Employment Act of 1911 (Acts 1911, c. 236) has no application to the liability of an owner for injuries to an employee of an independent contractor, engaged in constructing a building, from the collapse of such

building. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.

- 6. Who is not an Independent Contrac-Where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which it shall be performed, except that it shall conform to a particular standard when completed, he is not liable for an injury occurring to others by reason of any negligence of the person to whom the contract is let, and the fact that he retains a supervision of the work for the purpose of securing certain results, that he may stop work which is not properly done, that the right is reserved to make alterations in the contract, that the contractor is to be compensated by a lump sum, by a commission on the cost, or a per diem, or that the proprietor furnishes the building material, where the accident does not result from a defect in such material, does not change the rule. Marion Shoe Co. v. Eppley (Ind.) 1916D-220. (Annotated.)
- 7. Liability of Owner—Defect in Plans. When an owner has exercised due care to employ an architect to prepare plans and specifications for a building, and builds accordingly, he should not be held liable for any defects, unless they were such that he should have known of them. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 8. Effect of Nuisance Created by Owner. The owner of a building employed an independent contractor to paint it, and the contractor negligently fastened the guy ropes so that the stage on which he was painting slipped, and he fell and struck plaintiff on the sidewalk below. It appeared that the work was done in the usual way, and there was no evidence that it was customary to erect guards over sidewalks above which men were painting from a suspended stage during the work. Held, that, while an abutting owner causing a nuisance to be erected on his property is not excused from liability for an injury therefrom to a person using the street because he employs an independent contractor to do the work, yet, as the suspension of the stage above the sidewalk was not such a menace to the safety of those using it as to amount to a nuisance, the owner was not liable. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115. (Annotated.)
- 9. Admissibility of Evidence. In an action for damages by being struck by an independent contractor who fell from a staging suspended over the sidewalk by reason of his own negligence in fastening the guy ropes, where the president of the defendant owner testified for plaintiff that the contract for painting was given to the contractor and that the owner had nothing to do with the work, did not employ the men engaged in it, or control the

- methods, the plaintiff has a right to ask on redirect examination who owned the appliances used in the work, but not to inquire whether defendant took anv precaution to safeguard travel on the sidewalk below; since the latter question does not relate to any matter covered by the cross-examination. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115.
- 10. Res Ipsa Loquitur. The maxim "res ipsa liquitur," meaning that, although there must be reasonable evidence of negligence, yet where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those in control use proper care, affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, does not apply to the owner of a building who had no control over a contractor engaged in painting it, through whose negligence plaintiff was injured. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115.
- 11. Burden of Proof. Plaintiff, in an action for injury from being struck by an independent contractor who fell from a painter's stage suspended from defendant's building over the sidewalk, by reason of his negligent fastening of the guy ropes, has the burden of showing that defendant owner was guilty of negligence; and the mere fact that the contractor fell and injured him will not justify an inference of defendant's negligence. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115.
- 12. Jury Question Negligence. The question whether an injury might reasonably have been anticipated by the owner of a building abutting on a public street as a probable consequence of work, such as painting and repairing, which he has done by an independent contractor is generally a question of fact for the jury. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115. (Annotated.)
- 13. Duty of Owner. The duty of the owner or property abutting on a highway not to create a nuisance on the highway endangering the public use thereof does not make him an insurer against injury to the public or require him to provide against all possible injury, and does not require him, on employing an independent contractor to paint the building, to see that the guy ropes used by the contractor to fasten a stage are properly tied. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115. (Annotated.)
- 14. Such conditions were not such that the injury might have been anticipated by the owner as the probable consequence of the work if he failed to take proper precaution to prevent it, and hence the owner was not liable; although, if the injury had been such that he should have

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anticipated it, he would have been liable. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115. (Annotated.)

15. Erection of Scaffold - Injury to Pedestrian. The owner of a building contracted with a painter to paint it, he to furnish the appliances and employ the labor therefor, the owner not retaining any supervision of the work or any control over the men, and the contractor used a stage fastened by guy lines which were not tight enough, and which allowed the stage to slip, so that he fell therefrom and struck plaintiff as she was passing on the sidewalk below. Held, that the negligence was the negligence of an independent contractor, for which the owner was not liable. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115. (Annotated.)

#### INDEPENDENT COVENANTS.

To repair and to pay rent, see Landlord and Tenant, 38.

#### INDIANS.

Regulating shipping liquor to Indian Territory, see Intoxicating Liquors, 30.

- 1. Lease of Lands of Minor. Under Act Cong. April 26, 1906, c. 1876, 34 Stat. 145 (Fed. St. Ann. 1909 Supp. p. 190), requiring that allotments of minor Indians be leased under orders of the proper court, and section 2405, Stat. Ind. Ter. section 3509, Mansf. Dig. Ark. relating to the leasing of the lands of minors, an order of court permitting a guardian to lease his ward's land is indispensable to a valid lease. Fisher v. McKeemie (Okla.) 1917C-1039.
- 2. Proof of Age. In an action to cancel conveyances affecting an Indian alloc-ment consummated prior to the approval of Act Cong. May 27, 1908, c. 199, 35 St. at L. 313, § 3, the "enrollment records" are not conclusive evidence as to the age of the allottee. In such case his age is a question of fact, to be proved by competent testimony, as any other fact at issue in the case. Freeman v. First National Bank (Okla) 1918A-259.

#### INDICTMENTS AND INFORMATIONS.

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See Abduction, 1; Adultery, 3; Assault, 1; Conspiracy, 2, 3; Embezzlement, 3-5, Extortion, 1; False Pretenses, 6, 10; Intoxicating Liquors, 84, 89: Larceny, 2, 3, 8; Libel and Slander, 166, 167; Prostitution, 18, 19; Rape.

Charging abduction, see Abduction, 1. Erroneous construction held harmless error, see Appeal and Error, 228.

Failure to give name to injured person, see Automobiles, 67.

Concealment of assets, see Bankruptcy, 30. Accepting deposit while insolvent, so Banks and Banking, 15, 16, 18, 20.

For polygamy or bigamy, see Bigamy, 2. Offering bribe, see Bribery, 2, 3.

Quashing information as bar to prosecution, see Former Jeopardy, 5.

Validity of indictment found after discharge and reassembly, see Grand Jury, 1.

Irregularity in drawing grand jury, effect, see Grand Jury, 3-5.

Quorum necessary to validity, see Grand Jury, 7.

Defective information, relief, see Habeas Corpus, 6.

For involuntary manslaughter, see Homicide, 5-7. For murder, see Homicide, 4, 9, 10, 13. Included offenses, see Homicide, 8, 12.

## Negativing exceptions, see Licenses, 26. 1. FINDING AND FILING.

- 1. Misconduct of Grand Jurors. It is the policy of the law to preserve inviolate the secrecy of proceedings before the grand jury, and the discussion of evidence before them, relating to an alleged crime which they are then considering, by persons not sworn to testify as witnesses, will vitiate an indictment returned by them whether they were actually influenced by such discussion or not. The law seeks to guard against even the possibility such influence. State v. (W. Va.) 1918A-1074.
- 2. Effect of Invalid Appointment. The order appointing an attorney to file an information and prosecute the cause, being void for want of jurisdiction to make it, there being no temporary vacancy in the office of state's attorney, may be attacked by motion to quash the information filed by such appointee, and this without regard to the question of prejudice from the order. State v. Flavin (S. Dak.) 1918A-713.

## 2. FORMAL REQUISITES.

3. Verification. In the United States the informations used by the prosecuting officers are the informations used by the attorney general in England, and not those exhibited by masters of the crown, and which were governed by 4 and 5 William and Mary, c. 18; and as at common law an information could be filed by the attorney general simply on his oath of office,

and without verification, the verification of an information by a prosecuting attorney in this country is unnecessary, unless required by some constitutional or statutory provision. Weeks v. United States (Fed.) 1917C-524. (Annotated.)

- 4. Indictment at Common Law Concluding Against Statute. Under N. Car. Revisal 1905, § 3254, making an indictment sufficient in form where it expresses the charge against defendant in a plain, intelligent, and explicit manner, an indictment otherwise sufficiently good as charging a common-law offense is not invalid because it concludes "against the form of the statute." State v. Craft (N. Car.) 1917B-1013.
- 5. Formal Defects. Under Iowa Code, \$5290, providing that no indictment is insufficient, nor can the trial, judgment, or other proceedings be affected for the omission of certain formal allegations, for surplusage, repugnant allegations, or for other matter, formerly deemed a defect, but not tending to prejudice the substantial rights of the defendant on the merits, the verbal exactness and the technical strictness of old times are not now required in indictments. State v. McAnich (Iowa) 1918A-559.
- 6. Failure to Verify—Cure by Amendment. In a prosecution for libel, error of the court refusing to set aside an information in accordance with provisions of Rem. & Bal. Wash. Code, § 2101, because not verified, is without prejudice, where the court permits an amended information to be filed in the exact language of the original and duly verified. State v. Haffer (Wash.) 1917E-229.
- 7. Necessity of Verification-Information. The provision of the Fourth Constitutional Amendment (9 Fed. St. Ann. 249) that "no warrants shall issue but upon probable cause supported by oath or affirmation," which is a limitation upon the powers of the federal government only, does not require an information filed by a district attorney of the United States to be verified or supported by an affidavit based on personal knowledge and showing probable cause, unless such information is made the basis of an application for a warrant of arrest. If the sole purpose of the information is to state the accusation, a de-fendant may be charged and tried for a misdemeanor on an information not verified nor so supported. Weeks v. United States (Fed.) 1917C-524. (Annotated.)

8. Disregarding Defects. While it is the declared policy of the legislature, as well as of this court, to uphold indictments and informations whenever there has been a substantial compliance therein with the statutory requirements, this relates to matters of form, and not of substance. Brunson v. State (Fla.) 1918A-312.

#### Note.

Necessity that criminal information filed by prosecuting attorney be under oath. 1917C-531.

## 3. CHARGING OFFENSE.

#### a. In General.

- 9. Each Count Treated as a Whole. In determining the sufficiency of an indictment, each count must be treated as a whole, and not merely as a part thereof. Samuels v. United States (Fed.) 1917A-711
- 10. Requisites of Charge. Where the language of an indictment for murder in the first degree is clear enough to enable the jury to easily understand it, and is not so vague as to mislead the accused and embarrass her in the preparation of her defense or expose her to substantial danger of another prosecution for the same offense, the indictment, if not otherwise defective, should not be quashed. Robinson v. State (Fla.) 1917D-506.
- 11. Requisite Degree of Certainty. Where the language of an indictment is sufficiently certain to enable an innocent person to prepare for trial, and furnishes the accused with reasonable information of what he is called upon to answer by setting forth the constituent elements of the crime charged, it cannot be maintained that the accused is not apprised of the nature and cause of the accusation against him. Robinson v. State (Fla.) 1917D-506.

## b. Charging Malice.

- 12. Malicious Mischief. An indictment for malicious injury to property is not bad because it fails to charge that defendant acted "maliciously." State v. Ward (Minn.) 1916C-674.
- 13. Sufficiency. The words "wilfully and unlawfully" embody the idea of maliciousness. State v. Ward (Minn.) 1916C-674.
- c. Charging One Offense in Different Counts.
- 14. One Transaction in Several Forms. Where the statute declares an act unlawful when perpetrated in any one or all of several modes, the information may charge the act in separate counts, basing each count upon the different modes specified. State v. Bickford (N. Dak.) 1916D-140.

## d. Allegation of Time of Offense.

15. Meaning of "Then." As used in an indictment, the word "then" is an adverb of time, meaning "at that time," and the phrase "then and there" means at the time and place charged, and refers to a single transaction. State v. Klasner (N. Mex.) 1917D-824.

## e. Joinder of Offenses.

16. Indictment Sustained. Information for embezzlement examined, and held to charge one, and not several offenses. State v. Bickford (N. Dak.) 1916D-140.

## f. Joinder of Defendants.

17. Violation of License Statute. Where an indictment charged two jointly with practicing medicine without having obtained from the state board of medical examiners the prescribed certificate, such indictment was not invalid for the joinder, since, when two are supposed to be jointly guilty of an offense, they may be indicted jointly or separately, and, in either case, one alone may be found guilty and the other acquitted. State v. McAnish (Iowa) 1918A-559. (Annotated.)

#### Note.

Right to join two or more defendants in indictment for violation of license statute. 1918A-571.

#### 4. AMENDMENT.

- 18. Amendment at Trial. Allowing amendment of an information at close of testimony by inserting "Dorothy Burger" in lieu of "Jennie Doe," where defendant knew at time of filing information that Jennie Doe was a fictitious name intended to describe Dorothy Burger, is without prejudice in view of Mont. Rev. Codes, § 9174, allowing amendment at trial for variance in name where not prejudicial to defendant, and section 9157, providing that no judgment shall be affected by defects in form which do not prejudice rights of defendant. State v. Reed (Mont.) 1917E—783
- 19. Formal Amendment. Under Pa. Act March 31, 1860 (P. L. 433) § 11, authorizing the amending of indictments, it is proper to permit an indictment which charges the killing of a named woman by a man also named, but by clerical error uses the wrong gender of the pronoun in referring to each, to be amended by transposing the pronouns. Commonwealth v. Boyd (Pa.) 1916D-201.
- 20. Prejudice to Accused. Under Iowa Acts 33d Gen. Assem. c. 227, authorizing amendments to indictments which do not prejudice the rights of accused, an indictment for false pretenses which charged that accused induced prosecutor to part with his money on receiving a check therefor, that accused falsely represented to prosecutor that he had sufficient funds in the bank on which the check was drawn to pay it when presented, that prosecutor believed the representations to be true, and was deceived thereby, and that payment of the check was refused when presented because accused did not have any money on deposit, is properly amended by the al-

legation that prosecutor indorsed accused's check, and that money thereon was procured from a bank which was paid to accused. State v. Foxton (Iowa) 1916E-727.

## 5. QUASHING OR SETTING ASIDE.

21. Power of Court on Own Motion, Iowa Code, § 5319, provides that, if motion to set aside an indictment is made before plea is entered the indictment must be set aside, if certain objections appear. objections enumerated do not include that the indictment charges no crime. Section 5331 provides that, if demurrer to an indictment be sustained for failure of the indictment to charge a crime, the defendant must be discharged unless the defect can be remedied in another indictment, when the cause may be resubmitted to the grand jury. It is held that, although the statutes do not authorize a court, on its own motion, before plea, to set aside an indictment for failure to charge a crime, they do not expressly prohibit it, and therefore the court may, on its own motion, set aside an indictment for failure to charge a crime, and resubmit the cause to the grand jury before plea is entered. State v. Asbury (Iowa) 1918A-856.

(Annotated.)

- 22. Grounds for Quashing. Where the information charges an offense different from that stated in the complaint on which accused had a preliminary examination, the accused may, before pleading to the merits, move to quash the information on that ground. State v. Pay (Utah) 1917E-173.
- 23. Complainant Member of Grand Jury. It is not ground for quashing an indictment that the complainant was a member of the grand jury by which it was found but took no part in the deliberation therein. Veronneau v. Rex (Can.) 1917E-612. (Annotated.)
- 24. Prosecutor Member of Grand Jury. That the foreman of the grand jury was the prosecutor, and swore out a complaint against accused, is not ground for quashing an indictment against him, where the foreman retired from the jury room, and did not discuss the case with the grand jury, nor vote on passing the bill. State v. Pitt (N. Car.) 1916C-422.

(Annotated.)

## Note.

Power of court to set aside indictment on own motion and order resubmission. 1918A-860.

#### 6. VARIANCE.

25. Surplusage. Mere matter of unnecessary particularity or immaterial description contained in an indictment is not sufficient upon which to base a charge of variance between pleading and proof. Such variance must be based upon some essential element of the offense or some essential part of such element. Tingue v. State (Ohio) 1916C-1156.

#### 7. RESUBMISSION.

26. Necessity of Summoning Witnesses. Under Iowa Code, § 5278, providing that, on resubmission to the same or another grand jury, it shall be unnecessary to summon the witnesses again, but the minutes on the former indictment may be detached and attached to the second indictment, it is unnecessary that the witnesses, on whose testimony a defective indictment was found, be resummoned before the grand jury which brings in the second indictment on resubmission. State v. Asbury (Iowa) 1918A-856.

27. Resubmission to Grand Jury. Nev. Rev. Laws, § 7005, subd. 6, allows grand jurors to be challenged because of a state of mind which would prevent them from acting without prejudice to the substantial rights of the challenging party. Section 7399 provides that the court may dismiss an action after indictment, and section 7401 declares that such a dismissal shall not bar another prosecution for the same felony. Section 7044 provides that the dismissal of a charge shall not prevent the same charge from being submitted to a grand jury as often as the court may direct. Section 7101 provides that, if a demurrer to an indictment is allowed, the judgment is a bar to another prosecution, unless the court thinks that the defect may be avoided in a new indictment, and directs a resubmission to the same or another grand jury; and section 7024 limits evidence receivable by the grand jury to sworn witnesses, legal documentary evi-dence, and depositions. Defendant was in-dicted for obtaining money under false pretenses, a felony, and pleaded not guilty, and thereafter the indictment was dismissed, and the matter resubmitted to the same grand jury, who reported "No bill." Subsequently the matter was again resubmitted to the same grand jury, who returned an indictment for the felony. Held that, as a reconsideration of the charge or the evidence would be necessary, it could not be resubmitted to the same grand jury, which, having already formed an opinion on the merits, was subject to the challenge that their state of mind prevented them from acting impartially, but that the resubmission must be to another grand jury. State v. Towers (Nev.) 1916D-269. (Annotated.)

#### Note.

Resubmission of cause to grand jury. 1916D-273.

#### INDORSEE.

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## INDORSEMENTS.

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#### INDUCEMENT.

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INDUSTRIAL INSURANCE. See Insurance, 61.

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Liability of carrier to boy invited to ride, see Carriers of Passengers, 27, 70.

Custody on divorce of parents, see Divorce, 58-61.

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Parent's contract for services of child, see Parent and Child, 2.

Parent's action for loss of services, see Parent and Child, 3.

Support by parent, see Parent and Child, 4. Emancipation, see Parent and Child, 5.

Contracts between parent and child, see Parent and Child, 6-8. Infants as witnesses, see Witnesses, 5, 6.

## 1. LIABILITY ON CONTRACTS.

#### a. In General.

- 1. An infant is not bound by a contract made for him or in his name by another person purporting to act for him, unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him; but the person so contracting is himself bound. Cain v. Garner (Ky.) 1918B-824. (Annotated.)
- 2. Enforcement of Infant's Contract for Services. Where an infant's executory contract with plaintiff for personal services as a jockey was unenforceable against him, an injunction restraining him from a breach of its covenants by working for or serving any person except the plaintiff is improperly granted. Cain v. Garner (Ky.) 1918B-824.
- 3. A contract whereby a father undertook to bind his infant son to work for plaintiff as a stable boy and race rider for a term of three years for a fixed compensation to be paid to the father, which purported to be the act of the infant by his parents, and was signed by him and by his father and the plaintiff, covenanting that the infant would not leave the service of plaintiff and would faithfully serve him, but under which the plaintiff was under no obligation to teach the infant or to develop him as a jockey, is a contract for his personal services, and not an indenture of apprenticeship, under the laws of Iowa, where the contract was made. Cain v. Garner (Ky.) 1918B-824.

  (Annotated.)
- 4. When Binding. Attempted contracts by an infant are incomplete and imperfect, and do not become binding except by the act, or failure to act, of the infant after he reaches majority. Matter of Farley (N. Y.) 1916C-494.
- 5. Voidable or Void. Contracts by minors are generally not void, but voidable only, and may be ratified or disaffirmed after majority. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410.

6. Money Loaned. No recovery can be had at law or in equity against an infant for money loaned, though the loan was procured by false representations of the infant as to his age. Leslie v. Sheill (Eng.) 1916C-992. (Annotated.)

#### Note.

Infancy as defense to action for money loaned. 1916C-999.

#### b. Contracts for Necessaries.

7. Legal Services as Necessaries. A petition which seeks a recovery against a minor for legal services rendered in regard to his estate upon an express contract, or upon a quantum meruit, based upon a contract made in a foreign state, which does not plead the lex loci contractus of the contract, showing such services are classed as a "necessary," does not state a cause of action. Marx v. Hefner (Okla.) 1917B-656.

## c. Disaffirmance.

## (1) Right to Disaffirm.

8. Right to Avoid Contract—Contract for Personal Services. Except for necessaries, an infant may, at his election, avoid any executory contract made by him during infancy, including his contract for the performance of labor or personal services. Cain v. Garner (Ky.) 1918B-824.

## (2) Time of Disaffirmance.

- 9. The retention, for three months after full age, of possession of property purchased by an infant, his enjoyment of the beneficial use thereof, payment of part of the consideration therefor, and his offer for sale of part thereof do not preclude right to disafirm or authorize the inference of an intention to ratify. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410. (Annotated.)
- 10. An infant's contract, wholly consummated by him before or after full legal age, requires more prompt action and a less degree of confirmatory conduct than one not thus performed. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410.

  (Annotated.)
- 11. While much depends upon the promptitude with which acts are performed by way of confirmation or disaffirmance after attaining full age, no time has been, or in the nature of things can be definitely fixed as alike applicable to all cases. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410. (Annotated.)

#### Note.

What constitutes reasonable time for infant to disaffirm contract after majority. 1917D-413.

#### (3) Effect of Disaffirmance.

12. Right to Recover. Sections 4014 and 4015, N. Dak. Rev. Codes 1905, permit a minor to make contracts with certain exceptions, in the same manner as an adult, subject to his power of disaffirmance, and permit him to disaffirm contracts, except for necessaries, and statutory contracts, either before his majority or within one year thereafter, when the contract is made while he is under the age of 18; if made when over the age of 18, disaffirmance may be had by his restoring the consideration or paying its equivalent, with interest. Held, that a minor cannot disaffirm his express contract when partially performed and recover in an action based on the contract. Held, further, that an infant having elected to disaffirm his contract when partially performed, the dis-affirmance relates back to the inception of the contract, and the contract is totally destroyed and the parties left to their legal rights and remedies the same as though there had never been any contract. Yancey v. Boyce (N. Dak.) 1916E-258.

(Annotated.)

13. Plaintiff, a minor, made a contract to work for defendant, a farmer, during the season of 1912, and at the end of the season he was to be paid \$30 per month for his services. He disaffirmed this contract and left defendant's employ in August, and subsequently sued upon the contract to recover wages for the time he worked. It is held that the action cannot be maintained, and that the question of defendant's rights to recoup or offset damages sustained by the breach of the contract is therefore eliminated from the case. Yancey v. Boyce (N. Dak.) 1916E-258.

(Annotated.)

14. Discharge of Security. A disaffirmance after full age of a contract made while an infant, and a return, or offer to return, to the vendor of the property purchased, will effect the discharge of a trust lien given to secure payment of the consideration, and to acquit both principal and surety therefrom. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410.

#### Note.

Right of infant who repudiates contract for services to recover therefor. 1916E-261.

#### d. Ratification.

- 15. Whether he acts within a reasonable time after full age, and what acts constitute a ratification, are ordinarily questions of fact. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410.
- 16. To effectuate a ratification, however, the acts must be inconsistent with any other purpose, as where, after attaining his majority, he retains and for an unreason-

able length of time enjoys the beneficial use of property purchased while a minor, or exercises such acts of ownership over it as clearly evince a purpose to ratify. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410.

17. What Constitutes. While ratification is generally a question of intention, the purpose to ratify need not be expressly declared. Such purpose may be, and ordinarily is, inferred from the free and voluntary acts of the party to be charged, although he may not have in mind any definite intent or purpose to ratify. Hobbs v. Hinton Foundry, etc. Co. (W. Va.) 1917D-410.

#### 2. ACTIONS.

#### a. Pleading.

18. Expenditures for Nurture. A petition, in an action on a contract binding plaintiff to rear and maintain defendant's child during the minority of the child, which alleges that plaintiff provided the child with a home, maintained, clothed, and educated him, nursed and cared for him in sickness, and in that way expended the amount demanded, states a cause of action as against the objection that it does not allege that the expenses incurred were necessaries. Myers v. Saltry (Ky.) 1916E-1134.

#### b. Guardian Ad Litem.

- 19. Appointment of Guardian Ad Litem—Effect. Where a guardian ad litem for an infant party to an action has been duly appointed, the infant is properly in court for all purposes. Burke v. Northern Pacific R. Co. (Wash.) 1917B-919.
- 20. Order of Appointment. In an action for the death of a street car passenger, it is not error for the court to admit the order appointing a guardian ad litem on the fact of appointment but not on the truth of the matter alleged in the petition. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.
- 21. Allegation of Appointment. In an action for wrongful death of a street car passenger by the guardian ad litem of minors, an allegation that the guardian was appointed guardian ad litem and was authorized to commence and prosecute the action, and that he accepted the appointment, though inartistic, was not bad as pleading a conclusion. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.
- 22. Necessity for Guardian. Neither under an action upon an express contract, nor upon a quantum meruit, can a recovery be had against a minor in an action at law for an attorney's fee for legal services rendered in behalf of a minor in relation to his property, without the intervention of a legal guardian, as such legal ser-

vices cannot be classed as a "necessary," under the meaning of section 886, Okla. Rev. Laws 1910. Marx v. Hefner (Okla.) 1917B-656.

#### c. Evidence.

23. Burden of Proof. Where an Indian allottee brings an action to cancel certain deeds and mortgages affecting his allotment, on the ground that he was an infant when the same were executed, he thereby assumes the burden of proof in establishing the fact of his infancy. Freeman v. First National Bank (Okla.) 1918A-259.

## d. Actions for Injury to Minor.

24. Under Wis. St. 1915, § 1728a, subd. 1, forbidding the employment of children between fourteen and sixteen in any factory, etc., without first obtaining the permit therein specified, the violation of which is made by section 1728h a misdemennor punishable by fine and imprisonment, plaintiff, under sixteen, who misrepresented his age to defendant's foreman when he was employed, is not thereby estopped from recovering damages for the injury in such employment, as the statute is declaratory of a public policy, and is aimed at the master and not at the servant. Stetz v. F. Mayer Boot, etc. Co. (Wis.) 1918B-675.

25. Defenses. Under Wis. 1915. § 1728a, subd. 1, prohibiting the employment of any child between the ages of fourteen and sixteen at work in any factory, etc., without first obtaining the written permit therein specified, and section 1827h, declaring that any employer including a corporation violating section 1728a, subd. 1, shall be guilty of a misdemeanor and liable to fine or imprisonment, an employer of a child having no permit cannot defend on the ground that its foreman was reasonably justified under all the facts in relying on his representation that he was more than sixteen years of age; since the employer's violation of the statute constitutes a criminal offense, classed with gross negligence, and makes him liable in a civil action for injury resulting from such vio-lation of law. Stetz v. F. Mayer Boot, etc. Co. (Wis.) 1918B-675.

## e. Proceedings in Juvenile Courts.

26. Employment Forbidden. Under the Wash. Juvenile Court Law (Laws 1913, p. 520), a girl of 17 cannot sing in a café where intoxicants are sold, even though she gains her livelihood in that manner, and notwithstanding it is elsewhere provided in the act that children under the age of 12 shall not participate in any entertainment for hire. In re Lundy (Wash.) 1916E-1007. (Annotated.)

- 27. Procedure Approved. In the charge, apprehension, investigation and order involved herein, the child was not denied any of her constitutional rights. In Re Turner (Kan.) 1916E-1022. (Annotated.)
- 28. Verification of Complaint. A girl 15 years old found by the probate judge. sitting as the juvenile court, to be delinquent and incorrigible, to associate knowingly with immoral persons, to be growing up in idleness and crime, and violating the city ordinances by remaining out until late hours at night, was ordered committed to the Industrial School for Girls at Beloit. Her parents appeared without service of process on them, but the child was taken into custody by the probation officer upon a warrant based upon a complaint verified on information and belief. A hearing followed, and the testimony abundantly supported the findings of the court. Held, that such child is not entitled to a writ of habeas corpus because of failure to verify the complaint positively. In re Turner (Kan.) 1916E-1022. (Annotated.)
- 29. Proceedings not Criminal. By express declaration of the statute in question, and by the settled decisions applicable to similar enactments, all such proceedings, orders and judgments are deemed to have been taken and done in the exercise of the state's parental power, and neither the stigma nor the penalty for crime can be held to accompany such proceedings or order. In re Turner (Kan.) 1916E-1022. (Annotated.)
- 30. Vacating Commitment. A juvenile court has no power to vacate a commitment after the expiration of the term at which it is entered. Board of Children's Guardians v. Juvenile Ct. (D. C.) 1916E-1019. (Annotated.)
- 31. Purpose of Statute. The Kan. juvenile court act (Gen. St. 1909, §§ 5099-5113) has for its object, not the punishment of juvenile offenders for misconduct, criminal or otherwise, but their removal from the path of temptation and their direction into the paths of rectitude by preventive and corrective means. In re Turner (Kan.) 1916E-1022. (Annotated.)
- 32. The act is an assertion of the state's power as parens patriae and its right to exercise proper parental control over those of its minor citizens who are disposed to go wrong. In re Turner (Kan.) 1916E-1022. (Annotated.)
- 33. Order for Probation. Under the Utah juvenile delinquent statute providing that the juvenile court may order that the juvenile be committed to the State Industrial School, that the court may commit a juvenile to the care of a probation officer, subject to return to court for further proceedings, or may dispose of the

matter in any way deemed for the best interests of the delinquent, the act of the juvenile court in making an order of commitment upon the first hearing, and then conditionally suspending it by an order of probation, and, after violation of the conditions of probation, ordering that she be committed, while somewhat irregular, is not void. Stocker v. Gowans (Utan) 1916E-1025. (Annotated.)

- 34. Notice to Parent. Where the juvenile court, after notice of proceedings to the mother of a delinquent, and a finding of her unfitness, which was not disputed or appealed from, made an order of commitment, and suspended it by an order of probation, and having control of the delinquent and authority to modify its orders, it may on a showing of the delinquent's violation of the probation conditions order her commitment without further notice to the mother. Stoker v. Gowans (Utah) 1916E-1025. (Annotated.)
- 35. Review of Proceedings. Under the Utah juvenile statute, as amended and reenacted by Laws 1913, c. 54, giving the juvenile court jurisdiction over delinquents under the age of 18, and making its judgments operative until the delinquent reaches the age of 21 years, and providing that all orders of the court shall be under its control until the delinquent reaches such age, the delinquent or any one in her behalf may apply for a modification of the judgment, and determination of the right of her custody with a right of appeal as provided in section 11, so that the rights of delinquents may be enforced without recourse to habeas corpus proceedings. Stoker v. Gowans (Utah) 1916E-(Annotated.) 1025.
- 36. Married Infants. The operation of the law governing juvenile delinquents is not suspended merely because a delinquent enters into the marriage relation. Stoker v. Gowans (Utah) 1916E-1025.

  (Annotated.)
- 37. Purpose and Construction of Law. The Wash. Juvenile Court Law (Laws 1913, p. 520), declaring that certain minor children shall be considered delinquents and wards of the state, should be given a liberal construction, so as to give effect to the beneficent purpose of the law, except in so far as it purports to restrain the liberty of infants, in which case it should be construed with all the strictness of a criminal statute. In re Lundy (Wash.) 1916E-1007. (Annotated.)
- 38. Married Infant. The Wash. Juvenile Court Law (Laws 1913, p. 520), declaring that the law shall apply to all minor children under the age of 18 who are delinquent or dependent, and that the words "dependent children" shall mean uny child under the age of 18 who habitually visits any pool room, saloon, or place

where intoxicating liquors are sold, etc., applies to a girl of 17 who had previously been married to a man of full age, though the marriage had been annulled. In re Lundy (Wash.) 1916E-1007.

(Annotated.)

#### Notes.

Juvenile Courts. 1916E-1010. "Child" as including illegitimate child. 1918B-249.

INFECTIOUS DISEASES.
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#### INFRINGEMENT.

of trade names, see Trademarks and Tradenames, 3-7.

## INHERIT.

Meaning, see Tenants in Common, 2.

## INHERITANCE.

Nature of right to take by, see Descent and Distribution, 2.

INHERITANCE TAXES. See Taxation, 28, 171-179.

#### INITIALS.

See Names.

## INITIATIVE AND REFERENDUM. See Intoxicating Liquors, 14.

- 1. Scope of Power. Since by the bill of rights all political power is vested in and derived from the people, and by Miss. Const. 1890, § 33, as amended, a part of the legislative power is conferred upon the legislature, the remainder being reserved to the people, and by Const. 1890, § 273, the legislature has a limited power to amend the constitution (Laws Miss. 1916, c. 159) as to initiative and referendum gives no new power to the people and is valid. State v. Brantley (Miss.) 1917E-723. (Annotated.)
- 2. Emergency Laws. The provision in section 2 of chapter 237, N. Dak. Laws 1915 (commonly known as the State Board of Regents Act), empowering the governor to nominate and the Senate to confirm nominations for the offices of members of the state board of regents during the same session of the legislature at which the act creating the offices was enacted, does not conflict with or contravene the initiative and referendum amendment to section 25 of the state constitution. State v. Crawford (N. Dak.) 1917E-955.
- 3. Grant of Power to Municipality. The Minn. constitutional requirement that the

(Annotated.)

charter shall provide a legislative body for the city is not violated by conferring the power of the initiative and referendum upon the electors of the city after establishing such legislative body. State v. Duluth (Minn.) 1918A-683.

- 4. Legislative Power. The amendment of Ore. Const. art. 4, § 1, declaring that the legislative authority shall be vested in a legislative assembly, that the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same, and also reserve the power to approve or reject any acts of the legislative assembly, does not lessen the powers of the legislature in matters of legislation only, but the legislature is not the exclusive agent of legislation, and such power is conferred on the people by article 11, § 1, and article 4, § 1a, reserving to the people the initiative and referendum. Kalich v. Knapp (Ore.) 1916E-1051.
- 5. Form of Submission. The mere fact that separate powers of finitiative and referendum might have been submitted upon separate ballots is not determinative of the question whether submission of both projects on one ballot violated Miss. Const. 1890, § 273, as to plurality of objects. State v. Brantley (Miss.) 1917E-723. (Annotated.)
- 6. Submission on one ballot of the three powers of initiative and referendum as applied to statutes, and initiative as applied to constitutional amendments, being for the one general purpose of providing more direct control of legislation, does not violate Miss. Const. 1890, § 273, providing that, if more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately. State v. Brantley (Miss.) 1917E-723. (Annotated.)
- 7. Presumption as to Vote. In the absence of correct certification of the number of electors voting upon a constitutional amendment submitted at a general election, the court must presume that the highest number of votes cast for candidates for any one office represented the number of electors voting, so that a vote for the amendment to the constitution (Laws Miss. 1916, c. 159) providing for the initiative and referendum was adopted where the vote therefor was 19,118 and the highest vote cast for any office was 37,583. State v. Brantley (Miss.) 1917E-723.
- 8. Procedure. Wash. Const. Amend. 7, approved March 10, 1911 (Laws 1911, p. 136) requires the legislature to provide methods of publicity of all laws and amendments to the constitution referred to the people so that each voter of the state shall receive the publication at least

50 days before the election, and that any initiative measure shall become a law if approved by a majority of the votes cast thereon. Laws 1913, p. 418, enacted pursu-ant thereto, provides by section 29 that not less than 55 days before any election on initiative measures the secretary of state shall mail each voter a copy of the pamphlet containing the measure, and by section 30 that votes thereon shall be canvassed by the regular election officers, and that within 30 days after election the secretary of state shall canvass the vote and certify the result to the governor, who shall proclaim measures approved by a majority equal to one-third of the total vote cast to be the law of the state. In an action to enjoin the governor and state and county officers from enforcing initiative measure No. 3 (Laws 1915, p. 2), prohibiting the manufacture, keeping, sale, and disposition of intoxicating liquors, it was contended that the measure had not been lawfully submitted or voted upon. It is held in the absence of constitutional or statutory provisions for preserving any official record evidence or facts showing sufficiency of publication that, while the court judicially knew that the measure was submitted by the general election, that a majority of votes were for its adoption, that the governor had proclaimed the result of the canvass, and declared it a law, it could not judicially know any facts touching the sufficiency of the publication and hence could not determine its sufficiency. Gottstein v. Lister (Wash.) 1917D-1008.

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## 1. NATURE AND GROUNDS OF RE-LIEF.

#### a. In General.

1. Apprehension of Injury. An injunction should not be issued upon the mere apprehension of the complainant that some illegal act would be done. O'Rear v. Sartain (Ala.) 1918B-593.

2. Statute Regulating Procedure. Cal. Code Civ. Proc. §§ 525-533, defining the power of a superior court as to granting, refusing, modifying, and dissolving temporary injunctions, are not invalid as encroaching upon the original jurisdiction of the court in equity cases granted by the constitution of 1879. United Railroads v. Superior Court (Cal.) 1916E-199.

#### 2. SUBJECTS OF RELIEF.

- a. Property and Rights of Property Generally.
- 3. Unlawful Carriage of Passengers by Jitney. Where the plaintiff street railway company has a franchise from the city, its franchise is a property right, under which it can restrain any person from becoming a common carrier of passengers in competition with it without legislative or municipal authority, and for that purpose its franchise is exclusive against all persons upon which similar rights have not been conferred. Memphis St. R. Co. v. Rapid Transit Co. (Tenn.) (Annotated.) 1917C-1045.
- 4. Against Trespass. The grantee of the successful plaintiff in ejectment, in possession thereunder, is entitled to an injunction against one committing trespass upon the realty whose sole claim of title is under the unsuccessful defendant in ejectment. Williams v. Richardson (Fla.) 1916D-245.
- 5. In a suit to enjoin the closing of a right of way acquired by prescription. The petition sufficiently set forth a cause of action, and it was error to dismiss it on general demurrer. Carlton v. Seaboard Air-Line Ry. (Ga.) 1917A-497.
- 6. Against Creation of Cloud on Title. Equity will enjoin execution of a deed which it would cancel if executed. Maynard v. Henderson (Ark.) 1917A-1157.
- 7. Interference with Easement. Upon proper application, a court of equity will enjoin interference with an owner's easement when the injury complained of is irreparable, the intermeddling continuous, or the remedy at law for damages inadequate. Nicholas v. Title, etc. Co. (Ore.) 1917A-1149.

#### b. Personal Rights.

8. Against Publication of False Political Matter. The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by the following constitutional provisions: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for 1916C-1918B.

libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Neb. Const. art. 1, § 5. Howell v. Bee Publishing Co. (Neb.) 1917D-655. (Annotated.)

9. Against Publication of Libel. Where no breach of trust or of a contract appears, a bill in equity will not lie to enjoin the publication of libelous statements injurious to plaintiff; his remedy being an action at law for damages. Finnish Temperance Soc. v. Riavaja Pub. Co. (Mass.) 1916D-1087. (Annotated.)

#### Note.

Injunction against publication of or to compel retraction of libel. 1916D-1088.

#### c. Contracts.

- 10. Breach of Contract. Equi'y will restrain a breach of an express covenant where injury arising from a breach cannot be adequately compensated. Marvel v. Jonah (N. J.) 1916C-185.
- 11. Covenant Against Engaging in Competing Business. A stipulation, in a firm agreement between plaintiff and defendant for the general practice of medicine at Atlantic City, that defendant will not practice medicine in the city for three years after the termination of the firm, is enforceable in equity at the suit of plaintiff who had built up so large a practice in the city as to be unable to take care of it without assistance, as against the objection that equitable relief will deprive defendant of the privilege of practicing in the only field of his acquaintance; the practice of the firm not being confined to Atlantic City, but embracing adjacent boroughs. Marvel v. Jonah (N. J.) 1916C-185. (Annotated.)
- 12. Contract of Employment. Contracts for the services of artists of special merit are personal and peculiar, and, when they contain negative covenants which are essential parts of the agreement that the artist will not perform elsewhere, and the damages in case of violation are incapable of definite measurement, they are such contracts as ought to be specifically enforced, and a violation of the covenants will be restrained by injunction. Cain v. Garner (Ky.) 1918B-824.

#### Note.

Injunction as remedy for breach of express covenant not to engage in same business as covenantee. 1916C-187.

- d. Municipalities and Public Officers.
- Restraining Passage or Enforcement of Statute or Ordinance.
- 13. Enjoining Criminal Prosecution. While equity will not ordinarily enjoin a

- criminal prosecution (Georgia Railway & Electric Co. v. Oakland City, 129 Ga. 576, 59 S. E. 296) yet, where repeated prosecutions are threatened under a void municipal ordinance, and the effect of such prosecutions would tend to injure or destroy the property of the person prosecuted or deprive him of the legitimate enjoyment of his property, equity will entertain a suit to inquire into the validity of the ordinance, and enjoin its enforcement. Carey v. Atlanta (Ga.) 1916E-1151.
- 14. Preventing Criminal Prosecution. Where prosecution under a void regulation relating to a misdemeanor is threatened, and the attempted enforcement of the regulation will deprive plaintiff of a valuable property right, he may sue to enjoin the prosecution. Ideal Tea Co. v. Salem (Ore.) 1917D-684.
- 15. Against Enforcement of Penal Statute. The owner of a teachers' agency who was threatened with prosecution under the Wash. Employment Agency Law, and whose business would be greatly injured or destroyed in case of arrest and prosecution, could, where it appeared that he might come within the purview of the law, obtain an injunction against prosecution and in that way secure a construction of the act and test its constitutionality, not being bound to wait until criminal prosecution under the law prohibiting the charging of fees for obtaining employment had ruined his business. Huntworth v. Tanner (Wash.) 1917D-676.
- 16. Against Criminal Prosecution. While as a general rule a court of equity (or one exercising equitable jurisdiction) will not enjoin a proceeding before a recorder of a city, instituted for the purpose of punishing the violation of a penal ordinance, yet in certain cases a court having equitable jurisdiction may intervene to proceed property or property rights from irreparable damage by wrongful conduct of municipal officers, although repeated prosecutions in the recorder's court, or threats thereof, may be used as a means of consummating the wrong. Cutsinger v. Atlanta (Ga.) 1916C-280.
- 17. Restraining Prosecution Under Invalid Statute. Equity has jurisdiction to restrain the criminal prosecution of an employer under the Arizona anti-alien labor law of December 14, 1914, at the instance of an alien employee who alleges that the act violates the federal constitution and that its enforcement will result in his immediate discharge from employment, although such employment may be one at will, rather than for a term. Truax v. Raich (U. S.) 1917B-283.
- 18. Federal Injunction Against Enforcement of State Penal Statute. The threatened enforcement by state officers through civil or criminal proceedings, of a state

statute which is attacked as repugnant to the federal constitution, may be enjoined by a federal court, where the statute, if exerted against complainants and their property, will produce irreparable injury. Rast v. Van Deman, etc. Co. (U. S.) 1917B-455.

19. Against Prosecution for Violating Liquor Law. In an action to enjoin a prosecution for carrying on business without a license in violation of Ore. Laws 1913, p. 143, providing that no person shall sell or receive or solicit consignments, or farm, dairy, orchard, or garden products for sale upon commission, where the complaint does not deny that plaintiff is engaged in such business, it is insufficient to authorize equitable interference. Sherox v. Aitchison (Ore.) 1916C-1151.

(Annotated.)

- 20. Irreparable Injury the Criterion. Where an attempted enforcement of an invalid ordinance or statute would do irreparable injury to property rights, a court of equity may restrain the maintenance of the criminal actions. Sherod v. Aitchison (Ore.) 1916C-1151. (Annotated.)
- 21. Mere Invalidity Insufficient. The mere invalidity of a statute or ordinance is not sufficient to authorize an injunction against a prosecution thereunder, since such invalidity may be interposed as a complete defense to the prosecution. Sherod v. Aitchison (Ore.) 1916C-1151.

  (Annotated.)

#### Note.

Power of equity to enjoin criminal prosecution. 1916C-1153.

- (2) Restraining Payment of Moneys Unconstitutionally Appropriated.
- 22. Enjoining Purchase of Property. The averment of the unverified bill to enjoin a county from buying land that too much is being paid for it, and that complainant believes and alleges that the county is being burdened with \$50,000 more than the land is worth, this going as a profit to promoters, is insufficient as an attack on the purchase, authorized by the legislature at the price attacked. Heiskell v. Knox County (Tenn.) 1916E-1281.
  - (3) Restraining Discretionary Acts.
- 23. Equity has no power to control the discretion of county commissioners in the conduct of the county's business. O'Rear v. Sartain (Ala.) 1918B-593.
  - e. Civil Actions and Proceedings.
- 24. Restraining Suit in Another State. A court may restrain a citizen of the state of the forum from prosecuting a suit against a citizen of the same state in

- a foreign state. American Express Co. v. Fox (Tenn.) 1918B-1148. (Annotated.)
- 25. Defendant, a resident of Tennessee, will not be enjoined from suing a complainant in the state of Mississippi on a cause of action arising in Tennessee, because it would be to complainant's convenience to be sued in Tennessee, or because the rules of law in Mississippi are slightly different, for probably the laws of Tennessee would be applied, and such an injunction should be granted only in a very special case, and not one merely where the practice in two states differed. American Express Co. v. Fox (Tenn.) 1918B-1148. (Annotated.)
- 26. A court will not, at the suit of a nonresident corporation which might remove a suit brought by a resident of the state to the federal courts, enjoin a resident from suing in a foreign state, for such corporation could not be compelled to submit to the jurisdiction of the local courts. American Express Co. v. Fox (Tenn.) 1918B-1148. (Annotated.)

#### Note.

Power of court to enjoin proceedings in another state or country. 1918B-1150.

- f. Restraining Acts Constituting Nuisance as Crime.
- 27. Protection of Water Rights. Rev. St. Colo. 1908, c. 72, providing a method of establishing priorities to the use and distribution of water, and that any commissioner failing to perform his statutory duty, and any person violating the commissioner's order, shall be guilty of criminal offenses, does not afford a complete and adequate remedy for injury from the taking of water by a junior appropriator, when it is needed and demanded by a senior appropriator within the same irrigation division, so as to preclude an injunction. Rogers v. Nevada Canal Co. (Colo.) 19170—669.
- 28. Public Nuisance. The rule that equity cannot punish crime if the punishment is the only object of the proceeding does not prevent it from exercising its jurisdiction to enjoin a public nuisance against a disorderly house, which was a public nuisance at common law, particularly where criminal prosecutions have proved effective. People v. Clark (III.) 1916D-785. (Annotated.)
- 29. Private Nuisance. The keeping of a bawdyhouse being a crime, and being a private rather than a public nuisance it cannot be enjoined in a suit by the state. Laymaster v. Goodin (Mo.) 1916C-452.

(Annotated.)

## Note.

Right of state to enjoin private nuisance which is also crime. 1916C-455.

g. Restraining Labor Combinations.

30. Injunction Against Unionizing Employees. Where an employer makes nonmembership in a labor union a condition of employment, with the free assent of its employees, the fact that the employment is at will and terminable by either party at any time does not affect the right of the employer to an injunction against the efforts of third parties to organize the employees. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461. (Annotated.)

31. An employer, operating a nonunion mine and having agreements with his employees that they would not become members of a union, is as much entitled to an injunction to prevent the unionizing of the miners as the unionizing of the mine, assuming that there is a practical distinction between the two; the first being but a step in the process of unionizing the mine. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461. (Annotated.)

h. Restraining Criminal Prosecution.

32. Kirby's Ark. Dig. § 2454, providing for an inquest by sheriff's jury into the insanity of persons sentenced to be executed, affords such person a remedy in case he becomes insane after trial. Hence the chancery court cannot, on the ground that such person has no other remedy, justify an order enjoining his execution.

Ferguson v. Martineau (Ark.) 1916E-421.

(Annotated.)

33. Courts of equity have no jurisdiction to interfere by injunction with criminal proceedings; their jurisdiction to be confined solely to civil and property rights. Ferguson v. Martineau (Ark.) 1916E-421.

34. The threatened prosecution of a criminal action will not usually be enjoined, under Ore. L. O. L. § 389, authorizing suits in equity where there is not a plain, adequate, and complete remedy at law. Sherod v. Aitchison (Ore.) 1916C—1151. (Annotated.)

#### i. Restraining Criminal Act.

35. Enjoining Criminal Act. Although the acts of a water officer in permitting water to be taken by a junior appropriator, and the taking thereof by the latter, are erimes subject to prosecution, they constitute a special injury to the senior appropriator, and may be enjoined by a court of equity. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

#### Note.

Right of municipality to enjoin violation of municipal ordinance. 1916C-963.

## 3. ACTIONS FOR INJUNCTIONS.

## a. Bill.

36. Petition Held Sufficient. The allegations of the petition for an injunction in

this case were sufficient to withstand a general demurrer, which admits the facts alleged; and it was error to sustain the demurrer and dismiss the petition. Cutsinger v. Atlanta (Ga.) 1916C-280.

## b. Temporary Restraining Order.

37. On January 27th an injunction suit was instituted by the county attorney praying for a temporary restraining order enjoining defendants from permitting moving picture shows being opened on Sunday, and that the cause be set for hearing, and that upon final hearing the temporary restraining order be made permanent, and the petition was presented on the same day to the judge of the district court, who indorsed thereon the following fiat: "Petition granted and clerk of district court directed to issue and direct to each and every defendant . . . an order enjoining, restraining, and prohibiting them and each of them from opening or permitting to be opened their theaters and moving picture shows on Sunday . . . until further orders of this court; this cause set down for hearing Saturday, February 3d." Held, that the order was only a temporary restraining order and expired on the date of the hearing, unless extended, and hence a judgment of contempt for its alleged violation after such date was void. Ex parte Zuccaro (Tex.) 1917B-(Annotated.)

#### 4. TEMPORARY INJUNCTION.

#### a. In General.

38. Distinction Between Restraining Order and Temporary Injunction. Under the Texas practice, injunctions are classified: First, as a "restraining order," which is an interlocutory order made upon application for an injunction as a part of a motion for the preliminary injunction, by which a party is restrained pending the hearing of the motion; second, an order which operates, unless dissolved by an interlocutory order, until the final hearing; and, third, a perpetual injunction, which can only be ordered upon final decree. Ex parte Zuccaro (Tex.) 1917B-121.

(Annotated.)

39. Temporary Injunction Properly Denied. The court erred in granting a temporary injunction. Jacob's Pharmacy Co. v. Luckie (Ga.) 1917A-1105.

#### Note.

Distinction between temporary restraining order and temporary injunction. 1917B-123.

## b. Modification or Suspension.

40. Power to Modify. In view of Cal. Civ. Code, § 3421, providing that provisional injunctions are regulated by the

Code of Civil Procedure, and Code Civ. Proc. §§ 525-533, providing a complete system of law and procedure as to granting, refusing, modifying, and dissolving temporary injunctions, and of sections 939, and 963, allowing an appeal from an order granting or dissolving an injunction, a superior court, which, upon notice and hearing, has granted a temporary injunction absolutely restraining a defendant from the commission of certain acts during the pendency of the action, without reserving any right of revocation or modification, has no power subsequently to make an order staying the operation of the injunction until final determination of the cause or until a contemplated appeal has been heard. United Railroads v. Superior Court (Cal.) 1916E-199.

(Annotated.)

Modification or suspension of preliminary injunction before trial. 1916E-205.

#### 5. INJUNCTION BOND.

41. Where a telegraph company was enjoined, during the year 1914, from carrying on intrastate business within the state because it had not paid the city license fees, and the city had given the statutory bond to secure the injunction, the case will not, after the expiration of the year, be deemed moot, so as to preclude a review of the question by the court, for a dismissal of the appeal would result in leaving the question of whether the issuance of the injunction was wrongful undetermined, and would not give the telegraph company any rights under the bond; this being true, even though it might be maintained that the city, as an arm of the state, was not required to give bond. Postal Telegraph-Cable Co. v. Montgomery (Ala.) 1918B-554. · (Annotated.)

# INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

Under Workmen's Compensation Act, see Master and Servant, 206-230.

## INJURIES TO PROPERTY.

See Injunctions.
Measure of damages, see Damages, 15.

#### INJURY.

Meaning within Workmen's Compensation Act, see Master and Servant, 196.

#### INNKEEPERS.

- 1. Definitions and Distinctions, 443.
- 2. Statutory Regulation, 443.
- 3. Liability for Effects of Guest, 444.
- Liability for Personal Injuries to Guest, 444.
- 5. Lien of Innkeeper, 444.

See Licenses, 28-30.

Injury to guest by impure food, see Food, 25-26.

Duty to provide hotel with fire escapes, see Landlord and Tenant, 13.

#### 1. DEFINITIONS AND DISTINCTIONS.

1. When Relation Commences—Delivery of Baggage. The relation of innkeeper and guest involves the obligation to furnish accommodation on the one hand, and the obligation to pay on the other. Generally a person becomes a guest when he registers and engages accommodation. He may, however, be a guest before doing either. Handing baggage to a porter or bell boy of the inn may commence the relations, if the parties contemplate that accommodation be engaged. But one does not become a guest by merely handing his satchel to such employee when he does not intend to engage such accommodation. Parker v. Dixon (Minn.) 1918A-540.

(Annotated.)

2. Restaurants Distinguished from Inns. A restaurant keeper differs from an inn-keeper in that he furnishes only food, or food and drink, and not lodging or shelter, though, in so far as the character of the service performed by a restaurant keeper and by an innkeeper to their respective patrons is concerned, it is the same. Merril v. Hodson (Conn.) 1916D-917.

## Note.

Intrusting baggage to innkeeper or his employee as establishing relation of innkeeper and guest. 1918A-541.

#### 2. STATUTORY REGULATION.

3. The act of 1883 (Laws 1883, c. 47) known as the "Nebraska Hotel Act" imposing on innkeepers the duty to take certain precautions against fire does not contravene the provisions of the Fourteenth Amendment to the constitution of the United States, or deprive an innkeeper of life, liberty or property without due process of law, and is a valid enactment. Strahl v. Miller (Neb.) 1917A-141.

(Annotated.)

- 4. This act confers upon a guest at a hotel the right to maintain a cause of action against the proprietor for injuries received through the negligence of the proprietor or his servants. Strahl v. Miller (Neb.) 1917A-141. (Annotated.)
- 5. The fact that the statute or ordinance in question does not, in terms, impose a civil liability for its violation does not affect such evidence of its violation as may go to show negligence. Hoopes v. Creighton (Neb.) 1917E-847.

(Annotated.)

3. LIABILITY FOR EFFECTS OF GUEST.

6. Liability for Loss of Property of Guest. An innkeeper is answerable for the loss in his inn of the goods of his guest unless the loss arises from the negligence of the guest or the act of God or of a public enemy. Parker v. Dixon (Minn.) 1918A-540.

7. This rule of liability arises only in favor of guests. It does not arise in favor of one who comes to the inn intending only to avail himself without expense of the facilities and comforts which the inn-keeper furnishes free to the public at large. Parker v. Dixon (Minn.) 1918A-540.

## 4. LIABILITY FOR PERSONAL IN-JURIES TO GUEST.

- 8. Liability for Injury to Guest by Fire. A hotel owner may not omit to do the things that are reasonably necessary for the safety and protection of the guests of the house, and if he disregards the provisions of the law concerning the establishment of fire escapes upon the building, and such other devices as the law provides for, he will be held liable for the damages sustained because of the death of any guest which may be brought about by his negligence. Hoopes v. Creighton (Neb.) 1917E—847.
- 9. A requested instruction of the defendant, to the effect that the plaintiff's decedent assumed the risk of injury because he knew the dangerous condition of the building as regards injury by fire, was properly refused. Hoopes v. Creighton (Neb.) 1917E-847. (Annotated.)
- 10. Injury to Guest in Fire. An innkeeper is not an insurer of the safety of his ruest; but he is bound to exercise reasonable care for the comfort and safety of the guest while in his hotel, and if the guest is injured in attempting to escape from a fire through the negligence of the innkeeper or his employees the innkeeper is liable therefor. Strahl v. Miller (Neb.) 1917A-141. (Annotated.)

Note.

Liability of innkeeper to guest for injuries sustained by latter in fire. 1917A-143.

#### 5. LIEN OF INNKEEPER.

11. Owner of Apartment House. Colo. Rev. St. 1908, \$ 4013, providing that the keeper of any hotel, tavern, or boarding house, or any person renting furnished or unfurnished rooms, shall have a lien upon the baggage and furniture of his guests, boarders, and tenants for lodging, boarding or renting, does not give the owner of an apartment house consisting of suites rented furnished for housekeeping purposes for homes a lien upon the tenant's

goods for rent, as the words "any person who rents furnished and unfurnished rooms" are not intended to include all classes of rooms for whatever purpose rented, but are limited to persons renting rooms for lodging purposes, etc., and do not include furnished houses, as the apartment is to all intents and purposes the same as an individual dwelling house. Scanlan v. La Coste (Colo.) 1917A-254.

(Annotated.)

## INNOCENT BYSTANDER.

Wounded by another's self-defense, see Negligence, 102, 116.

#### INNOCENT PURCHASER.

See Bona Fide Purchaser.
Of altered note, see Alteration of Instruments, 7.

#### INNUENDO.

In complaint for defamation, see Libel and Slander, 82, 83, 90, 92, 101, 107.

#### INQUEST.

On sanity of convict condemned to death, see Sentence and Punishment, 7.

#### INQUISITION OF INSANITY.

Not applicable to convicts, see Insanity, 16.

#### INSANE DELUSION.

Defined, see Wills, 59, 60, 63. See Wills, 56, 59, 60-64, 79, 80, 82.

#### INSANITY.

1. Evidence of Insanity, 444.

 Inquisition of Insanity, 445.
 Maintenance of Insane Person and His Estate, 446.

4. Criminal Responsibility, 446.

Arrest of lunatic without warrant, see Arrest, 6.

Duty of carrier toward insane passenger, see Carriers of Passengers, 31.

Test of capacity to convey, see Deeds, 26. Attack on guardian's sale after restoration, see Guardian and Ward, 11.

Instructions, see Homicide, 64.
Duty toward patient who becomes insane,
see Hospitals and Asylums, 3.

Suicide while insane, see Life Insurance, 57-59.

As accident within Workmen's Compensation Act, see Master and Servant, 197. Of convict condemned to death, see Sentence and Punishment, 7, 12.

Impeachment of insane witness, see Witness, 105.

#### 1. EVIDENCE OF INSANITY.

1. Where defendant committed murder to avoid apprehension and conviction for

an attempted robbery, and relies upon insanity as a defense, the test of mental responsibility is not whether he was a confirmed thief and had not the will power to resist theft, but whether he had the mental capacity to distinguish between right and wrong with respect to the murder. State v. Mewhinney (Utah) 1916C-537.

- 2. Where the evidence to establish defendant's insanity can be considered only to show general insanity, the test of responsibility is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the criminal act. State v. Mewhinney (Utah) 1916C-537.
- 3. The mere fact that a maternal aunt of accused, relying on insanity, is insane, and confined in an insane asylum, may not be shown in support of the defense of insanity, unaccompanied by any evidence of the nature, extent, duration, or symptoms of her mental disorder. James v. State (Ala.) 1918B-119. (Annotated.)
- 4. Opinions of witnesses acquainted with the relatives of accused, relying on insanity, that insanity runs in the family, are incompetent, because mere conclusions. James v. State (Ala.) 1918B-119.

(Annotated.)

- 5. That the mother of accused and a maternal aunt were sent to the asylum may not be shown in defense of the insanity of accused, in the absence of anything to show the sort of asylum they were sent to, or why they were sent, and what their mental condition was at the time. James v. State (Ala.) 1918B-119. (Annotated.)
- 6. Insanity of Relatives. Evidence of the insanity of one or more members of accused's family, immediate or collateral, is not admissible, except in connection with other evidence directly showing that accused is insane. James v. State (Ala.) 1918B-119. (Annotated.)
- 7. Inheritable Nature of Insanity. The court judicially knows as an established truth of medical science that many forms of insanity are inheritable, and may recur in various individuals collaterally descended from a common source. James v. State (Ala.) 1918B-119.
- 8. Burden of Proof as to Insanity. A charge requiring the acquittal of accused, if the evidence leaves in the mind of the jury any reasonable doubt of his sanity, was properly refused. James v. State (Ala.) 1918B-119.
- 9. Insanity as Defense. There is a legal presumption of sanity. State v. Mewhinney (Utah) 1916C-537.
- 10. A charge that if the jury believe that, at the time accused shot decedent,

his conduct and acts were such that he was so mentally unbalanced that he did not know the consequences, that fact should be considered in determining the verdict, is properly refused, as misleading, and as singling out evidence for the consideration of the jury without stating any proposition of law. James v. State (Ala.) 1918B-119.

- 11. Condition on Prior Occasion. That accused, relying on insanity produced by intoxication, was on another occasion, when drunk, in such condition that no one could do anything with him, is properly excluded as irrelevant. James v. State (Ala.) 1918B-119.
- 12. Hearsay. Testimony by those having personal knowledge as to the transactions between deceased and accused, who claimed to have killed as the result of insame delusions, is admissible, but hearsay as to the transactions is not. Ryan v. People (Colo.) 1917C-605.
- 13. Conclusions of Witness. That the mind of accused, relying on insanity, had not been very strong since he had a fever a year before the offense, was properly excluded, as the mere opinion of the father of accused, seeking to so testify. James v. State (Ala.) 1918B-119.
- 14. A nonexpert witness, testifying to the insanity of accused, must state what acts of accused he has seen, and then give his opinion as to his sanity, but cannot testify that he has seen acts of insanity. James v. State (Ala.) 1918B-119.
- 15. Suicide as Evidence. Sanity is presumed, and the taking of one's own life does not, in itself, establish insanity.

  Ledy v. National Council (Minn.) 1916E—486.

  (Annotated.)

Notes.

Suicide as evidence of insanity. 1916E-488.

Admissibility, on issue of sanity, of evidence of insanity of ancestors or kindred. 1918B-124.

#### 2. INQUISITION OF INSANITY.

16. Present Insanity—Time When Issue may be Tried. Kirby's Ark. Dig. § 4003, providing for insanity inquests by the probate court, was enacted solely for the purpose of protecting the civil and property rights of insane persons, and has no reference to determining the question of the sanity of one who has been convicted and sentenced to be executed for a criminal offense. Ferguson v. Martineau (Ark.) 1916E-421. (Annotated.)

Time or stage in criminal proceedings when question of insanity of defendant may be determined by inquisition or otherwise. 1916E-424.

#### 3. MAINTENANCE OF INSANE PER-SON AND HIS ESTATE.

- 17. Keeping Up Life Insurance. In an action against the estate of an insane person to recover the cost of his maintenance, the court has power to order the investment of a part of the estate and the use of the income to pay the premiums on existing policies of insurance on the life of the insane person. Depue v. District of Columbia (D. C.) 1917E-414.
- 18. Liability of Estate for Maintenance. Under the Act of Congress of Feb. 23, 1905 (3 Fed. St. Ann. (2d ed.) 613), if a person committed to the government hospital for the insane as a charge on the District of Columbia has or comes into the possession of an estate, the District is entitled to recover therefrom the cost of his maintenance. Depue v. District of Columbia (D. C.) 1917E-414. (Annotated.)

## 4. CRIMINAL RESPONSIBILITY.

- 19. Instructions as to Insanity. On a trial for murder, defended on the ground of insanity, where the evidence can be considered only to show general insanity, and the court properly defines the test thereof, its failure to enlarge upon different phases of insanity and mental weakness is not prejudicial to defendant. State v. Mewhinney (Utah) 19160-537.
- 20. Test of Irresponsibility—Knowledge of Consequences. That accused was, at the time of the killing of decedent, so mentally unbalanced as not to know the consequences of his act, is not per se a palliation of murder, under a plea of not guilty, nor an excuse therefor, under a plea of insanity. James v. State (Ala.) 1918B—119.
- 21. Drunkenness. Insane conduct or mania resulting from present intoxication of accused, charged with murder, does not excuse the crime; and where there was no evidence to show any fixed insanity, resulting from drunken habits or otherwise, abnormal conduct and conditions of accused, associated with present drunkenness, may not be shown. James v. State (Ala.) 1918B-119.
- 22. A witness for accused, relying on the defense of insanity produced by intoxication, may not testify that while accused is drinking his reason is dethroned, or that he then displays acts of insanity, or is not responsible for what he does. James v. State (Ala.) 1918B-119.
- 23. Irresistible Impulse. A person who is so diseased in mind as to be incapable of distinguishing right and wrong, or being able to so distinguish, has suffered such an impairment as to destroy the will power, is not accountable, and such insanity may be manifested by insane delusions. Ryan v. People (Colo.) 1917C-605.

(Annotated.)

24. Insane Delusions. "Insanity" is a disease of the mind, while a "delusion," which is a symptom of the disease, is a false conception and a persistent belief, unconquerable by reason, of what has no existence in fact; hence an instruction that an insane delusion to alone suffice to establish the defense of insanity must be of such a character that, if things were as the person possessed of such delusion imagined them to be, it would justify the act springing from the delusion is, in a prosecution for homicide, where the defense was insanity and accused claimed to have been laboring under an insane delusion that he believed deceased, while acting as his attorney, had betrayed him, financially ruined him, and denounced him to the world as a leper and a drunkard, prejudicially erroneous, for it takes from the jury the question of insanity evidenced by delusions, and requires them to find that the delusion was sufficient, if true, to have justified the killing. Ryan v. People (Colo.) 1917C-605.

#### Note.

Irresistible or uncontrollable impulse as defense to criminal charge. 1917C-609.

#### INSOLVENCY.

See Assignment for Benefit of Creditors; Bankruptcy; Banks and Banking, 13-22, 17, 67-74; Receivers; Creditors' Bills.

Accepting deposits while insolvent, see Banks and Banking, 13-22.

Set-off of deposit against debt, see Banks and Banking, 48-53.

Effect, see Building and Loan Associations, 5.

Of fellow subscriber as release of subscription, see Corporations, 66.

Of corporations, see Corporations, 144-149. Insurance premiums trust for creditors, see Receivers, 11.

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Duty to inspect cars, see Carriers of Passengers, 20.

Right to inspect books, see Corporations, 104-114.

State inspection as affecting interstate commerce, see Interstate Commerce, 6 7

Of meat, city regulation, see Municipal Corporations, 89, 90.

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#### INSPECTION LAWS.

Police power, see Constitutional Law, 36.

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- 1. In General, 447.
- 2. Construction, 448.
- 3. Form, 448.
- 4. Requests to Charge, 448.
- 5. Repetition, 449.
- 6. Ignoring Evidence, 450.
- 7. Cautionary Instructions, 450.
- 8. Weight and Sufficiency of Evidence.
- 9. Instructions Unsupported by Evidence, 451.
- 10. Instructions Assuming Fact in Issue, 451.
- 11. Advising Jury to Disregard Argument of Counsel, 451,
- 12. Argumentative Instructions, 451,
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- 14 Presumption, 452.
- See Assault, 9; Automobiles, 47-51; Civil Damage Acts, 3.
- See Conversion, 8; Damages, 23-25; Death by Wrongful Act, 33-43; Extortion, 3; False Imprisonment, 7; False Pretenses, 19; Fires, 5; Homicide, 60-72; Insanity, 10, 19-24; Malicious Prosecution, 27-28; Negligence, 112-121; Prostitution, 7-9, 11, 13; Rape, 12, 15, 17; Robbery, 4; Trespass, 9. Satisfaction beyond reasonable doubt, see
- Accident Insurance, 27.
- Rulings brought up on appeal, see Appeal and Error, 94.
- Waiver of error by requesting charge, see Appeal and Error, 184.
- Presumptions on appeal, see Appeal and Error, 197-198.
- Charge on punitive damages harmless, see Appeal and Error, 215.
- Cure of error in admitting evidence, see Appeal and Error, 242-248.
- Harmless and prejudicial error, see Appeal and Error, 282-317.
- Record must show error, see Appeal and Error, 349, 350.
- Necessity of exception to error, see Appeal and Error, 377-383. Sufficiency of objections for review, see
- Appeal and Error, 404-419.
- In action against attorney for negligence, see Attorneys, 71.
- In actions to enforce negotiable paper, see Bills and Notes, 88, 89. In breach of promise suit, see Breach of
- Promise of Marriage, 14. In actions against carriers, see Carriers
- of Goods, 38-40. In actions for injury to passengers, see
- Carriers of Passengers, 81-83. In criminal cases, see Criminal Law. 75-
- 97. In shock damage cases, see Electricity,
- In .condemnation proceedings, see Eminent Domain, 89-91.
- As to conveyance by insolvent debtor, see Fraudulent Sales and Conveyances, 13.

- In prosecutions under liquor laws, see Intoxicating Liquors, 106.
- Duty of jury to follow instructions, see Jury, 43.
- As to privilege, see Libel and Slander, 58.
- In proceedings under Employers' Liability Act, see Master and Servant, 90-92.
- In proceedings under Workmen's Compensation Act, see Master and Servant, **3**56-3**61**.
- In action against master for negligence of servant, see Master and Servant, 369.
- prosecution under Sherman Act. see Monopolies, 24-26.
- Burden of proof in negligence action, see Negligence, 115.
- Care requisite in self-defense, see Negligence, 116.
- New trial for giving instructions in absence of counsel, see New Trial, 13.
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- Action by fireman for injury in going to fire, see Streets and Highways, 38.
- action for delay in telegram, see Telegraphs and Telephones, 33.
- In action against promoters of entertainment for personal injury, see Theaters and Amusements, 6.
- Instruction amounting to direction of verdict, see Verdicts, 35.
- In action for flood damage by embankment, see Waters and Watercourses. 33.
- In reference to testamentary capacity, see Wills, 89-96.

#### 1. IN GENERAL.

- 1. Duty to Declare Law. The court, in its instructions, must declare the law to the jury. Osteen v. Southern R. Co. (S. Car.) 1917C-505.
- 2. Rulings Sustained. The trial court committed no error in its charge to the jury or in its rulings on the admission of evidence. Wising v. Brotherhood American Yeomen (Minn.) 1918A-621.
- 3. Instructions Approved. In the motion for a new trial there are numerous exceptions to the charges of the court on the ground that there was no evidence to authorize the instructions criticized. examination of the evidence contained in the record shows that in each case such exception is without merit. For, while as to some of the issues covered by the instructions complained of there may have been no direct evidence, there were facts in evidence from which the jury would have been authorized to draw deductions which would have supported the contentions of the defendants in error relatively to those issues. Loewenherz v. Merchants, etc. Bank (Ga.) 1917E-877.

- 4. There was no error in the charge complained of in the twenty-first ground of the motion for a new trial. Sutton v. Ford (Ga.) 1918A-106.
- 5. Rulings on instructions are held not to be erroneous. State v. Cooper (W. Va.) 1917D-453.
- 6. An examination of the instructions discloses no error. O'Neal v. Bainbridge (Kan.) 1917B-293.
- 7. It is held that the court did not err in giving or refusing to give certain instructions. Ruble v. Busby (Idaho) 1917D-665.
- 8. In Case Tried Without Jury. Instructions are not only out of place in a lawsuit tried to the court without a jury, on an agreed case, but serve no useful office in equity. Tevis v. Tevis (Mo.) 1917A-865.

#### 2. CONSTRUCTION.

- 9. Instructions Considered as Whole. The court's instructions to the jury should be considered and construed as a whole. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141.
- 10. Instructions Approved. Instructions given by the court, when construed together, are found properly to state the law applicable to the evidence. Strahl v. Miller (Neb.) 1917A-141.
- 11. An instruction that it is not, as a matter of law, contributory negligence for a passenger to start to leave a car before it stops, but that that is a question for the jury, is not misleading when the instructions read as a whole are correct. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

#### 3. FORM.

- 12. Definiteness. In an action for damages from a fire caused by defendant's engine, due to the alleged escape of sparks from a smokestack, an instruction requiring the jury to find that the "engine was the occasion for the fire" is too indefinite. Hodges v. Baltimore Engine Co. (Md.) 1917C-766.
- 13. Use of Word "Alibi" in Civil Case. An instruction in a civil action against the owner of an automobile, whose chauffeur was alleged to have negligently run down plaintiff, that if defendant's plea of "alibi" was false that was a discrediting circumstance is erroneous, as the use of the term "alibi" and the rule stated is not appropriate in a civil action; the inducement to avert the imposition of damages not being the equivalent of the reason for making a false alibi in a criminal case, where the offender's life or liberty is affected, a discrediting circumstance. Watson v. Adams (Ala.) 1916E-565.

- 14. Necessity of Defining Terms. It was not reversible error for the court to use the term "proximate cause," without otherwise defining it, in absence of a request for an appropriate instruction. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141.
- 15. In Language of Statute Sued on. In an action based on statute, an instruction, following the language of the statute, is not erroneous because it did not define all of the ordinary terms, no request for a proper instruction being made. Lichtenstein v. L. Fish Furniture Co. (Ill.) 1918A-1087.
- 16. Abstract Instructions. Instructions should be concrete as to each issuable fact, and not abstract. State v. Cessna (Iowa) 1917D-289.
- 17. Expressing Qualifications of Rule in Each Instruction. Where instructions separately present every phase of the law as a whole, each instruction need not carry qualifications which are explained in the others. St. Louis etc., R. Co. v. Blaylock (Ark.) 1917A-563.

## 4. REQUESTS TO CHARGE.

- 18. Instruction Given in Substance. The court is not bound to grant a requested instruction in the very language of the request. Miller v. Delaware River Trans. Co. (N. J.) 1916C-165.
- 19. Necessity for Request. While Const. Wash. art. 4, § 16, requires the judges to declare the law, they need declare it only in a general sense, and a party desiring instructions on a particular phase of the case must request them. Hiscock v. Phinney (Wash.) 1916E-1044.
- 20. Immaterial Issues. It is not error to refuse to submit immaterial issues. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.
- 21. Singling Out Evidence Request Properly Refused. Requested instructions, directed to fragmentary and indecisive portions of the evidence, are rightly refused. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034.
- 22. Refusal of Request—Matter Adequately Covered. In an action for conspiracy to alienate the affections of a wife, where the instructions as a whole emphasized and reiterated the legal presumptions in favor of defendants, the burden of proof on the plaintiff, and the clearness of the evidence necessary to sustain such burden, the refusal of the court to instruct that the jury must be guided by reasonable inferences only, not by mere conjecture, in reaching a verdict, is not erroneous. Ratcliffe v. Walker (Va.) 1917 E-1022.

- 23. Instructions Sustained. No error is found in refusing to give requested instructions, nor is there prejudicial error in the charge as given. Manning v. St. Paul Gaslight Co. (Minn.) 1916E-276.
- 24. Effect of Request on Same Subject. Where plaintiff in writing requested an instruction dealing with contributory negligence, she cannot attack an instruction on contributory negligence on the ground that the issue was not raised by the evidence. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 25. Giving in Substance. The request of a defendant for instructions is complied with by giving them in substance, in a fair and comprehensive charge. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034.
- 26. Time for Requesting. Under Kirby's Ark. Dig. § 6196, subd. 5, providing that when the evidence is concluded either party may request instructions, which shall be given or refused by the court, etc., the trial judge has discretion to require that the instructions be settled before argument, and to that end may require that requests to charge be submitted before the opening argument. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317.
- 27. Instructions Approved. It is held that the trial court properly ruled on the instructions requested by the parties hereto. Hill v. Norton (W. Va.) 1917D-489.
- 28. Necessity of Requesting Instructions. Where an instruction is correct as far as it goes, a party to the action who deems the same not sufficiently explicit should present requests for more specific and comprehensive instructions. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141.
- 29. Effect of Erroneous Request. The court may refuse an incorrect requested instruction, and is not bound to modify it or give any other instruction in its place. Ratcliffe v. Walker (Va.) 1917E-1022.
- 30. Request Based on Partial Statement of Evidence. A requested instruction directing a verdict for defendant if the jury should find certain facts, but based on an incomplete and partial statement of the evidence, is properly refused. Ratcliffe v. Walker (Va.) 1917E-1022.
- 31. Requesting Excessive Number. Where the parties request over 100 instructions, most of which are either not the law or are not applicable or merely repetitions, such conduct is an abuse of the privilege of requesting instructions. Lichtenstein v. L. Fish Furniture Co. (III.) 1918A-1087. (Annotated.)

32. Effect of Erroneous Request. In a prosecution for assault with intent to murder, where an erroneous requested instruction on the issue, raised by the proof of defense of habitation, served to call the attention of the court thereto, the failure of the court to submit such issue to the jury under a proper instruction is error. State v. Cessna (Iowa) 1917D-289.

Note.

Propriety of requesting or giving numerous or lengthy instructions. 1918A-1091.

#### 5. REPETITION.

- 33. Refusal of Requests Already Given. There is no error in refusing requested instructions abstractedly correct, where they had already been covered by the instructions given. Oleson v. Fader (Wis.) 1917D-314.
- 34. Instructions Given in Substance. There is no error in the refusal of requested instructions, where they are given in substance, and in so far as the facts of the case call for instructions upon the matters therein requested. Harris v. Bremerton (Wash.) 1916C-160.
- 35. Requests Covered by General Charge. The refusal of instructions fully covered by those given is not error. Nicoll v. Sweet (Iowa) 1916C-661.
- 36. The refusal of an instruction covered by the charge as given is not available error. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.
- 37. Where the court's charge is explicit and fair, and covered all the aspects of the case requiring that all the facts must be proved against defendant beyond a reasonable doubt, and defines reasonable doubt in the language of defendant's counsel, it is not error to refuse a charge that if on the whole case the jury should find that the evidence was evenly balanced, or they were unable to determine where the truth lay, that created a reasonable doubt, and defendant would be entitled to an acquittal. Kaufman v. United States (Fed.) 1916C-466.
- 38. In a father's action for loss of services from the negligent death of a minor employee, a requested charge was refused that the burden was upon plaintiff to establish that the falling of the slate from the roof that caused the boy's death was not one of the dangers incident the employment. The court submitted whether it was defendant's duty to inspect the roof at the place where the boy was working, and instructed that plaintiff could recover only if the jury found that defendant owed such duty to the boy and failed to perform it, and that if it was the boy's duty to inspect the roof of the

- entry, or if the entry was subject to change wrought by him and the other workmen, and its condition resulted from what they did, plaintiff could not recover. Held, that the requested charge was properly refused as being substantially included in the instructions given. Carnego v. Crescent Coal Co. (Iowa) 1916D-794.
- 39. Though instructions requested by a party may correctly state the law, yet a judgment will not be reversed for refusal to give such instructions, if the law applicable to the issues involved is correctly given in the court's charge. Farmers' National Bank v. McCoy (Okla.) 1916D—1243.
- 40. The refusal of requested instructions, fully covered by given instructions, is not erroneous. Kimmins v. Montrose (Colo.) 1917A-407.
- 41. The refusal of requests covered by the granted prayers is not error. American Express Co. v. Terry (Md.) 1917C-650.
- 42. The requests to charge, so far as they were legal and pertinent, were covered by the general charge. Loewenherz v. Merchants', etc. Bank (Ga.) 1917E-877.

#### 6. IGNORING EVIDENCE.

43. Ignoring Admitted Facts. Where defendant insurance company, under the issues, admits its liability on the policy for an amount less than its face, an instruction requested by it, which ignored the admitted liability, is properly refused. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.

## 7. CAUTIONARY INSTRUCTIONS.

- 44. Cautionary Instruction as to Matter Stricken Out. Where all reference to city ordinances in an action for the death of an employee, which was based on defendant's failure to furnish fire escapes as required by statute, was stricken, the jury need not be informed that they cannot find defendant guilty for violating ordinances. Lichtenstein v. L. Fish Furniture Co. (III.) 1918A-1087.
- 45. As to False Testimony. An instruction to disregard false testimony must be conditioned on the witness wilfully or knowingly swearing falsely, and the omission of the qualifying words "wilfully and corruptly" is error. Babb v. State (Ariz.) 1918B-925.

## 8. WEIGHT AND SUFFICIENCY OF EVIDENCE.

46. Credibility of Witness. An instruction on the credibility of witnesses is not erroneous as invading the province of the jury because it states that the jury

- "should" consider the interest of the witnesses, rather than that they "may" consider such interest. Pittsburgh, etc. R. Co. v. Chappell (Ind.) 1918A-627.
- 47. Falsus in Uno. It was proper to charge that the jury are the sole judges of the weight and credibility of the witnesses, but that, if they find and believe that any witness had wilfully sworn falsely to any material facts, they may disregard the whole or any part of his testimony. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.
- 48. Statement That There has Been Perjury at Trial. An instruction that "there has been manifest perjury by witnesses who have testified in this case, as counsel for both sides have claimed in their argument. They, of course, differ as to which witnesses have testified falsely. It is for you to determine from all of the evidence, which includes the appearance of the witnesses when testifying as well as what they said, what evidence you credit"—held erroneous, as violative of section 2994, N. Mex. Comp. Laws 1897, which forbids comment by the court upon the weight of the evidence. State v. Chavez (N. Mex.) 1917B-127. (Annotated.)
- 49. Weight—Deposition as Compared With Oral Testimony. The weight and credibility of the testimony of witnesses whether oral or by deposition, having by proper instructions been entirely left to the jury, instructing them to give to the testimony of one testifying by deposition the same credence and weight as if he were present and testifying in open court, is not error. Hillis v. Kessinger (Wash.) 1917D-757. (Annotated.)
- 50. Instruction as to Credibility—Singling Out Particular Witness. In prosecution for horse stealing, instruction that if testimony of a witness, naming him, had been attacked through bias, and that if beyond a reasonable doubt such witness testified truthfully, his testimony should have the same weight and credence as that of any other witnesses, is erroneous and prejudicial as singling out the testimony of a single witness and giving undue prominence to an isolated fact. Babb v. State (Ariz.) 1918B-925.
- 51. Invasion of Province of Jury—Positive and Negative Testimony. In prosecution for horse stealing, instruction that positive evidence of one credible witness is entitled to more weight than the testimony of several witnesses who testify negatively or to collateral circumstances is erroneous, as invasive of the jury's province to determine the weight of evidence. Babb v. State (Ariz.) 1918B-925.
- 52. Manner of Stating Issues—Reading Pleadings. In an action for death of a railroad employee, where the trial court, instead of stating the issues of fact to-

the jury, reads a portion of the declaration of the plaintiff, and directs the jury to find in favor of the plaintiff if the greater weight of the evidence is on that side on any one or more of the five counts, such charge is error, certain averments of negligence not being supported by the proof, and no proof being offered as to some of the matters charged. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902.

53. Comment on Weight of Evidence. Under our law a trial judge is not permitted to comment on the evidence, or to give to the jury his views of its weight. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

## 9. INSTRUCTIONS UNSUPPORTED BY EVIDENCE.

- 54. In a striking employee's action for damages sustained from his eviction from a house occupied by him as part compensation for his services, where there is no evidence as to the use of excessive force, plaintiff is not entitled to go to the jury on that issue. Lane v. Au Sable Electric Co. (Mich.) 1916C-1108.
- 55. There was no evidence in the case that plaintiff was employed by parties other than defendants, and a submission of that question to the jury was error. Lufkin v. Harvey (Minn.) 1917D-583.

  (Annotated.)
- 56. Instruction not Applicable to Evidence—Prejudicial Effect. In a prosecution for involuntary manslaughter committed by reckless driving of automobile, where there is no claim and no evidence of any intent to kill, an instruction that intent may be proved by direct testimony, etc., although having no place in the case, cannot mislead the jury. People v. Falkovitch (Ill.) 1918B-1077.
- 57. Operation of Engine Causing Fire. In an action for damages by a fire set by defendant's engine, an instruction on the theory that defendant had taken over a contract under which a third person had theretofore operated the engine is erroneous, where the evidence showed that defendant was operating the engine under its own contract with the plaintiff. Hodges v. Baltimore Engine Co. (Md.) 1917C-766.
- 58. Action for Personal Injury. In an action for the death of a licensee engaged in repairing a coal-laden steamer at defendant's discharging dock, killed by coal which dropped from the buckets, an instruction as to decedent's dullness of hearing is properly refused, where it does not appear that it had anything to do with the injury, and where, others present of sound hearing and in a position to hear did not hear defendant's alleged warnings. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-

59. Limitation to Evidence. The charges to the jury should be confined to the evidence in the case. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

# 10. INSTRUCTIONS ASSUMING FACT IN ISSUE.

- 60. Instructions Disapproved. Certain excerpts from the charge were open to the criticism that they were not properly adjusted to the facts of the case. Peagler v. Davis (Ga.) 1917A-232.
- 61. Confining Charge to Issues. An instruction authorizing verdict for defendant if it was not proved true that plaintiff was a hypocrite was not within the issues; the answer merely denying that the published cartoon was susceptible of the imputation that he was a hypocrite. Newby v. Times-Mirror Company (Cal.) 1917E-186.
- 62. Applicability to Issues. In an action at law for breach of contract, wherein defendant set up the alteration of the contract, but there was no evidence that defendant retained any benefit received under the contract as changed, with knowledge of the change, instructions touching ratification by reason of such retention are inapplicable because not within the issues. Smith v. Barnes (Mont.) 1917D-330.

# 11. ADVISING JURY TO DISREGARD ARGUMENT OF COUNSEL.

63. Where, in an action for injuries at a railroad crossing, a controversy arises during the argument over a statement made therein that defendant's offer to compromise was an admission of liability, defendant is then entitled to request and have the court give an instruction that such was not the effect thereof. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317.

## 12. ARGUMENTATIVE INSTRUCTIONS.

64. Argumentative instructions should not be given. American Bauxite Co. v. Dunn (Ark.) 1917C-625.

### 13. INSTRUCTIONS AS TO ABAN-DONED ISSUE.

65. Necessity of Instructing. Where, in an action for the conversion of electrical machinery, sold to a contractor to be placed in an electrical plant for defendant, the case was tried on the theory that the selling price was competent proof as to the value of the machinery, it cannot be said that it was error not to instruct more definitely on the question of the reasonable value of the machinery, or that the trial theory was erroneous, in the absence of any request therefor. Allis-Chalmers Co. v. Atlantic (Iowa) 1916D-910.

#### 14. PRESUMPTION.

66. Presumption from Failure to Produce Evidence. It is proper to instruct that as a matter of law the failure of the plaintiff to produce a material witness creates a presumption that his testimony if produced would be unfavorable to the plaintiff. Carmody v. Capital Traction Co. (D. C.) 1916D-706.

#### INSTRUMENTS.

See Alteration of Instruments.

#### INSULTING LANGUAGE.

By conductor to passenger, actionable, see Carriers of Passengers, 25.

## INSURABLE INTEREST.

See Fire Insurance, 7; Life Insurance,

Under industrial policy, see Insurance, 61.

#### INSURANCE.

- 1. Insurance Agents and Brokers, 452.
  - a. In General, 452.
- b. Liability to Insured, 452.
  c. Liability to Insurer, 453.
  2. Statutory Regulations, 453.
- 3. Construction and Validity of Policy Generally, 453.
- 4. Commencement of Risk, 454. 5. Warranties and Representations, 454.
- 6. Waiver of Provisions, 454.
- 7. Forfeiture or Suspension of Policy, 454.
- 8. Fidelity Insurance, 455.
- 9. Liability Insurance, 456. a. Construction of Contract, 456.
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- 10. Animal Insurance, 457.
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- 14. Burial Insurance, 458.15. Tornado Insurance, 458.16. Industrial Insurance, 458.
- See Accident Insurance; Beneficial Associations, 1-7; Fire Insurance; Life In-
- Construction of Standard Policy Law, see Accident Insurance, 9.
- Action against insurer's attorney for neg-
- ligence, see Negligence, 63-65, 69. Insolvency, premiums trust fund, see Receivers, 11.
- Rights of insurer against tortfeasor, see
- Subrogation, 1-6.

#### AND 1. INSURANCE AGENTS BROKERS.

## a. In General.

1. An insurance company, having no knowledge until after a loss that the property insured by a policy issued by its agent, authorized to issue policies, was owned by a corporation of which he was a stockholder, did not ratify the act of the agent by making no objection to the report of the agent that the policy was issued, made shortly after its issuance. Riverside Development Co. v. Hartford Fire Ins. Co. (Miss.) 1916D-1274.

(Annotated.)

(Annotated.)

2. Insurance by Agent of Property of Corporation of Which Agent is Stockholder. An agent authorized to issue insurance policies cannot bind his principal by issuing a policy on property owned by him or in which he has an interest adverse to that of his principal, or on property owned by a corporation of which he is a stockholder, though the rate of premium is fixed, and though he acted in good faith in issuing it. Riverside Development Co. v. Hartford Fire Ins. Co. (Miss.) 1916D-1274. (Annotated.) Note.

Validity of insurance policy issued by agent on property of corporation of which agent is stockholder. 1916D-1275.

## b. Liability to Insured.

- 3. Failure to Procure Insurance. In a petition in which it is substantially alleged that a broker or agent undertook to prothat a broker or agent undersook to pro-cure insurance on certain property of an owner in some responsible company and where the parties agreed on the total amount of insurance, the amount to be placed on each class of the property to be insured, and that the premium should be taken from a certain fund provided by the owner, but that the broker neglected to procure the insurance, and in reply to an inquiry of the owner had assured him that the insurance had been obtained, and the property is thereafter destroyed by fire, a cause of action against the broker is stated, and certainly sufficient as against an objection of the defendants to the introduction of any evidence. Rezac v. Zima (Kan.) 1918B-1035.
- 4. A broker or agent who undertakes to procure insurance for another is bound to exercise reasonable diligence to obtain it on the terms and conditions agreed upon and to give timely notice to his principal in case he is unable to procure it on the agreed terms and conditions, and if he fails to carry out his agreement and a loss results through his inattention, incapacity or fraud he will be liable to the extent and for the amount that would have been re-coverable upon the insurance he had agreed to procure. Rezac v. Zima (Kan.) 1918B-1035. (Annotated.) Note.

Liability of insurance agent to owner of property for failure to procure insurance. 1918B-1037.

## c. Liability to Insurer.

- 5. Unauthorized Issuance of Policy. An insurance agent who issues a policy of insurance in violation of the instructions of his company is liable to the company for the amount of insurance paid and expenses incurred by the company on account of a loss under the policy. Insurance Co. v. Baer (Kan.) 1917B-491.

  (Annotated.)
- 6. An insurance agent cannot defeat his liability to his company for issuing a policy in violation of his instructions by showing that the company might have escaped liability on the policy by litigation. Insurance Co. v. Baer (Kan.) 1917B-491. (Annotated.)
- 7. Failure to Collect Premium. Where an insurance company's agents failed to comply with the company's demand that they either cancel a policy or collect an additional premium, and such demand continued for several months and until a loss occurred nearly six months after issuance of the policy, and where the company knew during such time that the policy was oustanding and made no unconditional demand for its cancellation, the liability of the agents is limited to the amount of the additional premium, and they are not liable for the sum paid by the company in settlement of the loss. Phoenix Ins. Co. v. Banks (Ark.) 1916D-649.

#### Notes.

Liability of agent to insurance company for failure to collect premium. 1916D-651.

Liability of agent to insurance company for issuing policy in violation of instruction. 1917B-493.

## 2. STATUTORY REGULATIONS.

8. The standard form of insurance policy prescribed by N. Car. Revisal 1905, § 4760, in making provision for subrogation, is declaratory of existing principles. Powell & Powell v. Wake Water Co. (N. Car.) 1917A-1302.

#### Note.

Liability for inducing change of beneficiary in insurance policy. 1917A-473.

# 3. CONSTRUCTION AND VALIDITY OF POLICY GENERALLY.

- 9. Essentials of Insurance Contract—Implied Terms. Some of the essentials of a valid contract of insurance may be unexpressed and rest in implication. Royal Ins. Co. v. Walker Lumber Co. (Wyo.) 1917E-1174.
- 10. Construction Favoring Insured. In case of ambiguity in the provision of an insurance policy, that construction should be adopted which is more favorable to the

insured or those claiming under the policy. Royal Ins. Co. v. Walker Lumber Co. (Wyo.) 1917E-1174.

11. What Constitutes Insurance Contract. Where a corporation contracts with its subscribers to procure for them medical services, drugs, and merchandise, at a relatively low rate, not guaranteeing performance by the individuals, who are to furnish services and goods, such corporation is not engaged in the insurance business subjecting it to the authority of the insurance commissioners, since by Laws Wash. 1911, p. 161 (the Insurance Code), "insurance" is a contract whereby one party, called the "insurer," for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party, called the "insured," or his beneficiary, upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury, while in the instant case there is no hazard or peril whereby the purchasers of contracts may suffer a loss or injury which the corporation insures against. State v. Universal Service Agency (Wash.) 1916C-1017.

(Annotated.)

- 12. Interpretation Favoring Insured. A policy reasonably susceptible of two interpretations will be construed most favorably for insured. Moore v. Aetna Life Ins. Co. (Ore.) 1917B-1005.
- 13. The terms of a policy of insurance are construed against the insurer and in favor of insured, even though a standard form of policy has been adopted under legislative enactment. Cottingham v. Maryland Motor Car Ins. Co. (N. Car.) 1917B-1237.
- 14. In case of ambiguity in an insurance policy, it should be construed in favor of indemnity to insured, rather than as being useless and nugatory. Rosenthal v. Insurance Co. (Wis.) 1916E-395.
- 15. The rule that policies of insurance should be liberally construed in favor of insured, because prepared by the insurer, has no application, where the contract is in the form prescribed by statute. Rosenthal v. Insurance Co. (Wis.) 1916E-395.
- 16. Where words are so used in a contract of insurance that their meaning is ambiguous or susceptible of two interpretations differing in import, that interpretation which will sustain the claim of the policyholder and cover the loss should be adopted. Lane v. Grand Fraternity (Tenn.) 1917A-376.
- 17. Though an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the insured, it should be construed, like other contracts, so as to give effect to the intention and express language of the parties. Seay v. Georgia Life Ins. Co. (Tenn.) 1916E-1157.

1916C-1918B.

- 18. Insurance contracts, if doubtful or equivocal, are construed against the insurer. American Surety Co. v. Pangburn (Ind.) 1916E-1126.
- 19. By-laws of Insurer—Conflict With Statute. By-laws of a mutual insurance association, in conflict with express statutory provisions, cannot be sustained. Schultz v. Des Moines Mutual Hail, etc. Ins. Assoc. (S. Dak.) 1917D-78.
- 20. Conditions in Policy. An insurance company may insert in its policy reasonable conditions as to the use of the property insured. Crowell v. Maryland Motor Car Ins. Co. (N. Car.) 1917D-50.
- 21. Rules of Construction. An insurance policy should be fairly and reasonably construed, unless it is so clear and unambiguous as not to require a construction, when its words are taken in their plain and ordinary sense. Crowell v. Maryland Motor Car Ins. Co. (N. Car.) 1917D-50.
- 22. An insurance policy should be so construed as to effectuate the purpose of indemnification against loss, rather than to defeat it. Crowell v. Maryland Motor Car Ins. Co. (N. Car.) 1917D-50.
- 23. An insurance policy should be interpreted by the rules which are applicable to other written contracts to ascertain and give effect to the intention of the parties. Crowell v. Maryland Motor Car Ins. Co. (N. Car.) 1917D-50.

#### Note.

What is an "insurance company" or "contract of insurance," 1916C-1022.

## 4. COMMENCEMENT OF RISK.

- 24. Validity of Oral Contract. An oral contract of insurance is valid, unless prohibited by statute, and will be binding from the time it is complete, although loss occurs before the policy is issued. Royal Ins. Co. v. Walker Lumber Co. (Wyo.) 1917E-1174.
- 25. When Policy Becomes Effective. An insurance policy providing that it shall not become effective until delivery, and which is sent to a local agent with instructions not to deliver it until a certain matter is adjusted, does not become effective on his adjusting the matter in question, neither that policy or the new one sent, in view of the adjustment having been delivered. Donovan v. Excelsior Life Ins. Co. (Can.) 1917D-283.

(Annotated.)

#### 5. WARRANTIES AND REPRESENTA-TIONS.

26. Unintentional False Statements. Where one applying for insurance truthfully states all the facts required by the

application to the insurer's agent, who fills out the application falsely and not in accordance with the applicant's statements, and the latter does not read over the application, or have it read over to him, and has no reason to suspect disparity, he is not guilty of fraud, and may recover. Simmons v. National Live Stock Ins. Co. (Mich.) 1917D-42.

## 6. WAIVER OF PROVISIONS.

- 27. Necessity of Written Waiver. A provision of an insurance policy that none of its conditions shall be deemed waived, unless in writing, signed by the president or vice president of the company, with its seal attached, cannot prevent a waiver by the company itself, acting through its officers who have charge of its business. Citizens' Trust, etc. Co. v. Globe, etc. Fire Ins. Co. (Fed.) 1917C-416.
- 28. Waiver of Defects. Regardless of the clause in a policy that no officer, agent, or other representative of the insurance company shall have the power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent, authorized to adjust a loss, the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss. Theriault v. California Ins. Co. (Idaho) 1917D-818.
- 29. Necessity of Pleading, Waiver of Payment of Premiums. Waiver of a matter relied on as a defense must be pleaded to be availed of; and hence, where plaintiff did not plead waiver of the provisions in an insurance certificate requiring payment of premiums, evidence of waiver is inadmissible. Schworm v. Fraternal Bankers Reserve Soc. (Iowa) 1917B-373.

#### Note.

Waiver of conditions in insurance policy by insurer's failure to inquire into existing facts. 1917B-500.

## 7. FORFEITURE OR SUSPENSION OF POLICY.

30. Suspension for Nonpayment of Premium. S. Dak. Civ. Code, § 677, provides that no insurance policy shall be forfeited or suspended for nonpayment of any note or obligation taken for the premium or any part thereof unless the insurer shall give the required notice to the insured. Section 678 provides that the term "premium" includes policy fees and all other sums of money paid or agreed to be paid in consideration of a policy of insurance. Section 685 provides that the foregoing provisions shall apply to all insurance companies and associations, both stock and mutual, transacting the business of insuring property. It is held that one insured by a mutual hail and cyclone insurance as

sociation, who gave a note for the payment of the assessments to be levied each year, was entitled to the statutory notice before his policy could be suspended for nonpayment of any assessment, notwithstanding a provision in the by-laws of the company to the contrary, since that requirement was expressly made applicable to mutual insurance companies. Schultz v. Des Moines Mutual Hail, etc. Ins. Assoc. (S. Dak.) 1917D-78.

#### 8. FIDELITY INSURANCE.

- 31. Acts Covered by Policy. The evidence is held to sustain a recovery on a policy insuring against loss by reason of "fraud or dishonesty" of an agent, where, while there was a dispute between the principal and agent as to the amount of compensation which the agent was entitled to retain from collections made, he used the money so collected, and was unable to pay it over on final settlement. Citizens' Trust, etc. Co. v. Globe, etc. Fire Ins. Co. (Fed.) 1917C-416. (Annotated.)
- 32. Failure to Disclose Existing Indebtedness of Employee. A renewal surety bond, insuring a principal against loss by reason of the fraud or dishonesty of an agent, which was procured by the agent, is not invalidated by the fact that, when the renewal was made, the agent owed the principal a considerable balance, of which the insurer was not advised, where the principal had no communication with the insurer, was not asked the state of its account, and had no knowledge of fraud or dishonesty on the part of the agent. Citizens' Trust, etc. Co. v. Globe, etc. Fire Ins. Co. (Fed.) 1917C-416.
- 33. Scope of Policy. A mere recital in a surety bond given by an agent that he has been appointed agent at a certain place does not limit the scope of the bond, or the liability of the surety to business done by the agent at such place. Citizens' Trust, etc. Co. v. Globe, etc. Fire Ins. Co. (Fed.) 1917C-416.
- 34. Construction in Favor of Insured. The purpose of contracts of fidelity insurance to procure full indemnity should not be defeated, except by clear and unambiguous limitations, assented to by the parties, and all ambiguities of expression, as in other insurance contracts, are to be construed most favorably to the assured. Dominion Trust Co. v. National Surety Co. (Fed.) 1917C-447.
- 35. Acts Covered by Policy. Under a surety bond insuring a corporation against loss through the personal dishonesty, amounting to larceny or embezzlement, of its president, the insurer is not liable for a loss due to the act of the president in issuing, in exchange for stock held by him, new certificates for greatly increased numbers of shares, which he sold and pledged,

as his acts did not amount to larceny or embezzlement, though the corporation's loss was as complete as if money had been stolen or embezzled. Dominion Trust Co. v. National Surety Co. (Fed.) 1917C-447.

(Annotated.)

- 36. Failure to Give Notice of Defalca-Under a surety bond insuring a corporation against loss through the dishonesty of its president, providing that if at any time there should come to the notice or knowledge of the corporation any act, fact, or information indicating that the president was dishonest it should immediately notify the insurer, that upon discovery by it that a loss had been sustained it should immediately notify the insurer and within the time limited make and furnish claim for and proof of loss, and that failure to give such immediate notice or make such claim or such proof should relieve the company from all liability thereunder, where after the president had issued, in exchange for stock, certificates for greatly increased numbers of shares, but before the discovery thereof the corporation discovered that he had stolen cash and securities belonging to it, but, the loss occasioned thereby having been partly repaired, it gave no notice to the insurer, but sought and obtained renewals of the bond, the insurer is relieved from all liability for the antecedent dishonesty in connection with the issuance of the stock certificates. Dominion Trust Co. v. National Surety Co. (Fed.) 1917C-477.
- 37. Acts Outside Employment. M. applied to plaintiff for assistance in procuring cash to carry M.'s business, and to that end they made a contract by which plaintiff agreed to "employ said M. as collector or agent to collect certain bills assigned to" plaintiff, "and to pay and allow said M. 1 per cent on all such collections." The practice of the parties was for M. to assign to plaintiff a number of accounts receivable, due from M.'s customers, and receive from plaintiff their full value, less 15 or 18 per cent, which accounts plaintiff gave to M. for collection as if no assignment had been made; M.'s customers not being notified of such assignment. Afterwards the parties had a settlement, in which M. paid plaintiff "interest and expenses" on the sum paid M. when the assignments were made, and M. never in fact received a commission for collecting the accounts assigned. The bond executed by defendant, providing for reimbursement to plaintiff for all loss through M.'s dishonesty, recited that M., "hereinafter called the 'employee,' has been appointed to the position of agent and collector in the service of [plaintiff], hereinafter called the 'employer.'" Plaintiff's statement of the character of the position stated that M.'s "position" was "agent or collector," and that the duties were the "collection of accounts assigned to me for

same" for a "commission or percentage as collected." M.'s application for the bond stated that, in addition to his salary as "agent or collector," he was to have an "income from business now in," referring to M.'s business. It is held that M.'s collection of accounts assigned by him to plaintiff and appropriation of the proceeds to his own use were not acts committed in the course of the employment described in the bond, so as to make defendant liable to plaintiff therefor. Coyle v. United States Fidelity, etc. Co. (Mass.) 1917C-450.

38. Notice of Claim. A policy of fidelity insurance issued to an insurance company on account of an agency required the assured to give immediate notice of any loss, or of facts indicating that loss had probably been sustained. The assured notified the insurer of a claim against the agency several months overdue, explaining that the delay in giving notice was due to its continued attempts to obtain settlement and statement of the account. The insurer, without objecting to the notice, also assisted in trying to obtain an agreement between the parties. It is held that it thereby waived the condition requiring immediate notice. Citizens Trust, etc. Co. v. Globe, etc. Fire Ins. Co. (Fed.) 1917C-416.

39. Recovery of Premium. Where a county trustee gave bond with a surety company as surety for the faithful performance of his duties, and paid a premium of \$4,000 in advance, and died after six months, during which time the bulk of the funds passing through his hands were collected and disposed of, his administratrix cannot recover back one-half of the premium, since the risk had attached, and neither it nor the premium can be apportioned. Crouch v. Southern Surety Co. (Tenn.) 1916C-1220. (Annotated.)

#### Notes.

Recovery of premium paid for fidelity insurance. 1916C-1222.

Act or default of employee covered by fidelity bond or insurance. 1917C-420.

#### 9. LIABILITY INSURANCE.

## a. Construction of Contract.

40. Under a contract indemnifying against loss through actions brought for injuries by employees that the insurer has exercised its option to defend the suit and appealed from an adverse judgment, but was unsuccessful, and merely created an extra charge in damages and interest, does not make it liable therefor beyond the amount limited in the contract, since such contract was made in view of that contingency. Little Cahaba Coal Co. v. Aetna Life Ins. Co. (Ala.) 1917D-863.

(Annotated.)

- 41. Extent of Recovery. A contract indemnifying an employer against loss or expense resulting from an injury or accident to its employees stipulated that the insurer's liability for loss should be limited to \$5,000; that the insurer was to pay the expenses of litigation in addition to the sum stipulated; that it should at its own cost defend injury suits in the name of assured; and that assured should not incur expenses without the consent of the insurer. While the contract was in force judgment was recovered against the employer for injuries to an employee in the sum of \$5,000, which on appeal was affirmed; the affirmance carrying with it ten per cent damages, and interest pending appeal. The defense and the appeal were conducted by the insurer in the name of the insured. It is held that the interest and damages were not "expenses of litigation" within the meaning of the contract of indemnity. Little Cahaba Coal Co. v. Aetna Life Ins. Co. (Ala.) 1917D-863. (Annotated.)
- 42. Indemnity Against Liability of Physician for Malpractice. Defendant insured plaintiff, a physician having in his employ two younger doctors as assistants, against loss from liability for bodily injuries or death suffered in consequence of error, mistake, or malpractice by any assistant in his employ "while acting under the assured's instructions." One of his assistants made a mistaken diagnosis, resulting in a judgment for damages against the physician. The diagnosis and treatment was left wholly to the assistant, and the physician apparently had no knowledge of the particular case and gave the patient no personal attention; the assistant merely acting according to previous general instructions and the custom which prevailed under the contract be-tween himself and the physician. Held, that defendant was not liable, since the quoted words were intended to qualify de-fendant's liability, and if they were treated as covering the physician's general instructions, they would neither expand nor restrict the insurer's liability, but would be altogether meaningless. Seay v. Georgia Life Ins. Co. (Tenn.) 1916E-1157. (Annotated.)

#### Note.

Indemnity insurance against liability of physician for malpractice. 1916E-1159.

## b. Actions.

43. Failure of Insurer to Defend Suit. The holder of a liability insurance policy, under which the insurer was bound to indemnify the policyholder against loss not exceeding \$5,000 and to defend a suit at its own expense, could not recover more than \$5,000 because of the insurer's failure to defend an action resulting in a default judgment for \$15,000 without alleging and

proving a meritorious defense to the action against it. Maryland Casualty Company v. Price (Fed.) 1917B-50.

#### 10. ANIMAL INSURANCE.

44. Notice of Sickness or Accident. Where the insurance policy on a stallion provided that the perils indemnified against did not include death from any cause, where the insured did not render forthwith by telegraph or telephone to the company at its home office notice of any sickness or accident, where the stallion was taken ill at 8:30 P. M., November 28th, plaintiff and veterinaries working over the animal all night, plaintiff sending a telegram to the insurer at 8:30 A. M. the next morning, notifying it of the illness, which telegram was not actually sent until 11:30 A. M., and not received at the home office of the insurer until after 1 P. M., the sending was a reasonable compliance with the policy, since the term "forthwith" does not in all cases mean instanter, but often has a relative meaning of all reasonable celerity, or all reasonable dispatch, or with reasonable and proper diligence, depending on the circumstance of each case. Simmons v. National Live Stock Ins. Co. (Mich.) 1917D-(Annotated.)

#### Note.

Animal insurance. 1917D-45.

#### 11. AUTOMOBILE INSURANCE

- a. Construction of Contract.
- 45. Condition Against Carrying Passengers for Hire. A clause in a policy of insurance on a motor car, providing that the car should not be "rented or used for passenger service of any kind for hire," does not authorize a forfeiture, where the car was used by the owner's chauffeur without his knowledge upon a single occasion to carry persons for hire; the car being destroyed while in the exclusive possession of the owner and after the forbidden use had ceased. Crowell v. Maryland Motor Car Ins. Co. (N. Car.) 1917D-50.

(Annotated.)

46. A clause in a policy of insurance of a motor car, providing that the car should not be "rented or used for passenger service of any kind for hire," implies more than a single act of renting or using, and refers to the business of carrying passengers for hire. Crowell v. Maryland Motor Car Ins. Co. (N. Car.) 1917D-50.

(Annotated.)

Automobile insurance. 1917D-53.

Insurance against liability of automobile owner. 1917D-61.

#### b. Adjustment of Loss.

47. Contract for Settlement — Effect. Plaintiff's auto, insured by defendant for

\$2,500, was burned, and plaintiffs filed claim for total loss, and defendant disputed it, and offered to settle it for \$2,000, or to ship the car for repairs, and plaintiffs elected to accept the proposition for repairs, stating that defendant must make the car as good as before the fire, and not delay too long, and defendant then wrote plaintiffs that it had made arrangements to ship the car and would at once proceed with the repairs, and that it estimated that it would take about four weeks for repairs. It is held that a settlement contract arose, terminating all rights under the policy contract, so that the only remedy thereafter was for breach of the new contract. Gaffey v. St. Paul Fire and Marine Ins. Co. (N. Y.) 1918B-1041.

(Annotated.)

#### c. Actions.

- 48. Error in the admission on defendant's cross-examination of testimony tending to show that defendant was indemnified against liability by an insurance company is highly prejudicial. Watson v. Adams (Ala.) 1916E-565. (Annotated.)
- 49. Proof that Defendant is Indemnified. The admission on cross-examination of defendant, whose chauffeur is alleged to have negligently run down plaintiff, of testimony tending to show that counsel appearing for defendant represents an indemnity insurance company is error, as defendant's liability is not affected by the fact that he is indemnified nor does it affect his credibility. Watson v. Adams (Ala.) 1916E-565. (Annotated.)

## 12. CREDIT INSURANCE.

50. Construction of Credit Insurance Bond. Credit insurance bonds, like other insurance policies, if ambiguous in their language, are to be construed strictly against the insurer, by whom they were framed. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.

(Annotated.)

- 51. The losses to which such clause relates are to be determined by the terms of the first bond, and not of the renewal, and the insurer is liable for a loss which comes within the terms of the first, although it is of a class not insured against by the renewal. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.
- (Annotated.)
  52. Renewal Bond—Losses Covered. A credit insurance policy, or "bond," insuring against loss of accounts due the insured from customers for goods shipped during the calendar year 1903, contained a clause providing that, "if this bond is renewed on or before the date of termination thereof by the issuance of a new bond, the losses occurring during the term of the renewal on goods shipped during

the term of this bond shall be included in the calculation of losses under said renewal the same as if the goods had been shipped during the term of such renewal bond." December 4, 1903, a second bond was issued, differing in some of its provisions, covering the term from October 1, 1903, to September 30, 1904. The only reference therein to the previous bond was a provision that losses occurring on goods shipped on and after October 1, 1903, should not be included under the first bond, but under the second. It is held that the second bond was a renewal of the first within the meaning of the quoted clause of the first, and covered losses arising on shipments made during the term of the first bond previous to October 1, 1903. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64. (Annotated.)

- 53. Computation of Total Sales by Insured. Where goods shipped by insured were returned, no sale was consummated which can be computed in making up the total sales under the bonds. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64. (Annotated.)
- 54. Each bond provided that on sales not exceeding \$450,000 during its term losses to the aggregate amount of \$5,000 should constitute an initial loss to be borne by the insured, the insurer being liable only for an excess of loss above that sum, and that, if the sales exceeded \$450,000, the initial loss should be proportionately increased. It is held that the fact that losses on sales made during the term of the first bond, but occurring during the term of the second, were payable under the latter, did not entitle the insurer to carry over the sales of the first term, and add them to those of the second, for the purpose of increasing the amount of the initial loss thereunder. Philadelphia Casualty Co. v. Fechheimer (Fed.) (Annotated.) 1917D-64.
- 55. Notice of Loss. That a preliminary notice of loss required and given the insurer incorrectly stated that the debtor had been adjudged bankrupt, whereas in fact he had been closed on execution, is immaterial, where no objection was made on that ground, and the insurer was liable in either case. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.
- 56. When Effective. Although the renewal bond was not executed until December 4, 1903, a clause therein providing that "losses occurring on goods shipped on and after October 1, 1903," should be included thereunder, and not under the first bond, made the second bond effective for all purposes from that date. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64. (Annotated.)

#### Note.

Credit insurance. 1917D-75.

#### 13. HAIL INSURANCE.

- 57. Time for Payment of Loss. A provision, in a hail insurance policy issued by a mutual company, that the loss should not be payable until a fixed time, is waived by a denial of all liability by the company. Schultz v. Des Moines Mutual Hail, etc. Ins. Assoc. (S. Dak.) 1917D-78.

  (Annotated.)
- 58. Officers of a mutual hail insurance company have authority to waive the provision of the by-laws deferring the payment of losses by denying liability on the policy. Schultz v. Des Moines Mutual Hail, etc. Ins. Assoc. (S. Dak.) 1917D-78.

  (Annotated.)

## Note.

Hail insurance. 1917D-81.

#### 14. BURIAL INSURANCE.

59. Burial Contract. Contracts under which an undertaker agreed, in consideration of the payment of monthly interest on so-called mutual notes issued by him during the lives of the makers, that he would provide them with respectable funerals, are contracts of insurance, rendering the undertaker, in the transaction of such insurance business, subject to regulation by the insurance department, under Ohio Gen. Code, § 670. Renschler v. State (Ohio) 1916C-1014.

(Annotated.)

#### Note

Burial insurance, 1916C-1016.

## 15. TORNADO INSURANCE.

60. An insurance company, joining with insured in the appointment of appraisers to appraise a loss, as required by a tornado insurance policy declaring that such appraisal shall affect no other question under the policy, does not thereby waive his right to object to the validity of the policy on the ground that the agent issuing it was a stockholder of the corporation owning the property covered thereby. Riverside Development Co. v. Hartford Fire Ins. Co. (Miss.) 1916D-1274.

(Annotated.)

#### 16. INDUSTRIAL INSURANCE.

61. Insurable Interest. Payment by the insurance company which issued a policy of "industrial insurance," the purpose of which is to provide a reasonable fund with which insured may alleviate his last sickness and secure decent burial, to insured's aunt, his beneficiary, who cared for him in his sickness and buried him, is permissible under the usual "facility of payment" clause in such a policy, providing that payment may be made to the beneficiary or any person equitably entitled, etc., though the aunt has no insurable interest in insured's life. Metro-

politan L. Ins. Co. v. Nelson (Ky.) 1918B-1182. (Annotated.)

#### Note.

Industrial insurance. 1918B-1186.

#### INTEMPERANCE.

See Intoxicating Liquors. Defined, see Public Officers, 48.

#### INTENT.

See Adultery, 2; Adverse Possession, 1; Prostitution, 17.

As essential to crime, see Criminal Law, 8.
As essential to dedication, see Dedication,

Presumption as to, see Evidence, 132. Inference from act, see Homicide, 61. Effect on validity of marriage, see Marriage, 2.

Information of partnership, see Partner-ship, 3, 10.

Of legislature in construction of statutes, see Statutes, 48-55.

As essential to fraud in use of name, see Trademarks and Tradenames, 7.

As governing signature, see Wills, 10.

As governing construction of will, see Wills, 145-152.

## INTENTIONAL INJURY.

Effect on recovery under accident policy. see Accident Insurance, 14.

#### INTEREST.

1. Right to Recover-

2. Computation of Interest.

3. Waiver.

See Usury.

On attorneys' fees, see Attorneys, 31.
Allowance of interest on forfeited bond,
see Bail, 1.

On bank deposit, see Banks and Banking, 25, 71.

On county indebtedness, see Counties, 7. Interest as disqualification, see Judges, 9-14.

Of juror, as disqualification, see Jury, 19, 20.

On city warrants, see Municipal Corporations, 36, 120-128.

On funds improperly collected by officers, see Pensions, 3.

Interest is ordinary revenue, see Schools,

Personal interest of trustee, effect, see Trusts and Trustees, 26.

### 1. RIGHT TO RECOVER.

1. Where the payment of interest is provided for by contract, it constitutes an integral part of the debt, as much so as the principal debt itself, and an independ-

ent action for its recovery may be maintained notwithstanding payment of the principal as such has been made and accepted. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

- 2. Recovery Separate from Principal. The general rule is that when the principal subject of a claim is extinguished by the act of the plaintiff, or of the parties acting in unison, all its incidents go with it, which rule is applicable where interest is awarded in the way of damages; it being recoverable only in an action for the principal and not constituting a distinct claim. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.
- 3. Right to Recover Admitted. Though defendant does not deny plaintiff's right to recover a certain amount, it is discretionary with the jury to add interest in computing its verdict, unless defendant has made a tender of an amount equal to or greater than the verdict. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.

#### Note.

Right to interest on judgment as affected by modification of judgment on appeal. 1917C-413.

#### 2. COMPUTATION OF INTEREST.

- 4. Accrual of Cause of Action. Where such statement of indebtedness was not furnished to the seller until June 7th, he is liable for interest on his share of the indebtedness only from that date, and not from March 8th, the date of sale. Miller v. Dilkes (Pa.) 1917D-555.
- 5. Compounding. Where the basic principle of an accounting by a trustee can be given effect without charging him with compound interest on the amount which he has held for his cestui que trust, it is not error to refuse to make such a charge. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571.

## 3. WAIVER.

- 6. Acceptance of Principal. Where the plaintiff was unlawfully removed from one office and installed in another at a lower salary and he continuously objected and protested to the reduction in salary and receipted for his salary only as on account and never in full, and upon judgment in his favor ordering the payment of the difference in his salary receipted for the amounts paid only as on account and not in full, his acts did not show a waiver of the interest, and he is entitled to recover the same upon the salary withheld. Shepard v. New York (N. Y.) 1917C-1062. (Annotated.)
- 7. The evidence is held to show such demand for the payment of principal of salary withheld as to fulfill the condition

that, the interest being only recoverable as damages for the nonpayment of the principal when due, it is necessary for plaintiff to prove a timely demand for the principal. Shepard v. New York (N. Ŷ.) 1917C-1062. (Annotated.)

INTEREST IN LAND. See Frauds, Statute of, 5, 10.

INTERFERENCE WITH BUSINESS. Action for see Torts, 2.

INTERFERENCE CONTRACT WITH RELATIONS.

See Labor Combinations.

INTERMEDIATE APPELLATE COURTS. Jurisdiction and powers, see Appeal and Error, 15-24.

Review of judgments, see Appeal and Error, 157, 158.

INTERNATIONAL LAW. See Treaties; Ambassadors and Consuls: Conflict of Laws.

#### INTERNMENT.

Of alien enemies, see War, 7.

INTERPLEADER.

See Pleading.

#### INTERPRETATION.

Of defamatory language, see Libel and Slander, 22-23.

INTERPRETATION OF STATUTES. See Statutes, 47-115.

INTERROGATORIES.

See Discovery.

INTERRUPTION OF STATUTE. See Limitation of Actions, 33-42.

### INTERSTATE COMMERCE.

- 1. What Constitutes Interstate Commerce. a. In General.
- 2. Regulation of Interstate Commerce.
  - a. Power of Congressb. Power of States
  - - (1) Police Power in General.
    - (2) Effect of Nonaction by Congress.
- 3. Interstate Commerce Act.

See Carriers, 1-3.

Inspection of grain as interfering, see Weights and Measures, 2,

#### 1. WHAT CONSTITUTES INTERSTATE COMMERCE.

#### a. In General.

- 1. Commerce within the federal constitution is commercial intercourse between nations and the states, and includes not only navigation and transportation, but the purchase, sale, and exchange of commodities, and hence the Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3), imposing an excise upon foreign corporations, does not apply to those engaged in foreign commerce, although it be a commercial business. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.
- 2. The sending of means of education by correspondence through the mails is commerce. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.
- 3. Where a Connecticut corporation maintained a Boston office, the sale and delivery of goods to citizens of Connecticut through the local office is not interstate commerce for that reason. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.
- 4. "Dealer"-Meaning of Term-Manufacturer Selling Product. Plaintiffs manufactured soft drinks in Ohio, and sold some of their goods in Newport, Ky., upon orders from retail dealers in Newport, by means of solicitors or through the drivers of their wagons acting as solicitors. When a retail dealer had theretofore purchased goods from them, they would place their goods upon their wagons and send them into Newport, and there expose them for sale to such dealer, and sell and deliver such goods as he might desire. If any person other than a former customer desired to huy goods while the wagons were in Newport, the sale would be made, and the goods then and there delivered to him. Held that, while some of the transactions constituted interstate commerce, some of them were intrastate transactions, and, whether the sales were made in the original packages or not, plaintiffs were doing business in Newport as wholesale dealers in soft drinks, and were subject to a license tax imposed by that state upon parties doing the business of a wholesale dealer in such goods. Newport v. Wagner (Ky.) 1917A-962. (Annotated.)

#### 2. REGULATION OF INTERSTATE COMMERCE.

a, Power of Congress.

5. Interstate Commerce — Exclusiveness of Federal Power. The power to regulate commerce between states, delegated to the federal government, makes its exercise of such power supreme, to the exclusion of the powers of state governments. Van Winkle v. State (Del.) 1916D-104.

#### b. Power of States.

### (1) Police Power in General.

- 6. The Ohio inspection act, in so far as the same affects interstate commerce, contravenes clause 2, section 10, article 1 of the federal constitution and is unconstitutional and void for the reason that it imposes a burden on such commerce, by way of fees, largely in excess of the expenses necessary for executing the inspection law. Castle v. Mason (Ohio) 1917A-164. (Annotated.)
- 7. Commerce between states may be affected by local inspection or police regulations without the latter becoming invalid on that account; for when the local police regulation has real relation to the suitable protection of the people of the state and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce. State v. McKay (Tenn.) 1917E-158.
- 8. Goods in Interstate Transit. Goods delivered to a common carrier at a point without the state, consigned to a purchaser at his residence within the state, are exempt from state regulations during the course of transportation. Newport v. Wagner (Ky.) 1917A-962.
- 9. Requiring Precautions at Crossings. The provision of the Ga. Civil Code (1910), § 2675, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, is not unconstitutional as applied to a railway train while engaged in interstate commerce, under the conditions set forth in paragraph 23 of the defendant's answer, on the ground that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the provisions of the constitution of the United States that "the Congress shall have power to regulate commerce with foreign nations and among the several states." The statute is an exercise of the police power of the state, though to some extent it may indirectly affect interstate transportation. board Air-line Ry. v. Blackwell (Ga.) (Annotated.) 1917A-967.

#### Note.

State regulation of railroads as interference with interstate commerce. 1917A-.973.

## (2) Effect of Nonaction by Congress.

10. Trade in Illegal Articles. The commerce clause of the federal constitution excludes state control only over interstate commerce in articles which are legitimate subjects of trade, and not over articles which are inherently unworthy of commerce and unfit for use of the people and

which the state, in the absence of congressional legislation covering the subject, has declared are not legitimate subjects of trade. American Express Co. v. Beer (Miss.) 1916D-127.

#### 3. INTERSTATE COMMERCE ACT.

- 11. Rates Fixed by Commission. The fact that plaintiff railroad company made a mistake in computing the freight charge and failed to discover it until six months afterward cannot constitute a waiver or estoppel precluding recovery of the correct amount, since the rate filed with the Interstate Commerce Commission is the lawful, arbitrary, and immutable rate; all parties concerned being charged with knowledge of it and its unescapable force. Pennsylvania R. Co. v. Titus (N. Y.) 1917C-862.
- 12. The rate filed with the Interstate Commerce Commission being the only legal rate and not variable by the act of the parties, payment of part of the freight charge by the consignee of goods can under no circumstances, relieve him from full payment. Pennsylvania R. Co. v. Titus (N. Y.) 1917C-862.

# INTERURBAN RAILWAYS. See Street Railways.

#### INTERVENING CAUSE.

When a defense, see Homicide, 3.

#### INTERVENTION.

See Costs, 6.

- 1. Pleading—Intervener's Plea. Where, in an action involving the title to the bed of a lake, the state intervenes and claims title, but does not allege whether the lake is navigable or unnavigable, it is properly required to make its complaint in intervention more specific, even though, as claimed, it might claim the bed of the lake because of either condition, since pleading contradictory facts, either directly or inferentially, by failing to allege either fact, is not a compliance with the statutory requirement that the complaint shall contain a plan and concise statement of "facts." Bernot v. Morrison (Wash.) 1916D-280.
- 2. In garnishment proceedings to reach funds deposited in bank in the name of the judgment debtor, the intervener's plea that the funds held by the garnishee were not the depositor's property, but the property of the intervener, is a statement of fact, and not a statement of a legal conclusion. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143.
- 3. Intervention by Owner of Garnished Funds—Plea Sufficient. In garnishment

proceedings to reach funds deposited in bank by the judgment debtor, the plea of the intervener, stating that the funds held by the garnishee bank were not its de-positor's property, but that they were the intervener's property, is a sufficiently definite allegation touching the ownership of the funds, which did in fact belong to the intervener, the depositor having their custody as his agent, it being unnecessary to set out the evidence upon which the intervener's claim of ownership was Home Land, etc. Co. v. Routh based. (Ark.) 1917C-1143.

#### INTER VIVOS.

See Gifts, 1-10.

#### INTESTACY.

Construction of will to avoid, see Wills, 160.

#### INTESTATES.

Actions concerning property of, see Descent and Distribution, 9.

#### INTOXICATING LIQUORS.

- 1. Power to Regulate and Control, 462.
- 2. What are Intoxicating Liquors, 463.
- 3. Validity of Regulations, 463.
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  - b. Regulating Sale to Indians, 465.
  - c. Qualification of Dealers, 465.
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  - (3) Presumptions and Burden of Proof, 472. d. Instructions, 472.

  - e. Punishment, 472.
- 7. Abatement of Liquor Nuisance, 472.
- See Civil Damage Acts, 1-6; Conflict of Laws, 1-3; Disorderly Houses, 1, 2; Local Option.
- Review of order revoking license, see Appeal and Error, 31.
- Provisions against use in insurance contract, see Beneficial Associations, 1.
- Unlawful sale as peace breach, see Breach of Peace, 5-8.

- Arrest of sober passenger by mistake, liability, see Carriers of Passengers, 28. Effect of intoxication on confession, see Confessions, 2.
- Prohibition amendment, self executing, see Constitutional Law, 91.
- Liquor contract void for illegality, see Contracts, 25.
- Criminal liability of Corporations, 22. of corporations,
- Opinion evidence as to intoxication, see Evidence, 78-81.
- Presumption as to sobriety, see Evidence, 140.
- Intoxication as bearing on intent, see Homicide, 32-34, 63.
- Drunkenness in homicide cases, see Homi-
- cide, 32-34, 62, 63. Drinking by jurors, effect, see Jury, 36, 37. Intoxication of defendant as mitigating
- damages, see Libel and Slander, 159. Granting of license not compellable, see
- Mandamus, 3.
- Intoxication of servant, effect under Workmen's Compensation Act, see Master and Servant, 231-234.
- Liability of officers for destroying liquor, see Militia. 5-10.
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- Intoxication as evidence of contributory negligence, see Negligence, 82.
- Drunkenness, removal from office, see. Public Officers, 47-49. Duty of sheriff to enforce liquor laws, see
- Sheriffs and Constables, 5, 16, 17.
- Sales to members of incorporated club, see Societies and Clubs, 2.
- Title of Hazel Law, see Statutes, 8. Title of prohibition act, see Statutes, 14. Construction of statutes in pari materia, see Statutes, 85.
- Intoxication as affecting testamentary capacity, see Wills, 69, 94.

## 1. POWER TO REGULATE AND CON-TROL.

- 1. A state may, consistently with the due process of law clause of U. S. Const. 14th Amend. (6 Fed. St. Ann. 416), forbid all shipments of intoxicating liquor, whether intended for personal use or otherwise. James Clark Dist. Co. v. Western Md. R. Co. (U. S.) 1917B-845.
- 2. Conditions to Issuance of License-Power to Prescribe. As the authority to sell liquor is a mere privilege which the state may grant or withhold, at its pleasure, it may require those desirous of permission to sell intoxicating liquor to procure a petition signed by a majority of the adult white inhabitants of the locality, as prescribed by the Going Act. Wade v. Horner (Ark.) 1916E-167.
- 3. The former charter of the city of Duluth limited the control of the city over the liquor traffic so that the city could regulate but not prohibit such traffic; but

the present charter, after continuing in force all powers previously possessed by the city, granted, in addition thereto, "All municipal power... of every name and nature whatsoever." Held, that "all municipal power" includes all powers generally recognized as powers which may properly be exercised by municipal corporations, and that the liquor traffic may be prohibited under the grant of such power. State v. Duluth (Minn.) 1918A-683.

- 4. It is not contrary to the public policy of the state to give the power to prohibit such traffic to a city of the first class, and such power may be given to a city of that class by a home-rule charter. State v. Duluth (Minn.) 1918A-683.
- 5. Prohibition of Sale. The power to prohibit the sale of intoxicating liquor within its limits may be given to a city by its charter. The general laws regulating the liquor traffic imposed regulations and restrictions more stringent than those theretofore existing, which the municipalities of the state could not abrogate or lessen; but such municipalities were free to impose any further restrictions authorized by their respective charters or other laws. State v. Duluth (Minn.) 19184-683.
- 6. Const. Tex. art. 16, § 20, authorizing the prohibition of the sale of intoxicating liquor, is not an implied limitation on legislative power, and the legislature has not only the authority but must pass all laws necessary and appropriate to prevent illegal sales. Longmire v. State (Tex.) 1917A-726. (Annotated.)
- 7. Regulation of Transportation of Liquor. As with the shipment and delivery of intoxicating liquor wholly within the state, the legislature alone has authority to deal, and, in so far as it may be necessary to protect the public health, morals, and welfare, its will, as expressed in statutes, is final. Longmire v. State (Tex.) 1917A-726. (Annotated.)
- 8. The legislature can, in the exercise of its police powers as an aid to the enforcement of the law against the sale of liquor, regulate shipments of liquor, and thereby prohibit acts which in themselves are harmless. Bird v. State (Tenn.) 1917A-634.

(Annotated.)

Right to prohibit possession of intoxicating liquor for personal use. 1916E-780. State regulation of transportation of

intoxicating liquors. 1917A-622.

# 2. WHAT ARE INTOXICATING LIQUORS.

9. Medicinal Preparation. A medicinal preparation containing alcohol, but which will not intoxicate by immoderate use because one using it "would become sick

long before he becomes intoxicated" is not "intoxicating liquor" forbidden to be delivered within the state by S. Car. Act Feb. 20, 1915 (29 St. at Large, p. 140). Geer Drug Co. v. Atlantic Coast Line R. Co. (S. Car.) 1917C-908. (Annotated.)

10. "Near Beer." "Near beer" is a beverage intended as a substitute for beer, and is in reality a malt liquor. Howard v. Acme Brewing Co. (Ga.) 1917A-91.

## Notes.

Medicinal or toilet preparation containing alcohol as within purview of intoxicating liquor statute. 1917C-909.

Regulation of alcoholic, spirituous, malt or vinous liquor as including or excluding nonintoxicating liquor. 1917A-94.

## 3. VALIDITY OF REGULATIONS.

## a. In General.

- 11. The authority given the agent to refuse delivery of a shipment of intoxicating liquor when intended for unlawful use does not confer upon him judicial power. State v. Missouri Pacific R. Co. (Kan.) 1917A-612. (Annotated.)
- 12. Provisions of the act relating to shipments within the state and the delivery of liquor to minors do not affect this prosecution and cannot be invoked for the purpose of building up the defense that the statute is unconstitutional. State v. Missouri Pacific R. Co. (Kan.) 1917A-612. (Annotated.)
- 13. State Regulation of Transportation. The requirements concerning statements in writing to be made or taken and filed with the county clerk do not violate the provisions of sections 15 and 20 of the Interstate Commerce Act as amended (Fed. St. Ann. 1912 Supp. pp. 119, 125). State v. Missouri Pacific R. Co. (Kan.) 1917A-612. (Annotated.)
- 14. Validity of Prohibition. Wash. Initiative measure No. 3 (Laws 1915, p. 2), prohibiting the manufacture, keeping, sale, and disposition of intoxicating liquors, except in certain cases, approved by popular vote at general election of 1914, does not violate the equal privileges and immunities provisions of the federal or state constitutions. Gottstein v. Lister (Wash.) 1917D-1008.
- 15. Such initiative measure does not violate the equal protection of the laws provisions of the state and federal constitutions. Gottstein v. Lister (Wash.) 1917D-1008.
- 16. Objection to Validity. The ordinance is valid so far as it prohibits the sale of intoxicating liquor at retail, and, as relator seeks a license to sell at retail only, whether the ordinance is valid so far as it prohibits sales at wholesale is

1916C-1918B.

not involved herein. State v. Duluth (Minn.) 1918A-683.

- 17. Confiscation of Liquor Unlawfully Kept. Construing these Ga. prohibitory laws in connection with the existing laws, liquors of the prohibited classes cannot be kept at all in certain places, cannot be kept in excess of limited quantities anywhere, and cannot be sold; and where such liquors are kept in excess of the quantities allowed, the keeping or possessing of them is unlawful. The qualities of property theretofore existing in them were taken away, and it is competent for the legislature to declare that they may be seized, condemned, and destroyed upon order of the judge of the court having jurisdiction; and such provision is a valid exercise of the police power of the state, and not un-constitutional on the ground that it does not provide for a hearing. Delaney v. Plunkett (Ga.) 1917E-685.
- 18. Prohibition of Possession for Personal Use. The restriction as to amount of intoxicating liquors that a citizen is allowed to keep in a building used solely as a dwelling or residence is not unconstitutional. Delaney v. Plunkett (Ga.) 1917E-685. (Annotated.)
- 19. These laws are not ex post facto in their character nor retroactive. Delaney v. Plunkett (Ga.) 1917E-685.
- 20. These prohibitory laws are not unconstitutional on the ground that they hinder, impede, and interfere with the power of Congress to regulate interstate commerce. Delaney v. Plunkett (Ga.) 1917E-685.
- 21. The acts of the general assembly, approved November 17, and November 18, 1915, hereinafter called the prohibitory laws or statutes (Georgia Laws Ex. Sess. 1915, pp. 77, 90), being acts to prohibit the manufacture, sale, keeping, etc., of intoxicating liquors, and containing, among other provisions, an inhibition against keeping intoxicating liquors in any place of business or public place, and also against the keeping of such liquors in excess of given quantities in any place whatsoever, are a valid exercise on the part of the legislative body of the police power. Delaney v. Plunkett (Ga.) 1917E-685.
- 22. Presumption of Unlawful Use. The N. Car. search and seizure law (Acts 1913, c. 44), making the possession of more than one gallon of spirituous liquor prima facie evidence of keeping it for sale in violation of law, is constitutional. State v. Randall (N. Car.) 1918A-438.
- 23. Purpose of Prohibition. The main purpose of the prohibition amendment to the constitution is to prohibit the manufacture and sale in the state of intoxicating liquor, and the provision prohibiting the manufacture and sale in the state

- is valid, though the provision prohibiting the introduction into the state of intoxicating liquor is invalid as interfering with interstate commerce. Gherna v. State (Ariz.) 1916D-94. (Annotated.)
- 24. Validity of Statute Bringing Liquor into Dry Territory. The provision of Hazel Law (27 Del. Laws, c. 139) § 6, that no person, in quantities greater than one gallon in 24 hours, shall bring intoxicating liquors into local option territory from any point within the state, bears a substantial relation to the sale of intoxicating liquor in prohibited territory, and therefore is a proper exercise of the police power of the state, and not an abridgment of the privileges of citizens, guaranteed by Const. U. S. Amend. 14. Van Winkle v. State (Del.) 1916D-104.
- 25. Validity of Exception—Physicians and Druggists. The Hazel Law (27 Del. Laws, c. 139) provides by section 5 that it shall not apply to the shipment or delivery to physicians or druggists of such liquors in unbroken packages not exceeding five gallons at any one time, and by section 6 prohibits any person from bringing into local option territory any liquor greater than one gallon within 24 hours. Const. Del. art. 13, § 1, provides for an election to determine whether the sale of liquors in certain districts shall be licensed or prohibited, and that, after a vote against license, no person shall thereafter manufacture or sell liquors except for medicinal or sacramental purposes. The Prescription Act (26 Del. Laws, c. 147) requires all prescriptions for intoxicating liquors for medicinal purposes to be written by practicing physicians. Held, in view of the recognized necessity of liquor as a drug, and therefore readily to be obtained by those authorized to prescribe or sell it, that the discrimination in favor of physicians and druggists was reasonable, and that the Hazel Law did not deny the equal protection of the laws. Van Winkle v. State (Del., 1916D-104.
- 26. Validity of Prohibitory Law. The state, in the exercise of its police power, may prohibit the manufacture and sale in the state of intoxicating liquors. Gherna v. State (Ariz.) 1916D-94.
- 27. Effect of Prohibitory Amendment. The Ariz. prohibition amendment to the constitution annuls existing laws permitting the manufacture and sale of intoxicants under licenses or other restrictions. Gherna v. State (Ariz.) 1916D-94.
- 28. Validity of Prohibitory Amendment. The Ariz. prohibition amendment to the constitution does not deprive liquor dealers of their property without due process of law, and does not discriminate against citizens of other states, though it may deprive dealers of the right to pursue the business which was previously lawful and

diminish the value of the property devoted to the business. Gherna v. State (Ariz.) 1916D-94.

C9. The Ariz. prohibition amendment to the constitution is not an ex post facto law, in so far as it prohibits the sale of liquor in existence at the time of its adoption. Gherna v. State (Ariz.) 1916D-94.

#### Note.

Validity of statute forbidding bringing of liquor into prohibition territory. 1917A-740.

### b. Regulating Sale to Indians.

- 30. Shipments of Liquor into Indian Territory. Act March 1, 1895, c. 145, § 8, 28 Stat. 697 (3 Fed. St. Ann. 424), which inter alia prohibits the carrying of intoxicating liquors into Indian Territory, was enacted as a part of the recognized guardianship by the United States of the Indians as a separate but independent people, and in the exercise of the constitutional power of Congress to regulate commerce with the Indian tribes, and was not repealed by the Enabling Act of Oklahoma, and the admission of the state thereunder, as to importation from parts of the state not within the former Indian Territory, and an indictment for conspiracy to violate said act by carrying liquor into such territory need not allege that it was to be imported from without the state of Oklahoma. Joplin Mercantile Co. v. United States (Fed.) 1916C-470.
- 31. In none of the legislation of Congress prohibiting the introduction of liquor into the Indian country have state lines been recognized, but the acts prohibited have always been held unlawful whether the liquor was introduced from points within the same state or from without. Joplin Mercantile Co. v. United States (Fed.) 1916C-470.

## c. Qualification of Dealers.

- 32. Where names signed to a statement of consent to the sale of intoxicating liquors were spelled differently from the names in the poll books, but the names would be pronounced the same, the doctrine of idem sonans will apply, and the names must be counted. Riley v. Litchfield (Iowa) 1917B-172.
- 33. Proceeding for Permission to Sell. A proceeding under the mulct law for permission to sell intoxicating liquors pursuant to a statement of consent, though special, is at law. Riley v. Litchfield (Iowa) 1917B-172.
- 34. Mode of Trial. Iowa Code, § 2450, providing for the filing of statements of consent to the sale of intoxicating liquors, and authorizing any aggrieved party to appeal from the decision of the board of supervisors to the district court, where the

matter shall be tried de novo, requires a trial in the district court as though not previously heard. Riley v. Litchfield (Iowa) 1917B-172.

- 35. Signatures Conformity to Poli Book. Where the names on a statement of consent to the sale of intoxicating liquor and on the poll books are the same, the identity of the signers with the electors whose names are on the poll books is presumed, but the presumption may be overcome. Riley v. Litchfield (Iowa) 1917B-172.
- 36. Signature by Incorrect Name. Where persons signing a statement of consent to the sale of intoxicating liquor testified that the names signed by them were not their true names, but that the change in the signatures was to make the names conform with those on the poll books, and not to deceive, but there was nothing to show that other persons resided in the city bearing the names appearing on the poll books, the names must be disregarded in determining the number of signers on the statement. Riley v. Litchfield (Iowa) 1917B-172.
- 37. Where "C. A. Oppelt" signed a statement of consent as "E. A. Oppelt," the name appearing on the poll book, and he testified to having resided in the city and to having voted at the last preceding election and that there was no one living in the city by the name of "Oppelt" excepting himself and son, and that the son had never voted, but did not know whether a person by the name of "E. A. Oppelt" voted, the person signing as "E. A. Oppelt" was "C. A. Oppelt," and his name must be counted, Riley v. Litchfield (Iowa) 1917B-172.
- 38. Where persons signing a statement of consent to the sale of liquor testified that the names signed by them were not their true names, evidence that the change in signatures was to make the names conform with those on the poll books and not to deceive, and that all of them were registered in their true names, but none of their true names appeared on the poll books, is admissible as against the objection that the evidence varied or explained the names on the poll books. Riley v. Litchfield (Iowa) 1917B-172.
- 39. Where electors signing a statement of consent to the sale of liquor, on discovering that their true names were not on the poll books, signed the names to the statement corresponding with those on the poll books, supposed to have been written for them by the judges of election, pursuant to advice of canvassers to procure signatures to a statement of consent, the canvassers are not chargeable with inducing electors to sign names other than their own. Biley v. Litchfield (Iowa) 1917B-172.

- 40. Affidavit to Signatures. The purpose of Iowa Code, § 2452, declaring that the signing of a name of another to any statement of consent shall be punishable as forgery, and every statement shall be accompanied by affidavit of some reputable person showing that these persons personally witnessed the signing of each name thereon, and any false statement in the affidavit shall be punishable as perjury, is that each signer shall be identified as the person named, so that a genuine statement may form the basis of subsequent proceedings, and a canvasser who procured over 200 signatures to which he made affidavit, and who admitted that he did not know over half of them, and had never seen them before or since the signing of the petition, and only knew their names because attached to the statement, is guilty of perjury in the performance of his work and is not a reputable person, and the signatures procured by him must be excluded. Riley v. Litchfield (Iowa) 1917B-172.
- 41. Effect of Death or Removal of Signer. Iowa Code, §§ 2448, 2452, providing that a statement of consent to the sale of intoxicating liquors signed by a majority of the voters as shown by the poll list shall, if found sufficient, be effectual, and that no name shall be counted that is not signed within thirty days prior to the filing of the statement, imply that all signing within thirty days prior to the filing shall be counted, and fixed the period during which signatures may be procured, and the thirty days mentioned is that period, and a name signed within that time and while a resident of the municipality must be counted, though he has since that time removed from the city or has died. Riley v. Litchfield (Iowa) 1917B-172.
- 42. Qualification of Signers. The poll list of the electors is conclusive evidence of those who voted at the election in determining whether a statement of consent to the sale of liquor has been signed by the requisite number of electors, and the law does not contemplate an investigation as to who had the right to vote, but it is sufficient that the name appeared on the poll lists. Riley v. Litchfield (Iowa) 1917B-172.
- 43. Withdrawal of Signature. Electors signing a statement of consent may revoke withdrawals not filed, and may file revocation of withdrawals prior to the taking effect of withdrawals. Riley v. Litchfield (Iowa) 1917B-172.
- 44. Validity of Local Option Law. As the colored electors are entitled to vote on the question whether the sale of intoxicants shall be licensed, which is submitted at the biennial general state elections, and may present a petition for the suppression of the sale of intoxicants, under the Ark.

Three Mile Local Option Law (Kirby's Dig. §§ 5128-5132), it cannot be held that they are unlawfully deprived of any voice in the suppression of liquor traffic by the Going Act, which requires a petition signed by a majority of white electors, as condition to the granting of a license. Wade v. Horner (Ark.) 1916E-167.

(Annotated.)

- 45. The Ark. Going Act does not deprive colored citizens of the right of remonstrance against the issuance of a license; such persons having the same right to make themselves parties to a proceeding for the issuance of a license as any other elector, and to present their remonstrances in the same manner. Wade v. Horner (Ark.) 1916E-167. (Annotated.)
- 46. Validity of Statute Discriminating Against Race. The Going Act (Acts Ark. 1913, p. 180), providing that when a majority of the adult white inhabitants of a city or town petition the county court, asking that a license for the sale of intoxicants be issued, the court may issue such license, if the majority of the votes cast at the last election was in favor of license, merely prescribes a condition precedent to the issuance of a license, and is not invalid under either the state or federal constitution, as providing for an election from which electors of African descent were illegally excluded. Wade v. Horner (Ark.) 1916E-167.

(Annotated.)

## Note.

Validity of intoxicating liquor statute which makes distinction between races with respect to granting of license or otherwise, 1916E-170.

- d. Conflict Between Statute and Ordinance.
- 47. Regulation of Transportation. An ordinance which attempts to regulate the transportation of intoxicating liquors within the city for legal purposes, and to prohibit such transportation for illegal purposes, but which does not permit the transportation of such liquors for all of the purposes recognized as legal by the law of the state, is invalid; and a judgment quashing a complaint drawn under such an ordinance will be sustained. Kausas City v. Jordan (Kan.) 1918B-273.

(Annotated.)

- 48. Club House System as Nuisance. Under statutory power to declare what shall be nuisances and abate them, a town cannot, by ordinance, make the clubhouse locker system of receiving and using intoxicating liquors in an orderly way a nuisance. Cortland v. Larson (Ill.) 1916E-775. (Annotated.)
- 49. The ordinance was not within the town's police power for the orderly recep-

tion, keeping, and use of intoxicating liquors by private individuals, and does not affect the public welfare or health. Cortland v. Larson (Ill.) 1916E-775.

(Annotated.)

50. Prohibition of Possession for Personal Use. Under charter power to "regulate, prohibit and license the selling of intoxicating liquors," a town cannot enact an ordinance prohibiting club members from receiving and keeping intoxicating liquors for their individual use in clubhouse lockers. Cortland v. Larson (Ill.) 1916E-775. (Annotated.)

#### e. Annulment of License.

- 51. The Ariz. prohibition amendment to the constitution does not impair the obligation of contracts, though prohibiting the sale of liquor by existing licensed dealers. Gherna v. State (Ariz.) 1916D-94.
- 52. The prohibition amendment to the constitution is not invalid as confiscating the license money paid by liquor dealers, or because depreciating lease rentals and stocks of liquor, for these have no bearing on the right to sell liquor after the revocation of a license. Gherna v. State (Ariz.) 1916D-94.
- 53. Revocation of Licenses by Statute. The state, in the exercise of its police power, may revoke liquor licenses, and whether the law is confiscatory may be litigated, provided the state permits the bringing of an action against it for that purpose. Gherna v. State (Ariz.) 1916D-94.

#### f. Regulating Transportation.

- 54. Under the laws of Kansas cities of the first class have power to pass ordinances regulating the transportation of intoxicating liquors for legal purposes and prohibiting such transportation for illegal purposes. Kansas City v. Jordan (Kan.) 1918B-273. (Annotated.)
- 55. Such an ordinance as is mentioned in section 1 of this syllabus is a law of this state within the meaning of the United States Constitution, and of the Webb-Kenyon Act (Part 1, 37 U. S. Stat. at Large, c. 90, p. 699, 4 Fed. St. Ann. (2d ed.) 593). Kansas City v. Jordan (Kan.) 1918B-273. (Annotated.)
- 56. Such an ordinance as is mentioned in section 1 of this syllabus is not an unlawful regulation of interstate commerce.

  Kansas City v. Jordan (Kan.) 1918B-273.

  (Annotated.)
- 57. A city ordinance regulating the transportation of intoxicating liquors for legal purposes, and prohibiting such transportation for illegal purposes, is consistent with the law of this state regulating the transportation and delivery of intoxi-

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cating liquors. Kansas City v. Jordan (Kan.) 1918B-273. (Annotated.)

#### g. The Webb-Kenyon Act.

- 58. The Webb-Kenyon Act (Part 1, 37 U. S. Stat. at Large, c. 90, p. 699, Fed. St. Ann. 1914 Supp. p. 208), removing the interstate character and protection from intoxicating liquor shipped into a state for the purpose of use in violation of its laws, is a valid exercise of the commerce power vested in Congress by the Constitution. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.
- 59. The act is not void as a delegation of power over interstate commerce, but is a legitimate exercise of such power. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.
- 60. State Regulation of Transportation. The Hahin Act (Laws Kan. 1913, c. 248) is not void as an attempt to regulate interstate commerce, but, complementary to the Webb-Kenyon Act, is a valid enactment concerning the bringing into the state of intoxicating liquors for unlawful use here. State v. Missouri Pacific R. Co. (Kan.) 1917A-612. (Annotated.)
- 61. There is nothing repugnant to the due process of law clause of U S. Const. 5th Amend. (9 Fed. St. Ann. 288), in the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, c. 90, Fed. St. Ann. 1914 Supp. p. 208), under which an interstate shipment of intoxicating liquor, though intended for personal use, may be subjected to the state prohibitory laws. James Clark Dist. Co. v. Western Md. R. Co. (U. S.) 1917B-845.

  (Annotated.)

62. Congress did not exceed its power under the commerce clause in enacting the provision of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, c. 90; Fed. St. Ann. 1914 Supp. p. 2028), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law

of the state into which the liquor is transported. James Clark Dist. Co. v. Western Md. R. Co. (U. S.) 1917B-845.

(Annotated.)

63. Validity and Effect of Webb-Kenyon Law. Any immunity from the prohibitions of W. Va. Code 1913, c. 32A, as amended by Laws 1915, c. 7, § 7, Laws 1915, 2d Ex. Sess. p. 660, § 34, against the shipment from without the state of intoxicating liquors intended for personal use, and the receipt and possession of liquors so transported, which the interstate character of such a shipment might otherwise give, is taken away by the provisions of

the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, c. 90, Fed. St. Ann. 1914 Supp. p. 208), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state to which the liquor is transported, although individual use may not have been prohibited by the West Virginia law. James Clark Dist. Co. v. Western Md. R. Co. (U. S.) 1917B-845. (Annotated.)

64. The Webb-Kenyon law, prohibiting the transportation of liquors from one state into another, to be received, kept, or used in violation of the law of the latter state, thereby divesting intoxicating liquors of their interstate character in so far as the power of the state to regulate the sale or disposition thereof and shipments into the state for that purpose is concerned, is valid. Gottstein v. Lister (Wash.) 1917D-1008.

65. Effect on State Legislation. Such initiative measure is not invalid as an interference with interstate commerce, since the Webb-Kenyon act (Act March 1, 1913, c. 90, 37 Stat. 699 [4 Fed. St. Ann. 2d ed. 593]) divests intoxicating liquors of their interstate character in so far as the power of the state to regulate the sale and disposition thereof and the shipment into the state for that purpose is concerned. Gottstein v. Lister (Wash.) 1917D-1008.

66. Prohibition of Importation. The May-Mott-Lewis Act (Laws Miss. 1914, c. 127) §§ 2, 7, and 11, par. 2, making it unlawful for any person to order and have shipped to him, or for him to receive from without the state, intoxicating liquors in excess of one gallon, though imposing a direct burden on interstate commerce, is authorized by the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699), divesting intoxicating liquor of its interstate character, when it is intended by any person interested therein to be received in violation of the laws of the state into which it is being transported, even as applied to liquor being transported for the personal use of the consignee and his family and not to be sold or used unlawfully. American Express Co. v. Beer (Miss.) 1916D-127.

67. The requirement of the May-Mott-Lewis Act (Laws Miss. 1914, c. 127), § 5, that those transporting liquors into the state shall keep a record of same and file statements thereof with the clerk of the circuit court, is not invalid as imposing a direct burden on interstate commerce, regardless of whether it is within the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699, Fed. St. Ann. 1914 Supp. p. 208), prohibiting the transportation of liquor from one state into another

tor sale in violation of any law of the state where received. American Express Co. v. Beer (Miss.) 1916D-127.

68. The Webb-Kenyon Act (Act March 1, 1913, c., 90, 37 Stat. 699, Fed. St. Ann. 1914 Supp. p. 208), making it unlawful to transport into a state intoxicating liquor "intended by any person interested therein to be received, possessed, sold or in any manner used . . . in violation of any law of such state," is a proper exercise of the power vested in Congress to regulate commerce. American Express Co. v. Beer (Miss.) 1916D-127.

69. Liquor Shipped for Lawful Purpose. The Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699, Fed. St. Ann. 1914 Supp. p. 208), by its title purporting to divest liquor of its interstate character only "in certain cases," and prohibiting transportation of intoxicating liquors from one state into another, to be received, possessed, sold, or used in violation of any law of such state, does not divest liquor of its interstate character in all cases, but removes the protection of the commerce clause only when the liquor is to be used in violation of any law of the state; and hence the Hazel Law (27 Del. Laws, c. 139), enacted thereunder, prohibiting the shipment or delivery of liquor in a prohibition district of the state for any purpose, except to physicians and druggists, is invalid as to a shipment and delivery of liquor from another state into a prohibition district of this state for the receiver's personal consumption, a purpose recognized by the act itself to be lawful. Van Winkle v. State (Del.) 1916D-104.

#### 4. LICENSES.

## . Operation and Effect of Statute.

70. What Constitutes Tavern. Under R. I. Gen. Laws 1909, c. 123, § 2, forbidding the granting of a liquor license to a place within 200 feet of any public or parochial school or to any place except taverns licensed on May 22, 1909, the place must be used as a tavern, and it is not sufficient to show that it was at that time licensed as a tavern, even though such license might afford presumptive evidence that it was so used. Rice v. Board of License Commissioners (R. I.) 1916C-1189.

71. "Premises" of School. R. I. Gen. Laws 1909, c. 123, § 2, provides that no liquor license shall be issued to a place within 200 feet, measured by any public traveled way, of the premises of any school. A church owned land on H. street, with a building thereon, 80 feet from the street, the basement of which was used as a parochial school, with a space on each side for yard, with a gate on the street at about the middle of the lot, and a double gate at the northwest corner thereof opening on a driveway on the northerly side

of the building, with a post near the northwest corner of the building, both gates being used as means of access by tne pupils, who were told not to play in front of the building. The distance from a point on the east side of H. street opposite the southwest corner of a licensed place along the street to the northwest corner of the school lot was 154 feet, and, when prolonged for 200 feet from the starting point, the line extended across the entrance to the middle gate; but a line from the same point of beginning to the post near the corner of the lot, then turning east and extending along and across the driveway to the post, measured 240 feet. Held, that the term "premises," in reference to real estate, usually includes appurtenances, and that as applied to the school included the school yard, driveway, and paths, so that the licensed building was within 200 feet of the school; the fact that the driveway was used by other persons for bringing coal, etc., not making it a "public traveled way." Rice v. Board of License Commissioners (R. I.) 1916C-1189. (Annotated.)

72. Nature of License. A license for the sale of liquor is not a contract within the protection of the constitutional guaranties, but is a mere permit affording protection to the holder, but the privilege may be revoked by the repeal of the law authorizing the issuance of the license. Gherna v. State (Ariz.) 1916D-94.

73. Right to License Social Club. A social club, incorporated under Mo. Rev. St. 1909, §§ 3432-3445, cannot procure a retail license as a dramshop keeper under section 7188, which license, under the express provisions of section 7191, can be granted only to a "law-abiding, assessed taxpaying male citizen over twenty-one years of age." State v. Missouri Athletic Club (Mo.) 1916D-931.

#### b. Consent to Granting of License.

74. Signatures. Where poll lists contained the Christian names of electors, while the names to a statement of consent to the sale of intoxicating liquors contained only the letters of the Christian names, the signatures to the statement were not signatures of names of persons appearing on the poll books, and must be disregarded. Riley v. Litchfield (Iowa) 1917B-172.

75. Consent of Infant Owner. Under N. Y. Liquor Tax Law (Consol. Laws, c. 34, § 15, subd. 8), as amended by Laws 1911, c. 643, § 2, requiring the consent of owners of dwelling houses situated within 300 feet of a saloon to the issuance of a license therefor, infant owners may not give a valid consent, in view of the policy of the liquor law as to infants, nor can an infant, through an agent, make a valid

consent. Matter of Farley (N. Y.) 1916C-494. (Annotated.)

#### Note.

Power of infant to consent to issuance of liquor license. 1916C-497.

## c. Liquon Dealer's Bond.

76. Liability of Surety on Transferor's Under Burns' Ind. Ann. St. 1914, § 82230 (Laws 1911, c. 119, § 12), providing that if, upon hearing of a petition for transfer of a liquor license, the commissioners approve the application for a license, it shall grant the holder permission to sell and the applicant permission to purchase, and upon filing of a bond by such purchaser, with the approval of the county auditor, the board shall issue to the purchaser of the license a certified copy of the order of transfer, where, on transfer of a license, the transferee files no bond, but, the surety on his transferor's bond having assented to the substitution, such surety's assent to the change is filed with the approval of the commissioners, the old bond meets the requirements of the statute and binds the surety. White v. State (Ind.) 1917B-527.

77. In such case both transferee and surety are bound to discharge the statutory conditions of the bond, under Burns' Ind. Ann. St. 1914, § 1278, providing that no bond shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged, but shall be bound to the full extent contemplated by the law requiring the same. White v. State (Ind.) 1917B-527.

#### 5. OFFENSES.

## a. Distribution by Social Club.

78. Where an incorporated club furnishes intoxicating liquors to its members at a clubhouse, keeping an account of each transaction and requiring the member at stated times to pay for what he has received, this is a "sale," within Mo. Rev. St. 1909, § 7188, prohibiting the sale of intoxicating liquors without a license, when such section is liberally construed pursuant to the express requirement of section 7222. State v. Missouri Athletic Club (Mo.) 1916D-931. (Annotated.)

79. That a social club, in reliance on a construction placed by the supreme court on the dramshop act (Rev. St. Mo. 1909, §§ 7186-7229) in a decision adjudicating the rights of social clubs to sell liquor without a license, and on legislative acquiescence in such decision through failure to enact any subsequent law affecting its subject matter, has enjoyed the privilege of selling intoxicating liquor and made expenditures in anticipation of the continued enjoyment of such privilege, will not pre-

clude a forfeiture of the club's charter for abuse of its corporate powers by keeping and selling intoxicating liquors. State v. Missouri Athletic Club (Mo.) 1916D-931.

#### Note.

Application of statute regulating liquor traffic to bona fide social club distributing liquor to members. 1916D-940.

### b. Sale by Physician.

80. The Hazel Law (27 Del. Laws, c. 139), providing by section 5 that it shall not apply to the shipment or delivery to physicians of liquors in unbroken packages not exceeding five gallons at any one time, does not permit liquor to be sold by physicians. Van Winkle v. State (Del.) 1916D-104.

## c. Importation of Liquor.

- 81. Regulation of Transportation of Liquors. Tenn. Acts 1913 (2d Ex. Sess.), c. 3, which is entitled "An act to prohibit" the shipment and conveying of intoxicating liquors from one county to another, but providing that the venue for prosecution shall be in the county to which shipments are made or in which deliveries are made, does not prohibit the personal transportation of liquor, since "ship" means to put or receive on a ship or other vessel for transportation, to send away, to get rid of; and "deliver" means to give or transfer, to yield possession of, to make or give over, to make the delivery of, to commit, to surrender, to rescind; and both imply a change of custody, and do not apply to personal transportation, and it will be presumed that if the legislature intended to prohibit personal transportation, it would have provided for the venue of prosecutions for violation of that provision also. Bird v. State (Tenn.) 1917A-634.

  (Annotated.)
- 82. Tenn. Acts 1913 (2d Ex. Sess.), c. 1, which is entitled "An act regulating the shipment" and delivery of intoxicating liquor, and section 9 of which excepts from the prohibition of the acts personal transportation of liquor for personal or family use in quantities not exceeding one gallon, does not prohibit the personal transportation of quantities greater than one gallon, since the title includes only the regulation of shipment and delivery, and to construe it to prohibit personal transportation would render the statute unconstitutional under Const. art. 2, § 17, requiring the subject of an act to be expressed in its title. Bird v. State (Tenn.) 1917A-634.
- 83. Construction of Statute—Counties to Which Applicable. The Allison Law (Acts Tex. 33d Leg. 1st Called Sess. c. 31) applies to a county which, prior to its enactment, had adopted prohibition. Longmire v. State (Tex.) 1917A-726.

(Annotated.)

- 84. Unlawful Transportation of Liquor. An indictment alleging that accused, a private person, unlawfully transported and delivered intoxicating liquor to a person named in a county which had adopted prohibition, need not allege whether the transportation was interstate or intrastate, since Allison Act (Acts Tex. 33d 1st Called Sess. c. 31, §§ 2-4) relates to intrastate transactions, and section 12 thereof declares that it shall not be necessary to negative exceptions, but the same shall be available as purely defensive matter. Longmire v. State (Tex.) 1917A-726.
- 85. Shipment for Personal Use. The transportation of intoxicating liquors from "wet" territory in the state into prohibition territory by a citizen of the latter territory, for his own use or as agent for another for his own use, is not a violation of Allison Act (Acts Tex. 33d Leg. 1st Called Sess. c. 31). Longmire v. State (Tex.) 1917A-726.

#### d. Persons Liable.

86. Illegal Sale—Liability of Person Buying as Agent. The penalties of the Minn. local option statute, Laws 1915, c. 23, § 13, are directed against the seller and not against the buyer; and one who purchases intoxicating liquor in a dry county at the solicitation of another, and with his money and for his use and as his agent, in good faith, and not as a subterfuge or for purposes of evasion, does not commit an offense. State v. Provencher (Minn.) 1917E—598. (Annotated.)

87. The law, however, does not countenance an evasion or subterfuge. The claimed agency must be exercised in good faith and not to hide a participation in an illegal traffic. The evidence in this case was such as to make the defense of agency in good faith for the jury and the court by charging that there was no defense of agency in good faith erroneously deprived the defendant of the right to have the question determined by the jury. State v. Provencher (Minn.) 1917E-598.

(Annotated.)

## 6. PROSECUTIONS.

#### a. Duty of Arresting Officer.

88. Arrest for Threatened Violation of Law. On making an arrest for a threatened violation of the liquor law, the sheriff should take such steps as are necessary to prevent the threatened sales, as, in case of a saloon open for business, by closing it till the liquors are removed, and then release the offender and leave future sales and future threats to be dealt with as they arise. State v. Reichman (Tenn.) 1918B-889.

#### b. Indictment.

89. Indictment containing several Counts. The information in twelve counts charged

the unlawful bringing of intoxicating liquor into the state, in twelve others its unlawful delivery here, and in the twenty-fifth both a bringing in and a delivery. Held, that each count charged an offense, and it was error to exclude evidence under any of such counts. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.

#### c. Evidence.

### (1) Admissibility.

- 90. Admissibility of Records Kept by Carrier. The statements of the shipments made and filed by the carrier with the county clerk were competent evidence, as were also the dockets of a justice of the peace showing pleas of guilty by such consignees to the charges of violating the prohibitory law. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.
- 91. Admissibility of Records of Internal Revenue Collector. Certified copies of records in the office of the United States internal revenue collector for this district showing that from July, 1912, to July, 1913, the consignees held receipts for taxes paid as wholesale liquor dealers were competent and their exclusion was error. State v. Missouri Pacific R. Co. (Kan.) 1917A-612
- 92. Pointing Out Person Referred to. Witnesses testifying to sales of liquor, but not knowing the name of the person selling, may be allowed to point to the one or the other of defendants as the person. People v. Elliott (III.) 1918B-391.
- 93. Sales by Bartender. Testimony of sales at the bar by persons other than defendants, who had charge of the premises and managed the business, such other persons acting as bartenders, is competent; all being guilty as principals. People v. Elliott (II.) 1918B-391.
- 94. Other Offenses. Where the issue on a prosecution for violation of a municipal ordinance was whether defendant kept at his storehouse prohibited liquors with intent to sell same contrary to law, a question to a witness, whether he bought liquor at that location recently before the offense alleged and after the passage of the ordinance, is an evidential fact bearing on defendant's guilt. Borok v. Birmingham (Ala.) 1916C-1061.
- 95. Abbreviations—Admissibility of Explanation. No error is committed in a prosecution for the unlawful keeping for sale of intoxicating liquor, in allowing the express agent who delivered the goods to testify as to the meaning of abbreviations in his receipt book, such as "Liq.," "Cs.," and "Bx." State v. Gordon (N. Dak.) 1918A-442.
- 96. Keeping Liquor for Sale. Where in an action for the unlawful keeping for sale

- of intoxicating liquor as a beverage proof is made that liquor was on several occasions delivered to customers at the shop of the defendant, it is immaterial that the liquor itself was stored at some other place. State v. Gordon (N. Dak.) 1918A-442.
- 97. Keeping for Sale—Proof of Sales. Where a person is charged with the offense of unlawfully keeping intoxicating liquor for sale, evidence of sales is admissible as a circumstance tending to prove the crime charged. State v. Gordon (N. Dak.) 1918A-442.
- 98. Proof of Receipt of Liquor—Express Delivery Book. The delivery book of an express company in which various consignments of liquor were receipted for by the defendant is admissible in evidence in a prosecution for unlawfully keeping intoxicating liquor for sale, and in spite of the fact that the original bills of lading or shipping bills were not introduced, where the signature of such defendant appears in such book as a receipt for such liquor, and is proved to be his. State v. Gordon (N. Dak.) 1918A-442.
- 99. Government License. Where one is accused of maintaining a liquor nuisance at a certain place, proof of the issuance to such person of a government license for the sale of intoxicating liquors in the town and state where such nuisance is claimed to have been maintained is admissible, even though the premises described in said license are different from those mentioned in the information, as such evidence tends to show that the defendant was in the business of selling intoxicating liquors. State v. Kilmer (N. Dak.) 1917E-116.

#### (2) Sufficiency.

- 100. Proof of Venue. The venue is proved on a prosecution for selling liquor in the town of D., anti-saloon territory, by testimony that witness knew defendant E. and his place of business, a certain number on a certain street, and that it is in said town; all the testimony relating to sales by defendants and their bartenders in that place of business. People v. Elliott (III.) 1918B-391.
- 101. Evidence of Illegal Sale. Evidence, on a prosecution for sale of liquor in antisaloon territory, is held to be sufficient to support the conviction. People v. Elliott (III.) 1918B-391.
- 102. Possession as Evidence of Purpose. The receipt of large quantities of liquor is at least some evidence of the receipt of such liquor for unlawful purposes. State v. Gordon (N. Dak.) 1918A-442.
- 103. Ownership of Building Where Unlawfully Sold. Evidence examined and held sufficient to establish the crime alleged by a preponderance of the evidence. Hammett v. State (Okla.) 1916D-1148.

(3) Presumptions and Burden of Proof.

104. Presumption from Payment of Federal Tax. Iowa Code, § 2427, making receipts of payment of United States liquor taxes presumptive evidence that the person owning the receipt is engaged in keeping liquor for sale "contrary to the provisions of this chapter," applies to an action under section 2423 to recover payments made for liquor illegally sold, for the two sections are in the same chapter. Cvitanovich v. Bromberg (Iowa) 1917B-309.

105. The presumption created by Iowa Code, § 2427, arising from a receipt of payment of United States liquor taxes, may be rebutted. Cvitanovich v. Bromberg (Iowa) 1917B-309.

#### d. Instructions.

106. Instructions Held Applicable. Instructions as to giving away liquor, or other shift or devise to evade the liquor law, and sales by servant, are held under the evidence applicable to the case. People v. Elliott (Ill.) 1918B-391.

#### e. Punishment.

107. Action for Penalty—Nature of Proceeding. An action in the name of the commonwealth against an express company to recover the penalties imposed for the violation of Ky. St. § 2569b, subsec. 2, forbidding the transportation of intoxicating liquors into prohibition territory, instituted under Cr. Code Prac. § 11, authorizing a prosecution of a public offense punishable only by fine, by penal action in the name of the commonwealth, and under Ky. St. § 1139, providing that the fine imposed by law shall inure to the commonwealth, except where given to a particular person, or by indictment, is not a civil, but a penal action, and no judgment for imprisonment can be had thereunder. Commonwealth V. American Express Co. (Ky.) 1916E—875. (Annotated.)

108. Punishment. The fact, that the Okla. Constitution prescribes the punishment for the sale of intoxicating liquors does not prevent the legislature from imposing other and different or greater punishment for using or permitting one's premises to be used for the sale of intoxicating liquors, as the two offenses are separate and distinct and require different proof to support them. Stout v. State (Okla.) 1916E-858.

109. Action for Penalty—Nature of Proceeding. Section 4191, Comp. Laws Okla. 1909, provides as the punishment of one who uses or permits his premises to be used for violating the prohibition law both fine and imprisonment and a penalty. Held:

(a) That the proceeding to recover the penalty is the punishment of an offense.

(b) That while this proceeding punishes an offense, it at the same time is in the nature of a civil action and is governed by the rules of procedure applicable to civil instead of criminal cases. Stout v. State (Okla.) 1916E-858. (Annotated.)

#### Note.

Action for penalty for violation of intoxicating liquor statute. 1916E-868.

#### 7. ABATEMENT OF LIQUOR NUI-SANCE.

110. Scope of Regulation—Nonintoxicating Liquor. A manufacturing plant where only nonintoxicating malt liquor is made and sold is not a nuisance which may be abated under the "blind tiger" statute (Ga. Civ. Code 1910, § 5335), which declares that "any place commonly known as a blind tiger, where spirituous, malt, or intoxicating liquors are sold in violation of law, shall be deemed a nuisance, and the same may be abated or enjoined as such," etc. Howard v. Acme Brewing Co. (Ga.) 1917A-91. (Annotated.)

111. Exclusiveness of Abatement Proceeding. That Tenn. Acts 1913 (2d Ex. Sess.), c. 2, declaring a saloon a nuisance, provides a method for its abatement, merely furnishes a cumulative remedy, and does not abrogate any other remedy or affect a sheriff's duties. State v. Reichman (Tenn.) 1918B-889.

## INVENTIONS.

See Patents.

#### INVITEE.

See Licensee. Personal injuries, see Negligence, 10-12, 21, 23-28.

INVOLUNTARY MANSLAUGHTER. See Automobiles, 63; Homicide, 1, 5-7.

## IRRESISTIBLE IMPULSE.

See Insanity, 23.

## IRRIGATION.

1. Irrigation Companies.

- Priorities and Rights of Appropriators.
   a. Actions to Fix Rights of Appropriation.
  - (1) Proof of Rights.
  - (2) Decree.
- b. Injunction to Protect Rights.3. Injury to Property of Others.

#### 1. IRRIGATION COMPANIES.

1. Contract for Water Rights. Plaintiff transferred to an irrigation company certain water rights under a contract providing that the purchaser agreed to measure the water which might be secured by

certain ditches, determine what was the full one-third thereof, and pay plaintiff annually \$6 per million cubic feet for all of the third of the water delivered by these ditches in excess of the one amount furnished for the irrigation of plaintiff's land. It is held that, under such contract, plaintiff was only entitled to one-third of the water derived from the appropriations which he transferred, and hence could not object to the ditch company's deduction from the volume carried by one of the ditches for water derived from another appropriation. Divide Canal, etc. Co. v. Tenney (Colo.) 1917D-346.

#### 2. PRIORITIES AND RIGHTS OF AP-PROPRIATORS.

- a. Actions to Fix Rights of Appropriation.
  - (1) Proof of Rights.
- 2. Evidence Immaterial. In an action to enjoin injury to plaintiffs' prior water rights, alleging that defendants had diverted water when needed and demanded by plaintiff, evidence as to the acreage irrigated in the district from year to year, the annual rainfall, and the amount of water stored by certain reservoirs without decree, is immaterial. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.
- 3. Violation of Appropriator's Right—Evidence of Excuse. In an action to enjoin injury to plaintiffs' prior water rights, alleging concert between the water commissioners and certain defendants, evidence for a defendant that at one time a certain headgate of its ditches was washed out, tending to show that the headgate could not be shut down then in accordance with the direction of the water officers, is admissible. Rogers v. Nevada Canal Co. (Colo.) 1917C—669.
- 4. Certificate of Adjudication. In such action, a certificate of the proper court of certain facts in the adjudication of plaintiffs' water rights established by the decree of such court is admissible under the express provision of Colo. Rev. St. 1908, §§ 3284, 3285, as prima facie evidence of so much of the decree as was recited therein. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.
- 5. Declarations of Defendants. In such action, testimony of the division engineer, the state engineer, and an officer of the district court, who served restraining orders, as to certain statements made by the water commissioner and by some of the defendants, explaining why an order of distribution had not been carried out, and supporting plaintiffs' allegation of concerted action on the part of the water users, their control of the water commissioners, and their intention to use waters, without regard to plaintiffs' superior rights, is admissible. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

## (2) Decree.

- 6. Priority of Appropriation—Decree as Res Judicata. The volume of the priority awarded a ditch in adjudication proceedings is res judicata, and the facts upon which such award is based cannot be inquired into in a collateral proceeding. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.
- 7. Extraterritorial Effect. The decrees entered in one irrigation division, until modified in accordance with law, must be considered as an entirety, and the water of natural streams thereof distributed in accordance therewith, although the diversion and use of the water are made at points beyond the territorial limits of the particular water district in which the decrees were entered. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.
- 8. Finality of Adjudication. After four years from a final decree in any water district, appropriators in different districts taking water from the same stream are barred from an independent action against another appropriator to determine their relative rights, although the respective appropriations sought to be readjudicated were obtained in several statutory proceedings in different districts, and such appropriators have not joined in either proceeding. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

#### b. Injunction to Protect Rights.

- 9. Protection by Injunction. The taking of the water of a stream by users whose rights of appropriation were junior to those of the plaintiffs, and who had no legal right to use it until the plaintiffs' superior rights were supplied, constituted an injury to plaintiffs' rights; and where no relief was sought against the owners of reservoirs, who were designated merely to disclose the manner in which the water officers neglected to obey former decrees, the fact that such officers, who were also defendants, had not distributed water according to law, does not relieve the defendants from an injunction against their appropriation. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.
- 10. Increase of Acreage by Plaintiff. In an action to enjoin injury to the water rights of plaintiffs as prior appropriators, where there was no claim that the quantity of water diverted was greater than that to which plaintiffs' respective decrees entitled them, evidence that some of the plaintiffs, subsequent to their decrees, had enlarged their acreage, is inadmissible. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

## 3. INJURY TO PROPERTY OF OTHERS.

11. Injury from Construction of Ditch. An owner of land lying below an irrigation

ditch cannot recover for damage to his land caused by seepage, without showing that the ditch was negligently constructed, since Colo. Rev. St. 1908, §§ 993, 3233, which require the owner of a ditch to keep it in good condition and carefully maintain its embankment so that waters therefrom shall not damage premises of others, do not make the owner absolutely liable. North Sterling Irr. Dist. v. Dickman (Colo.) 1916D-973. (Annotated.)

12. Colo. Const. art. 2, § 15, providing that private property shall not be taken or damaged for public or private use without just compensation, is limited to eminent domain proceedings, and does not make the owner of a ditch absolutely liable for damages resulting from its construction to land, no part of which was taken. North Sterling Irr. Dist. v. Dickman (Colo.) 1916D-973. (Annotated.)

Note.

Liability of owner of irrigation ditch for damages arising from its construction and maintenance, 1916D-981,

ISSUE OF STOCK.

See Corporations, 56, 73.

ISSUES.

See Pleadings, 88-102.

ITINERANT VENDERS.
See Hawkers and Peddlers.

JAILS.

See Prisoners.

#### JANITOR.

As within Workmen's Compensation Act, see Master and Servant, 258, 259.

JEOPARDY FOR THE SAME OFFENSE.
Meaning, see Former Jeopardy, 2.

#### JEWS.

Appeal to race prejudice, see Argument and Conduct of Counsel, 22.

### JITNEYS.

See Carriers of Passengers, 84-91.
Prevention of competition with street cars, see Injunctions, 3.
As nuisances, see Nuisances, 13.

#### JOINDER OF CAUSES.

See Actions and Proceedings, 9–12; Pleading, 7, 8.

JOINDER OF COUNTS. See Pleading, 8.

JOINDER OF OFFENSES.
See Indictments and Informations, 16.

JOINDER OF PARTIES.

See Parties to Actions, 3-10.

#### JOINT ADVENTURES.

Joint tortfeasors, judgment against one as bar, see Torts, 11.

One jointly indicted with defendant, as witness, see Witnesses, 4.

- 1. Liability for Materials Evidence Sufficient. Evidence, in an action on a subscription agreement of stockholders of a corporation, to recover on claims for materials furnished, or services performed at the request of their agent is held to sustain a finding that, under the agreement, the agents of all the subscribers operated the company's mill in attempting to repay the subscribers, and in so doing incurred liability for the materials, etc. Hannah v. Knuth (Wis.) 1917C-681.
- 2. In such case, it is not necessary to prove each of the assigned claims by the testimony of the person who did the work or furnished the material, although such testimony was competent; but the testimony of the agent who incurred such obligations was sufficient. Hannah v. Knuth (Wis.) 1917C-681.
- 3. In such case, the minutes of a meeting of subscribers are in the nature of admissions, and competent as affirmatively showing that a certain number of the subscribers were present at that meeting, hearing the minutes of the directors' meeting and choosing a committee to act as an advisory board to the 'board of directors. Hannah v. Knuth (Wis.) 1917(-681.
- 4. Formation of Joint Adventure—Evidence. In such case, the minutes of the directors' meeting, accepting such subscription agreement, are competent as part of the res gestae. Hannah v. Knuth (Wis.) 1917C-681.
- 5. Rights of Parties—Withdrawing from Enterprise. The stockholders of a mining company, who subscribed an agreement to raise a fund to buy the material, etc., necessary to operate its mill, and to pay its pressing bills by having them assigned to their representative, the balance to be used to operate the mine and mill, provided that the directors pledge them enough of the production to repay the subscription and guarantee that none of the money received from operation should be used except to run the mill, until they were repaid, and that the property purchased should remain their property, who understood they were to be represented by some one in purchasing materials, pay-

ing bills, and operating the mine, could not thereafter disable the other signers from proceeding with the enterprise by merely neglecting or refusing to take any part in meetings for the selection or authorization of such agents, but would be bound by the action of their associates in creating such agency. Hannah v. Knuth (Wis.) 19170-681.

- 6. Obligation in Favor of Husband and Wife—Survivorship. Where an obligation is in favor of a husband and wife such joint security or chose in action survives to the wife as against the personal representative of the husband, though the consideration therefor passed from the husband. Smith v. Haire (Tenn.) 1916D—529. (Annotated.)
- 7. Legal Meaning of "Any." Gen. St. 1887, § 1954, providing that "every such corporation" may increase or reduce its capital and the number and par value of its shares, provided that within thirty days after reduction a certificate signed by a majority of the directors shall be published, and provided that, in case of the reduction of the capital stock of "any corporation" by any mode which shall render it insolvent, the stockholders, assenting thereto, shall be liable for the debts of the corporation, included in chapter 120, entitled "Joint-Stock Corporations," and originally passed by Pub. Acts 1880, c. 97, dealing with joint-stock corporations, section 11 of which is the same as section 1954, applies only to joint-stock corporations, and the quoted words "any corporation" must be limited to joint-stock corporations. Barber v. Morgan (Conn.) 1916E-102.
- (Annotated.)
  8. Joint Stock Companies Definition. A joint-stock corporation is one organized under a general statute authorizing the creation of such corporations and providing the procedure for creating it, and is distinguished from a corporation created by special resolution or act of the legislature, which resolution or act is the charter of the corporation, when accepted, and the corporation organized thereunder, and the corporation is a chartered corporation, as distinguished from a joint-stock corporation. Barber v. Morgan (Conn.) 1916E-102.
- 9. Trustees of Joint-stock Company—Power to Sell Shares. Where the owners of land, in order to promote the sale thereof as a town site, convey the land to trustees under a trust agreement providing that the same shall be divided into 1,000 shares, to be sold for the benefit of the owners and their associates, the holders of the certificates to become a joint-stock company to further control the enterprise, the shares do not belong to the company; and hence the fact that the trustees thereafter conveyed the land to

the stock company's directors does not deprive them of authority to continue to sell unsold shares and issue trust certificates to represent the same. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

10. Joint-stock Companies—Issuance of Certificate. Issuance of a certificate is not essential to constitute membership in a joint-stock company. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

## JOINT DEPOSITS.

See Banks and Banking, 29-37, 43, 44, 56.

JOINT REMAINDERMEN. See Remainders and Reversions, 20.

JOINT-STOCK CORPORATION.
Defined, see Joint Adventures, 8.

#### JOINT TENANTS.

See Tenants in Common, 1-4.
In bank deposit, see Banks and Banking, 29-37.

- 1. The common law doctrine of survivorship as between joint tenants is repudiated in Connecticut. Allen v. Almy (Conn.) 1917B-112. (Annotated.)
- 2. Survivorship—Rights of Creditors of Deceased. On the death of the first of joint tenants, her creditors have no rights in the property as against the survivors, who take not from her, but directly from the grantor in the deed creating the tenancy. Wood v. Logue (Iowa) 1917B—116.
- 3. Estates—Creation—Joint Tenancy or Tenancy in Common. An estate of joint tenancy may be created by apt words, Iowa Code, § 2923, merely providing that a conveyance to several persons creates a tenancy in common, "unless a contrary intent is expressed." Wood v. Logue (Iowa) 1917B—116. (Annotated.)
- 4. Survivorship Nature of Devolution of Title. Upon the death of one joint tenant, the other takes the whole estate, not by descent as the heir at law of the other, nor under the laws regulating intestate succession, but as the sole surviving tenant. Attorney General v. Clark (Mass.) 1917B-119.
- 5. Creation of Joint Tenancy. Where two sisters receive property by conveyance as joint tenants, and also make deposits in a savings bank for their joint use and benefit, and purchase certain securities which are issued to them as joint tenants, their estate includes the right of survivorship, and the estate in all the properties is a joint tenancy. Attorney General v. Clark (Mass.) 1917B-119. (Annotated.)

- 6. Termination. A joint tenant may always terminate the joint tenancy by transfer or conveyance of his interest. Attorney General v. Clark (Mass.) 1917B-119.
- 7. Joint Tenancy in Personalty. A joint tenancy is not confined to real estate, but may also exist in personal property. Attorney General v. Clark (Mass.) 19178-119.
- 8. Fraud—Creation of Joint Tenancy. Where a joint tenancy is created by contract, it is prima facie for valuable consideration, and in the absence of fraud or showing of bad faith such an agreement is valid. Attorney General v. Clark (Mass.) 1917B—119.
- 9. Evidence held to show that the creation of a joint tenancy in two sisters was in good faith and without fraud. Attorney General v. Clark (Mass.) 1917B-119.
- 10. Right to Create. Section 2966 of the Kan. Gen. St. of 1909, abolishing joint tenancies and survivorship, does not make it unlawful for a grantor to convey an estate to two grantees or the survivor of the two; and the survivor may lawfully take the entire fee under such a conveyance. Withers v. Barnes (Kan.) 1917B-55. (Annotated.)

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#### 1. APPOINTMENT AND ELECTION.

1. Municipal Court — Manner of Electing Judge—Validity of Statute Establishing Branch of Court. It was the intention of Laws Minn. 1913, c. 102, that the preferential system of voting for which provision was made in the Duluth home rule charter of 1912 should apply to the election of the municipal judges of the

- city; and said act, though not passed by a two-thirds vote, legally provided an assistant judge, and a branch or division of the court, and fixed the terms of office and times of election of the judges and otherwise regulated the court and proceedings therein. Brown v. Smallwood (Minn.) 1917C-474.
- 2. Special Judge Selection by Agreement. An agreement made pursuant to section 11, chapter 112, serial section 4558, W. Va. Code 1913, selecting a special judge to try a cause, purporting to be signed by counsel for all the parties, is not void because not signed by a guardian ad litem for infant defendants. Mankin v. Dickinson (W. Va.) 1917D-120.

#### 2. COMPENSATION.

- 3. Power to Increase or Diminish. Under Wis. Const. art. 4, § 26, declaring that the compensation of a public officer shall not be increased or diminished during his term, a circuit judge is a "public officer." State v. Nygaard (Wis.) 1917A-1065.
- 4. Increase of Compensation Allowance for Expenses. S. Dak. Laws 1911. c. 239, provides that when a judge of the supreme court, not legally resident at the state capital shall have changed his actual residence thereto, there shall be paid to such judge, for his increased expenses of living, the fixed sum of \$50 a month, payable on the certified vouchers of such judge. Const. art. 21, § 2, fixing the salaries of supreme court judges, provides that they shall receive no fees or perquisites whatever for the performance of any duties connected with their office, and that the legislature may not increase their salaries, except as provided in the constitution itself. Article 5, § 30, provides that the judges of the supreme court shall receive such salary as may be provided by law consistent with the constitution, and no such judge shall receive any compensa-tion, perquisite, or emolument for or on account of his office, in any form what-ever, except such salary. The state auditor refused to pay to the presiding judge of the supreme court an amount due him under the statute, and such judge sought mandamus in the supreme court to compel the issuance of a warrant covering the amount. It is held that the allowance of expenses incident to the performance of his duty by a judicial or other officer was not violative of constitutional prohibitions against the allowance of perquisites to public officers, for the only object of an allowance of expenses is to preserve the officer's salary to him free of encroachments thereon, through expenses imposed by his official position; such payments covering expenses not being "compensation," "perquisites," or "emoluments," within the constitutional inhibition; a "perquisite" being a gain or

profit incidentally made from employment in addition to regular salary or wages, something gained by a place or office beyond the legal salary or fee, while the word "emolument" includes "perquisite," "salary," "compensation," "pay," "wages," and "fees," which do not include an allowance for expenses, incident to the discharge of the duties of a public office—such an allowance not being an "increase of salary," a "perquisite," or an "emolument of office." McCoy v. Handlin (S. Dak.) 1917A-1046.

- 5. Construction of Statute. Mo. Rev. St. 1909, § 10695, prescribing the fees of judges of probate courts, but declaring that, after deducting reasonable and necessary expenses for clerk hire, the amount of fees collected, exceeding the compensation for a judge of the circuit court, must be paid into the county treasury, must be strictly construed against a probate judge, and a probate judge, who performs clerical work himself, is not entitled to compensation therefor in excess of that prescribed in determining the amount he must pay into the county treasury. Greene County v. Lydy (Mo.) 1917C-274.
- 6. Mo. Rev. St. 1909, § 10695, fixing the fees of probate courts and requiring the payment of a part thereof into the county treasury for the benefit of the school fund, is a general law, applicable to every probate judge, where the statutory conditions arise. Greene County v. Lydy (Mo.) 1917C-274.
- 7. Compensation of Probate Judge. A probate judge elected before the enactment of Laws Mo. 1911, p. 304, fixing compensation for circuit judges acting as members of the jury commission created thereby, is not entitled to have the compensation considered in determining the amount of fees he may retain under Rev. St. § 10695, based on the increase the circuit judges will receive, and thereby increase his salary during his term, in violation of Const. art. 14, § 8. Greene County v. Lydy (Mo.) 1917C-274.
- 8. Judges of probate courts are not "county officers," within Mo. Const. art. 9, § 12, authorizing the legislature, by a law uniform in its operation, to provide for and regulate the fees of county officers. Greene County v. Lydy (Mo.) 1917C-274.

### 3. DISQUALIFICATION.

#### a. In General.

9. Disqualification of Judge — Prior Suspension of Officer. In a proceeding to oust public officers under Tenn. Pub. Acts 1915, c. 11, the fact that the judge before whom proceeding was begun suspended defendants from office does not preclude

him from sitting in the trial on the merits; the practice being as where a chancellor in an injunction suit issues an interlocutory order. State v. Howse (Tenn.) 1917C-1125.

- 10. Disqualification of Judge to Review His Own Acts. In the absence of a statute to the contrary, a judge is not disqualified to review his own judicial acts.

  McConnell v. Goodwin (Ala.) 1917A-839.

  (Annotated.)
- 11. Probate Judge Condemnation Proceeding. Ala. Code 1907, § 5423, excepting a probate judge from disqualification as to any instrument which by law is required to be prepared by him, has no bearing on his disqualification in a county condemnation proceeding, where it does not appear that there are any such instruments to be heard or determined by him. McConnell v. Goodwin (Ala.) 1917A-839.
- 12. Necessity of Action by Interested S. Dak. Laws 1911, c. 239, provides that whenever a judge of the supreme court, not legally resident at the state capital, shall have changed his actual residence to the capital, there shall be paid to such judge, in consideration of his increased expenses the fixed sum of \$50 a month, payable on the certified vouchers of the judge. The state auditor refused to issue warrants to the members of the supreme court for the amounts due under the statute, and plaintiff, the presiding judge of such court, sought mandamus in such court to compel issuance to him. It is held that the court was not disqualified because of financial interest, since where a disqualification for interest, if permitted to prevail, leaves no tribunal at which relief may be sought, thus depriving a litigant of his constitutional right to sue, the disqualified judge or judges may decide the cause; in the instant case, the supreme court being the only tribunal open to the plaintiff, for, although the circuit court had jurisdiction, an appeal would lie to the supreme court, and before an appeal of the circuit court could have been determined by the supreme court, the current appropriation to meet the payment sought to be enforced would have lapsed, thus rendering ineffective the writ, while, in determining the constitutionality of the law, the circuit court judge would have been interested because his decision would have established a precedent upon his right to traveling expenses, etc., under Laws 1907, c. 49. McCoy v. Handlin (S. Dak.) 1917A-1046. (Annotated.) Notes.

Necessity as justifying action by disqualified judge or officer exercising judicial power. 1917A-1061.

Disqualification of judge to review his own acts. 1917A-840.

## b. Pecuniary Interest.

erest in Legal Question In-Wis. St. 1913, § 2579, provides 13. Interest that a judge of any court of record inferested in any proceeding therein shall have no power to hear or determine it, except with the consent of the parties thereto, and Const. art. 1, § 9, declares every person entitled to a certain remedy in law for injury in his person or property, and that he ought to obtain justice freely, without denial or delay, con-formably to the laws. Relator brought certiorari to set aside an income tax assessed on his salary as circuit judge, and appealed from a judgment of the superior court that it was taxable. Held, that the "interest" which disqualifies must be a pecuniary one, and that, though the judges of the supreme court were interested in the decision of the question raised, it was their duty to hear and decide the case, that there be no denial of justice. State v. Nygaard (Wis.) 1917A-1065. (Annotated.)

Note.

Disqualification of judge by interest in legal question involved in litigation. 1917A-1069.

#### c. Relationship to Parties.

14. Participation of Judge's Partner as Counsel. A judge of a criminal court of record is not disqualified from trying a criminal case within the jurisdiction of his court by the fact that the law firm of which he is a partner are the legal advisors of the board of county commissioners who have charge and supervision of the public roads of the county, and such convict is sentenced to fine and imprisonment in the county jail at hard labor, and is placed by said county commissioners at work under guards upon the public roads of the county. Neither is he so disqualified by the fact that his law partner is the state's attorney for the judicial circuit in which his county is located; such state's attorney having nothing to do with prosecutions before such criminal court of record that has a prosecuting officer of its own who attends to all prosecutions on behalf of the state in such criminal court of record. Coleman v. Fisher (Fla.) 1917A-1229.

(Annotated.) 15. Participation in Proceeding as Public Officer. Under Ala. Code 1907, § 3860, giving the probate court jurisdiction in proceedings by the county to condemn land for public uses, in spite of the fact that the probate judge is by law an ex officio member of the court of county commissioners, by whose authority alone such proceedings can be initiated under the general statutes, and in view of Loc. Acts 1911, p. 240, vesting jurisdiction of public roads in a county in a road commission, of which the probate judge is

ex officio a member and its clerk, a probate judge is not disqualified, in a proceeding in his court by the road supervisor in the name of the county to establish a public road, because as a member he advises and consents to the proceeding, since it would be unreasonable to suppose the existence of disqualifying prejudice therefrom, and since the result does not even remotely or contingently affect his personal or pecuniary interest. Mc-Connell v. Goodwin (Ala.) 1917A-839.

16. Relationship to Persons Remotely Interested. In a proceeding filed in the probate court by a road supervisor in the name of a county for the establishment of a public road, the fact that near relatives of the probate judge are promoting its establishment by contributions does not render him incompetent to conduct the proceeding, since they are not parties to the record, or parties in interest in any legal sense, having only a general and remote interest, such as pertains to the general public. McConnell v. Goodwin (Ala.) 1917A-839.

## Note.

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#### 1. ORDER DISTINGUISHED.

1. In What Proceedings Entered-Special Proceeding. A special proceeding terminates in an order, instead of a judgment. Matter of City of New York (Court House) (N. Y.) 1917D-157.

"Order of Court"—What Constitutes. Where an instrument consisting, first, of a petition of a guardian to the judge for an order to lease the ward's property, and second, the lease upon which is indorsed "Approved 3/3/07. Thomas C. Humphry, Judge"-the same does not constitute an "order of court," as required by the stat-ute. Fisher v. McKeemie (Okla.) 1917C-1039. (Annotated.)

#### Note.

What constitutes "order of Court." 1917C-1041.

#### 2. REQUISITES AND VALIDITY IN GENERAL.

- 3. Signature-Effect of Omission. Where the record entry contains all the essential elements of a judgment, it is not necessary to the validity of the judgment that it should be signed by the judge; the re-quirement as to signing the judgment being merely directory. Brown v. Harding (N. Car.) 1917C-548.
- 4. Decree on Insufficient Service. Where jurisdiction of a defendant has not been acquired, a decree rendered against him in the cause is not binding upon him. Myakka Co. v. Edwards (Fla.) 1917B-201.
- 5. Want of Jurisdiction—Effect. cree entered by a court which has no jurisdiction of the subject-matter is void ab initio and may be disregarded by the parties. People v. Clark (Ill.) 1916D-785.
- 6. Personal Judgment Against Nonresident. Despite the ordinary rule that no judgment in personam can be recovered against a nonresident, except upon appearance, unless personally served within the jurisdiction, a valid judgment may be obtained where the property of a nonresident is attached, in which case the court may, for the purpose of adjudicating the rights to the property, consider claims against the nonresident, Johnson v. Whilden (N. Car.) 1916C-783.
- 7. Sufficiency of Record— Jurisdiction Jurisdiction by the record, Showing must be affirmatively shown by the record, where the parties defendant are shown to be nonresidents and constructive service is depended on for jurisdiction. Myakka Co. v. Edwards (Fla.) 1917B-201.

- 8. Right to Render Personal Judgment—Constructive Service. A personal decree against nonresident defendants, not served otherwise than by publication, and not appearing to the proceeding, is erroneous. Grant v. Swank (W. Va.) 1917C-286.
- 9. Form—Against Several Defendants. In such case, where the court finds for plaintiff, it properly orders judgment against the joint property of all the defendants and the separate property of each, except as to one not served with process, and who did not appear in the action. Hannah v. Knuth (Wis.) 1917C-681.
- 10. Against Defendant not Served—Who may Object. The judgment in a negligence case is not invalidated, as against the only defendant who was summoned or appeared and defended, because also in form against others. Rosenberg v. Dahl (Ky.) 1916E—1110.
- 11. Approval of Lease—What Constitutes. Where a lease has indorsed thereon: "Antlers, I. T. Mar. 3, 1907. I have carefully examined the within lease and respectfully recommend the approval of the same. F. D. Capping, Probate Master" and "Approved 3/3/07. Thomas C. Humphry, Judge"—the same is not sufficient to show an appointment of a master, his report thereon, and confirmance thereof by the court, and the same does not amount to an order of the court approving or authorizing the lease. Fisher v. McKeemie (Okla.) 1917C-1039.

## 3. RENDITION AND ENTRY.

- a. Effect of Rendition and Entry.
- 12. For the purpose of its enforcement, a judgment is evidence of its own existence immediately on rendition and entry as provided by law. Sweetser v. Fox (Utah) 1916C-620. (Annotated.)
- 13. When Enforceable. A judgment may be enforced either by execution or action, immediately after rendition, unless execution be stayed. Sweetser v. Fox (Utah) 1916C-620.

#### b. Record Entry.

14. Iowa Code, § 3784, declares that all judgments must be entered on the record of the court, and section 288, par. 1, provides for the entry of the proceedings of the court in a book known as a record book. Paragraph 2 provides for a judgment docket containing abstracts of the judgment; while paragraph 6 provides for an appearance docket, and authorizes the keeping of a combination docket, which shall include the entries to be made in the judgment docket and fee docket. Held, that this did not include the record book required by paragraph 1, and hence copies of the entries in the combination docket will not establish the rendition of a judg-

ment, but the judgment, to be valid, must be entered in the record book, which is the record of the court. Rudolph Hardware Co. v. Price (Iowa) 1916D-850.

#### 4. CONSTRUCTION.

- 15. When Full Faith and Credit Attaches. The full faith and credit clause of the federal constitution applies as soon as a judgment is enforceable and not merely after the time to appeal has elapsed. Sweetser v. Fox (Utah) 1916C-620.
- 16. Ownership—Presumption. The presumption is that the plaintiff in a judgment is the owner of it, and the burden of proof is on the one who alleges the contrary. Brown v. Harding (N. Car.) 19176-548.

#### 5. CONFORMITY TO PLEADINGS.

17. Sufficiency. A judgment based on a plea of guilty "as charged," the information charging only voting twice at an election, though merely directing confinement for "illegal voting," is sufficient. In re Siegel (Mo.) 1917C-684.

#### 6. JUDGMENT NON OBSTANTE VER-EDICTO.

- 18. Motion After Entry of Judgment. A motion for judgment notwithstanding verdict, invoking no discretion and being interposed after entry of judgment, must be denied. Hillis v. Kessinger (Wash.) 1917D-757.
- 19. When Authorized. The laws of this state authorize a judgment notwith-standing the verdict only in cases where it is clear upon the whole record that the moving party is, as a matter of law, entitled to judgment on the merits. First State Bank v. Kelly (N. Dak.) 1917D-1044.
- 20. Such judgment is not warranted on the ground merely that the evidence was variant from and inadmissible under the allegations of the defendant's answer, but it must further appear that no amendment of the answer can properly be made making such testimony competent. First State Bank v. Kelly (N. Dak.) 1917D-1044.

#### 7. JUDGMENT ON PLEADINGS.

21. Motion for Judgment—Description of Instrument Sued On. In a notice of motion for judgment the description of the instrument sued on as a "promissory note" is good as far as it goes, and its incompleteness in no way prejudices the defendant. Colley v. Summers Parrott Hardware Co. (Va.) 1917D-375.

## 8. JUDGMENT ON EVIDENCE.

22. Taking Case from Jury. Judgment on the evidence should not be rendered by

a trial court when a jury is a matter of right and there is evidence sufficient to submit to the jury. O'Neal v. Bainbridge (Kan.) 1917B-293.

## 9. LIEN.

## a. After-acquired Property.

23. Judgments became liens on the after-acquired realty of the judgment debtor received by inheritance from his father at the time of its acquisition by the debtor. Hulbert v. Hulbert (N. Y.) 1917D-180.

## b. Effect of Assignment.

24. Effect of Assignment to Judgment Debtor. If a judgment is assigned to the judgment debtor's wife and by her will given to the judgment debtor, it is extinguished, as the two antagonistic rights off creditor and debtor merge in one and the same person. Brown v. Harding (N. Car.) 1917C-548. (Annotated.)

#### Note.

Effect on judgment lien of assignment of judgment or execution issued thereon to or for benefit of judgment debtor. 1917C-557.

#### e. Action to Enforce.

25. Prerequisites to Sale Under Judgment—Establishment of Priorities. Plaintiff recovered two judgments against P, who subsequently conveyed part of a tract of land owned by him to B and later conveyed the rest to his son. The land was subject to a superior judgment, and the then owner of the superior judgment quitclaimed to B the land conveyed to her by P. In a suit by plaintiff to enforce the lien of his judgments against the land conveyed to B, there were conflicting contentions that the superior judgment had never been paid but was still a charge on the lands of P, that it had been assigned to P's wife and by her will given to P, and that it had been assigned to P's son. It is held that these questions as to the status of the superior judgment must be determined before a sale of any of the land in order that the land could be sold and the proceeds distributed, and also in order to remove the cloud from the title and obtain a sound price for the land, and, as plaintiff had an interest in the settlement of such matters, he would not be de-layed or embarrassed by requiring that the land last sold by P should be first sold for the satisfaction of plaintiff's judgments before resorting to the land sold to B. Brown v. Harding (N. Car.) 1917C-

26. Right of Nominal Party to Enforce Judgment. In an action to enforce the lien of judgments against land formerly owned by the judgment debtor, it is no

concern of the defendants that the person in whose name the judgments were taken is not the beneficial owner of the judgments, as defendants will be protected by payment to the plaintiff of record. Brown v. Harding (N. Car.) 1917C-548.

## d. Abatement and Revival.

27. Duration. The lien of a judgment, the debt secured by which is due and payable at its date, though against the personal representative of a decedent, not being extended by scire facias or otherwise within the 10 years limited, by Rev. Code 1852, amended to 1893, p. 814 (19 Del. Laws, c. 778), for its existence, expires at the end of such time, and not being thereafter revived, no longer exists. Cohen v. Tuff (Del.) 1917C-596.

28. A bona fide purchaser from a devisee of a judgment defendant being, by provision of 19 Del. Laws, c. 778, § 4, not "in any manner affected" by the lien of the judgment, after being lost, being revived by seire facias, so that the land cannot be reached by proceedings directly on the judgment, it for the same reason cannot be reached by an order of the orphans' court to sell lands to pay the judgment of the deceased judgment defendant. Cohen v. Tuff (Del.) 1917C-596.

29. Rights of Interim Purchaser. 19 Del. Laws, c. 778, § 4, providing that when the lien of a judgment is lost or interrupted, and it is thereafter revived by scire facias it shall not "affect any prior bona fide purchaser from such (in the original judgment) defendant or terretenant," means a purchaser from such defendant "or from" a terre-tenant, and so protects a purchaser from the devisee of the original defendant. Cohen v. Tuff (Del.) 1917C-596.

## VACATING AND SETTING ASIDE.

- 30. Vacation for Fraud—Evidence. A judgment will not be stricken on the ground that it was obtained through fraud, in the absence of proof of plaintiff's fraud and deceit. Malone v. Topfer (Md.) 1916E-1272.
- 31. A judgment will not be stricken without reasonable proof of circumstances which make it inequitable. Malone v. Topfer (Md.) 1916E-1272.
- 32. Existence of Defense—Failure to Present. A judgment will not be vacated on the theory that defendant had a meritorious defense, where he did not claim to have been surprised and at trial made no effort to present it. Malone v. Topfer (Md.) 1916E-1272.
- 33. Vacation After Term. A decree cannot be vacated on motion after the expiration of the term, except for clerical error or matter of form. People v. Clark (Ill.) 1916D-785.

- 34. Motion to Vacate—Made but not Granted During Term. A motion to set aside a final judgment, entertained, argued and docketed at the same term of the court, and submitted to and taken under consideration by the court, but without final action thereon at that term, will stand continued until the next term, without other order of continuance by virtue of section 12, chapter 114, W. Va. Code 1906. Cole v. State (W. Va.) 1916D-1256. (Annotated.)
- 35. If a motion to set aside a final judgment be made, entertained, docketed and taken under consideration by the court at the same term at which it is pronounced, and be so continued by operation of law, jurisdiction is thereby reserved to set the same aside at a subsequent term. Cole v. State (W. Va.) 1916D-1256.

(Annotated.)

36. Judgment Affecting Infant. In the absence of fraud or collusion, minors properly represented in an action are bound as fully as persons of full age by a judgment rendered therein. The only grounds for vacating such a judgment are the grounds which are sufficient to vacate a judgment affecting an adult. Burke v. Northern Pacific R. Co. (Wash.) 1917B-919.

' (Annotated.)

- 37. Proof of Fraud. Fraud which will justify the vacating of a judgment or decree must be actual and positive, not merely constructive, and the proof of fraud must be clear and satisfactory. Burke v. Northern Pacific R. Co. (Wash.) 1917B-919.
- 38. Constructive Fraud. Where a consent judgment was entered in favor of infants in an action in which they were represented by a guardian ad litem, who appeared and was examined by the court as to the benefit of the compromise to the infants, the failure of the guardian to call other witnesses to testify as to the circumstances of their father's death, which were fully known to the guardian ad litem, is not constructive fraud which authorizes the setting aside of the judgment. Burke v. Northern Pacific R. Co. (Wash.) 1917B-919
- 39. Ground for Vacation of Judgment—Action in Wrong County. It is not ground for setting aside judgments on motion that the actions in which they were rendered were brought in the wrong county, as an objection to the venue should be made before judgment, and is waived by pleading to the merits. Brown v. Harding (N. Car.) 1917C-548.
- 40. Venue of Motion. A motion to set aside judgments for irregularities should be made in the superior court of the county where they were rendered, and not in an action in another county to enforce the lien of the judgment against land in such

- county. Brown v. Harding (N. Car.) 1917C-548.
- 41. Vacation for Irregularity—Time for Application. A motion to set aside for irregularities judgments rendered in 1870 comes too late when made in an action commenced in 1913 to enforce the lien of such judgments against the former homestead of the judgment debtor. Brown v. Harding (N. Car.) 1917C-548.
- 42. Grounds for Opening—Mistake of Attorney. On an appeal from an order relieving defendant from a default judgment suffered by reason of an excusable mistake of fact on the part of his attorney and permitting a defense to be interposed, held, under the record of facts, that the trial court in granting such relief did not abuse the discretion vested in it in such cases. Murtha v. Big Bend Land Co. (N. Dak.) 1917A-706. (Annotated.)

#### Notes.

Advice of counsel as ground for opening default judgment. 1917A-709.

Vacation of judgment affecting infant duly represented. 1917B-922.

Power of court to amend or set aside judgment at subsequent term where proceeding therefor is commenced during term at which judgment is rendered. 1916D-1260.

# 11. CONSENT JUDGMENTS.

- 43. Jurisdiction of Subject-matter. Where there is want of jurisdiction of the subject-matter, a judgment is void, and consent of the parties cannot impart validity to it. State v. Dunlap (Idaho) 1918A-546.
- 44. Decree on Invalid Consent of Attorney. Where, in a proceeding to which infants were parties, the court, after reference to a master, rendered a decree, it will be upheld, and is binding on the infants, though there was a stipulation that such decree might be entered by consent at chambers, for the decree was based on the action of the court, and not the consent, which was not binding on the infants, being signed by their attorney, who was representing interests antagonistic to them. Glover v. Bradley (Fed.) 1917A-921.
- 45. Presumption. In the absence of a showing to the contrary, it will be presumed that a judge who entered a consent judgment on the compromise of an infant's claim made the inquiry as to its benefit to the infant which his duty required. Burke v. Northern Pacific R. Co. (Wash.) 1917B-919.

# 12. DEFAULT JUDGMENTS.

## a. Time of Entry.

46. Default After Attempt to Remove. It is held, under the facts of this case, that:

the default was not prematurely entered. State v. American Surety Co. (Idaho) 1916E-209.

47. After Remand from Federal Court. Where a defendant has been sued in a state court, and summons has been served upon him, and, prior to the expiration of the term within which he is required to answer under the statute and without appearing or answering, he files a petition for a removal to the federal court, and an order denying the removal is made by the state court, and the record is thereafter transferred by the defendant to the federal court, when, on motion in the latter court, the cause is remanded to the state court for want of jurisdiction in the federal court, and the clerk of the district court enters the default of the defendant for failure to appear and answer, it is held, that the action of the clerk in entering the default of the defendant is regular and valid and within the authority and direction of sections 4140 and 4360 Idaho Rev. Codes, and that such default is not void for want of jurisdiction. State v. American Surety Co. (Idaho) 1916E-209.

## b. Necessity for Hearing.

48. Where the default has been entered by the clerk against the defendant, as was done in this case, the court has jurisdiction to hear the proofs submitted by the plaintiff and to enter judgment thereon. State v. American Surety Co. (Idaho) 1916E-209,

## c. Opening Default.

## (1) In General.

49. Under the above facts, where the defendant moves to have the default vacated on the ground of inadvertence, surprise, or excusable neglect, it is held, that under the excuse presented and the facts of this case, as shown by the record, the trial court did not err in refusing to set aside said default. State v. American Surety Co. (Idaho) 1916E-209.

#### (2) Grounds.

50. Section 4140, Idaho Rev. Codes, fixes the time within which a defendant shall appear and answer, and the fact that, prior to the expiration of that time, the defendant undertook to have the cause removed to the federal court, and it was thereafter remanded, such action on the part of the defendant to change the forum will not serve to extend the time for answer in the state court, and will not relieve the defendant from a default which it thus allows to be entered against it. State v. American Surety Co. (Idaho) 1916E-209.

# 13. AMENDMENT AND CORRECTION.

51. Amendment Nunc Pro Tunc. If such final judgment be in fact pronounced and

directed at one term of the court, but by inadvertence or misprision of the clerk it is omitted, the court at a subsequent term on sufficient evidence may correct or supply the record thereof by a nunc pro tunc order, and if the fact of such judgment be not impeached by some bill of exception or other part of the record, such nunc pro tunc order will be accepted as conclusive evidence of the facts recited therein. Cole v. State (W. Va.) 1916D-1256.

52. Premature Entry by Clerk. Where the court took the case under advisement and intimated that it would decide for defendant, and the clerk then without proper authority made a judgment entry for defendant on the minutes, the court is not thereby precluded from changing its mind and ordering a judgment entry for plaintiff, and the judgment so entered is valid where the court then on motion and hearing ordered the incorrect entry expunged. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655.

#### 14. SATISFACTION.

- 53. Marshaling of Assets—Inverse Order of Alienation—Effect of Prejudice to Creditor. Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and the rule extends to a purchaser of the remaining land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. Brown v. Harding (N. Car.) 1917C-548.
- 54. Redemption—To Whom Title Passes. But if a redemption is made by a judgment creditor whose right to make it, though good on the face of the record, has, in fact, been destroyed by the tender of the payment of the judgment, the title of the purchaser at the sale nevertheless passes to him, if the holder thereof accepts the redemption money with full knowledge of the tender. Orr v. Sutton (Minn.) 1916C—527.
- 55. A tender by the judgment debtor of the full amount due on a judgment, under which the judgment creditor has filed an intention to redeem land, before the arrival of the time when the judgment could be used for such purpose, and under circumstances clearly disclosing that both parties appreciated the purpose of such tender, destroys the right of the judgment creditor to thereafter use the judgment as a basis for redeeming such land. Orr v. Sutton (Minn.) 19160-527.

(Annotated.)

56. To destroy a judgment creditor's right to use the judgment as a means for obtaining certain land through redemption, it is not indispensable that

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the judgment creditor, in addition to tender of payment, bring suit to compel satisfaction of the judgment and deposit the money tendered in court. Or v. Sutton (Minn.) 1916C-527. (Annotated.)

57. Tender of Payment of Judgment. No one in the line of redemptioners, nor an intermeddler, may by tender of payment of a judgment impair or destroy a judgment creditor's right to use the judgment to effect redemption. Orr v. Sutton (Minn.) 1916C-527. (Annotated.)

#### Note.

Effect of tender of amount due on judgment. 1916C-536.

## 15. RES JUDICATA.

## a. Issues not Litigated.

- 58. Matters Which Might Have Been Litigated. While a judgment is final and conclusive upon the parties not only as to the issues actually determined, but every other question which might or ought to have been litigated, a judgment awarding plaintiff damages for a libel printed in defendant's evening paper was not a bar to a subsequent action for the printing of the same libel in defendant's morning paper; the causes of action being wholly separate, and plaintiff not being bound to unite them in one suit. Cook v. Conners (N. Y.) 1917A-248.
- 59. Issues not Identical. A judgment that a sum received by a firm of attorneys for services rendered in procuring a settlement of the estate of a testator must be refunded because of the invalidity of the settlement is not res judicata as to the rights of the partners as between themselves and as to the right of a partner refunding the entire amount to contribution from his copartners. Estate of Ryan (Wis.) 1916D-840.
- 60. Matters not in Issue. A claim suit between a chattel mortgagee and a third party resulting in favor of the third party, and instituted after the levy of an attachment by the chattel mortgagee on the mortgaged property as the property of the mortgagor is not res judicata in a detinue suit by the mortgagee against the mortgagor as to the same property. Ex parte Logan (Ala.) 1916C-405.
- 61. Issues Concluded—Judgment in Rem. The judgment in an action in rem does not establish, even prima facie, a fact not involved in the issues or determined by the judgment. Werner v. Fraternal Bankers' Reserve Soc. (Iowa) 1918A—1005.
- b. Dissolution of Provisional Injunction.
- 62. Under the rule that a superior court may not revoke, modify, or otherwise disturb its judgments and orders, regularly made in pursuance of plain statutory provisions, where the statute prescribed the

method by which such judgments and orders may be reviewed, except as authorized by statute, a suspension of the operation of a temporary injunction absolutely restraining the commission of certain acts pendente lite constitutes a prohibited reversal of an order. United Railroads v. Superior Court (Cal.) 1916E-199.

(Annotated.)

# c. Judgment or Decree on Issue Voluntarily Submitted.

63. Where, in a suit for partition, the widow of one of the heirs was complainant and her adopted daughter a defendant, and in that suit the widow voluntarily submitted her rights, as against such daughter, to adjudication, and the court having jurisdiction of the parties and subject-matter erroneously determined that the adopted daughter was entitled to inherit a part of the land from her father, such decree, not having been appealed from, and the time to appeal having expired, is conclusive and res judicata of that issue. Fisher v. Browning (Miss.) 1917C-466.

## d. Decision Without Judgment.

- 64. Finding of Facts—Effect of Future Developments. An opinion of the recorder's court, in a prosecution for a ferry company's violation of the smoke ordinance, that there is then no known appliance which can be used upon marine boilers to prevent the emission of dense smoke, is not res judicata as to whether subsequently known appliances to prevent such smoke are practical. People v. Detroit, etc. Ferry Co. (Mich.) 1918B-170.
- 65. Finding in Action to Cancel Conclusive in Action on Instrument. In an action on checks, findings, in a suit to cancel the checks and enjoin the holders from transferring same or suing thereon, that the contract pursuant to which the checks were given had been performed are conclusive, though the supreme court, in sustaining the action of the circuit court in dismissing the suit in equity upon the merits, inadvertently added that no reason appeared why any party to such suit had not an adequate remedy at law; and, it is not error to exclude evidence of facts inconsistent with such findings, or to refuse to relieve defendant from the effect of a stipulation of facts filed in the suit in equity. Lamro Townsite Co. v. Bank of Dallas (S. Dak.) 1917C-346.

## e. Persons Concluded.

- 66. Wife of Judgment Debtor. A wife is not bound by judgment in an action against her husband to which she was not a party. Dale v. Marvin (Ore.) 1917C-557.
- 67. Failure to Appeal. Where plaintiff, who held land as trustee, did not appeal

from the judgment in a suit to remove a cloud from his title, he is concluded by the verdict which found that defendant was the owner of the equitable interest of plaintiff's cestui que trust. Johnson v. Whilden (N. Car.) 19160-783.

68. Effect of Judgment on Grantor of Party. Intervener in this action, claiming certain rights and interests in the land in controversy, conveyed the same to a third person to enable such third person to perfect the title; such third person thereupon brought an action to quiet title to the land, making defendants Stubler, under whom intervener now claims, parties defendant; judgment was rendered to the effect that defendants were the owners of the land free and clear of all claims on the part of plaintiff in the action, who was prosecuting the same in the interests of intervener. It is held that the judgment forever barred and extinguished all rights intervener may have had in or to the land, including the right to terminate the Stubler title by redemption as their mortgagor. Telford v. McGillis (Minn.) 1916E-157.

(Annotated.)

- 69. Conclusiveness of Judgment Settling Title—Persons Concluded. A judgment in an action to determine the title to real property is conclusive of the rights of all parties to the action and those in privity with them, and includes all rights or interests in the property which were or could have been litigated therein. Telford v. McGillis (Minn.) 1916E-157.
- 70. Conclusiveness as to Persons not Parties. A former adjudication, to be available as a plea in bar, must have been a determination of the same issue between the same parties or their privies, though it is not always necessary, for the person sought to be bound should have been a party to the record in the former suit, but it is enough if he had a right to control the litigation and appeal from the judgment. Fish v. Vanderlip (N. Y.) 1916E-150.
- 71. Third Person Assisting Defense. Where a party of underwriters insured a vessel by a contract making the liability of each party several, and not joint, a judgment against the insured in his action against one of the insurers, in which the defendant and other insurers openly participated in the defense and contributed to the expense thereof, is not a bar to a subsequent action against the defendant, as he was not a party to, and could not properly have been made a party in, the former action. Fish v. Vanderlip (N. Y.) 1916E-150.

  (Annotated.)

# Notes.

Estoppel by judgment as applicable to person assisting prosecution or defense of action. 1916,E-154.

Judgment settling title to land as conclusive between successful claimant and grantor of defeated claimant. 1916E-161.

# f. Criminal Judgment as Bar to Civil

72. Conviction on Plea of Guilty—Effect in Civil Action. Where defendant railroad ejected plaintiff passenger from its train, arresting and imprisoning him in the city jail for being drunk and drinking on its car, plaintiff's plea of guilty to a charge of being drunk and disorderly in the city has no conclusive effect in his subsequent civil action for his arrest and ejection by the road. Spain v. Oregon-Washington R. etc. Co. (Ore.) 1917E—1104. (Annotated.)

#### g. Matters Concluded.

- 73. Action by Insurer on Rights by Subrogation. Where the subrogee proceeds in the first instance against the insured and in that proceeding it appears that the damages for which a tortfeasor is liable to an insured exceeds the sum for which the insured settled with him, and that a sufficient sum remains unpaid to satisfy the subrogee, such a conclusion is final between the parties to the record. Fire Assoc. v. Wells (N. Y.) 1917A-1296.
- 74. Matters Concluded. A judgment is conclusive between the parties and their privies upon all matters embraced within the issues in the action which were or might have been litigated therein, and it is immaterial whether issues are joined by an answer to the complaint or tendered by the plaintiff and left unanswered. Tax Lien Co. v. Schultze (N. Y.) 1916C-636.
- 75. Scope of Issues. In an action Pursuant to Greater New York Charter (Laws N. Y. 1901, c. 466, §§ 1035-1039, as amended by Laws 1908, c. 490, and Laws 1911, c. 65) to foreclose a tax lien, where the complaint alleged that owners of adjoining lands, not necessary parties defendant, but made parties defendant, had or might have, and the plaintiff believed that they had or might have, an interest in or claim upon the described premises by way of easement, etc., there is no issue as to whether such defendants had prior easements in the premises superior to the tax lien; and hence, as to such easements, they are not concluded by the judgment therein. Tax Lien Co. v. Schultze (N. Y.) 1916C-636.
- 76. Such rule applies as well to a judgment by default, when the facts stated warrant the relief sought, as to one rendered after contest. Tax Lien Co. v. Schultze (N. Y.) 1916C-636.
- 77. Jurisdictional Facts. Where a judgment in personam against a nonresident

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was sought to be sustained on the ground that property interests of the nonresident had been attached, the judgment is not conclusive upon the validity of the attachment for, if the attachment were invalid, the court had no jurisdiction. Johnson v. Whilden (N. Car.) 1916C-783.

78. Claims for Wrongful Attachment. Under the rule established in Idaho, a judgment concludes all claims for wrongful attachment in the action in which the judgment is obtained. Pindel v. Holgate (Fed.) 1916C-983.

79. Matters Concluded by Decree Quieting Title. Where L, sued plaintiff to quiet title to land, and plaintiff, claiming to own the land under a deed from L, the delivery of which was disputed, answered and asked that his title be quieted and recovered a judgment quieting title in him, such judgment did not establish the delivery of the deed as against parties claiming under a mortgage from L. executed and recorded several months before the action was commenced in which such judgment was rendered, as a mortgagee or his assigns are not bound by a judgment against the mortgagor in a suit commenced by third parties subsequent to the execution and recording of the mortgage, unless the mortgagee or some one authorized to represent him is made a party to the litigation. Coe v. Wormell (Wash.) 1917C-679.

# 16. DIRECT ATTACK.

80. Direct Attack—What Constitutes. A suit in equity to set aside a judgment and have declared invalid a sale thereunder and have all proceedings in the action and the order confirming the sale canceled, was a direct attack on the judgment. Ford v. Clendenin (N. Y.) 1917A-658.

# 17. COLLATERAL ATTACK, WHEN PERMISSIBLE.

81. Collateral Attack—Judgment on Constructive Service. The jurisdiction of the court may be attacked collaterally when it is dependent upon constructive service. Myakka Co. v. Edwards (Fla.) 1917B-201.

82. Grounds — Defect of Parties. A judgment cannot be questioned collaterally in an action to enforce the lien thereof against certain land of the judgment debtor, on the ground that the plaintiff in the judgment had no right to sue on the notes on which the judgments were rendered, as an objection for defect of parties must be taken by answer or demurrer or it will be considered as waived. Brown v. Harding (N. Car.) 1917C-548.

# JUDGMENT NON OBSTANTE VEREDICTO.

See Judgments, 18-20.

#### JUDICIAL ACTS.

Mandamus to compel, see Mandamus, 4-7.

#### JUDICIAL NOTICE.

See Evidence, 1-19.

#### JUDICIAL POWER.

Defined, see Constitutional Law, 12.

#### JUDICIAL SALES.

1. Conduct of Sale.

2. Rights and Liabilities of Purchaser.

a. In General.

b. Title.

Contract to suppress bids, see Contracts, 30.

#### CONDUCT OF SALE.

1. Advertisement—Misnomer of Party—Effect. An advertisement of a sheriff's sale on execution reciting judgment in favor of a creditor against certain debtors, the levy upon all their right, title, and interest in the real property described by legal subdivisions, divests the debtors of any title to the property; the use of the name "Hattie Brown," instead of "Kittie Brown," not vitiating a prior sufficient description, and this independently of Ore. L. O. L. § 241, subd. 4, which expressly makes a confirmation of sale a conclusive determination of the regularity of the proceedings for sale. Brown v. Farmers' etc. National Bank (Ore.) 1917B-1041.

(Annotated.)

2. Sale Under Junior Execution. Under Rem. & Bal. Wash. Code, § 515, requiring the sheriff to indorse upon an execution the time when he received it, a sheriff who holds two executions against the same property and sells the property under the junior execution is liable to the senior creditor, as the law contemplates a sale under the first writ, with the privilege to the execution creditor to bid at his own sale, thus protecting his interests, and it is not sufficient that the proceeds of the sale are applied on his judgment. Continental Distributing Co. v. Hays (Wash.) 1917B-708. (Annotated.)

## Note.

Misnomer of party in advertisement or notice of sale as affecting validity of judicial sale. 1917B-1046.

#### 2. RIGHTS AND LIABILITIES OF PURCHASER.

## a. In General.

3. Time to Examine Title. A master in chancery in selling land under a decree only allowed the purchaser three hours in which to comply with the terms of sale, and, upon noncompliance within that time,

resold the property. Held, that the purchaser was not allowed a reasonable time to examine the title, and hence the resale was a nullity. Smith v. Smith (S. Car.) 1916C-763. (Annotated.)

#### Notes.

Right of purchaser at judicial sale to reasonable time to examine title. 1916C-

Rights of parties on sale under junior attachment or execution. 1917B-710.

#### Title.

- 4. Sale Under Junior Writ-Rights of Parties. A sale of personal property under a junior execution will convey good title to the purchaser. Continental Distributing Co. v. Hays (Wash.) 1917B-708. (Annotated.)
- 5. Sale of Curtesy Interest. A sheriff's deed on sale under execution against one's curtesy interest in land conveyed to his deceased wife and "her natural heirs" would be a cloud on her son's title. Maynard v. Henderson (Ark.) 1917A-1157.

#### JUNK DEALERS AND JUNK SHOPS.

- 1. "Dealer"-Meaning of Term-Junk Dealer. One who sells junk and old metals on sixteen different dates within two months may be found to be a "dealer" within Mass. Rev. Laws, c. 102, § 29, imposing a license on dealers in junk and old metals. Commonwealth v. Silverman (Mass.) 1917A-948. (Annotated.)
- 2. A licensed junk dealer in one town who makes sales of junk and old metals in another town without a license therein, may be convicted of violating Mass. Rev. Laws, c. 102, § 29, providing for the licensing of dealers in junk and old metals, for in construing the word "dealer" there is no distinction between one who sells and one who buys. Commonwealth v. Silverman (Mass.) 1917A-948. (Annotated.)

## JURISDICTION.

See Admiralty, 1-3; Adoption of Children, 3, 4; Bastardy, 8, 14; Courts, 2-20; Creditors' Bills, 4-6; Death by Wrongful Act, 7-9; Equity, 1-6; Partition, 3; Quieting Title, 2; States, 1, 2.

Of appellate courts, see Appeal and Error, ŝ−25.

Jurisdiction of appellate court after remand, see Appeal and Error, 475.

Special appearance to object to jurisdiction, see Appearances, 2.

Disbarment proceedings, see Attorneys, 45.

Action against foreign corporation, see Corporations, 166.

Of offenses, see Criminal Law, 3, 4.

Of divorce suits, see Divorce, 1-7.

Of election contest, see Elections, 82.

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Effect of want of jurisdiction on decree, see Judgments, 4-10, 43.

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Time of motion for new trial jurisdictional, see New Trial, 27.

Plea to jurisdiction, see Pleading, 52, 53. In prohibition proceedings, see Prohibition, 5.

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Of taxing power, see Taxation, 3, 12, 13. Of probate of wills, see Wills, 114-120.

#### JUROR.

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Disqualification of juror as ground for new trial, see New Trial, 12, 29.

Removal from office, jury trial, see Public Officers, 54.

Number requisite for civil verdict, see Verdicts, 5, 6.

## 1. RIGHT TO JURY TRIAL.

# a. In General.

- 1. Constitutional Right to Jury Trial—Fourteenth Amendment. Trial by jury is not embraced in the rights secured by the 14th Amendment to the federal constitution. New York Central R. Co. v. White (U. S.) 1917D-629.
- 2. Trial by jury is not embraced in the rights secured by the 14th Amendment to the federal constitution. Hawkins v. Bleakly (U. S.) 1917D-637.
- 3. Effect of Ordinance of 1787. Iowa was not a part of the northwest territory, and was therefore unaffected by the guaranty in the Ordinance of July 13, 1787 (1 Stat. at L. 51, note, 8 Fed. St. Anu. 17), for the government of that territory, that the inhabitants thereof shall always be entitled to the benefits of trial by jury. Hawkins v. Bleakly (U. S.) 1917D-637.
- 4. The admission of Iowa to the Union under the Acts of March 3, 1845 (5 Stat. at L. 742, 789, cc. 48 and 76); August 4, 1846 (9 Stat. at L. 52, c. 82); and December 28, 1846 (9 Stat. at L. 117, c. 1), upon an equal footing with the original states, and the adoption of a state constitution, abrogated any extension to Iowa of the guaranties of the Ordinance of July 13, 1787 (1 Stat. at L. 51, note, 8 Fed. St. Ann. 17), for the government of the northwest territory, including the right to trial by jury, which may have been affected by the Act of June 12, 1838 (5 Stat. at L. 235, c. 96), establishing a territorial government for Iowa. Hawkins v. Bleakly (U. S.) 1917D-637.
- 5. Scope of Constitutional Guaranty. Const. art. §§ 1, 5, providing that the right of "trial by jury" shall remain involate, merely guarantees such right to a jury trial as existed before Wisconsin became a state, which was a trial in a court of competent jurisdiction by a jury of twelve men impartially selected. Reliance Auto Repair Co. v. Nugent (Wis.) 1917B-307.
- 6. Const. U. S. Amend. 7, as to trial by jury, does not limit state action. Middleton v. Whitridge (N. Y.) 1916C-856,

#### b. In Criminal Cases.

7. Petty Offenses. Neither the constitution nor the statutes of this state give the right of trial by jury to persons charged with petty offenses under the ordinances of a city. St. Paul v. Robinson (Minn.) 1916E-845.

#### c. Civil Cases.

## (1) Proceedings to Enforce Liens.

- 8. Attorney's Lien. In an action involving the right of attorneys to a lien a jury trial cannot be demanded as of right on the issue of the attorneys' fees. McCracken v. Joliet (Ill.) 1917D-144.
- (2) Proceedings for Removal of Officer.
- 9. A proceeding to deprive of office a person procuring his election thereto by corrupt practices is not criminal, and an act providing therefor is not invalid because it does not allow a jury trial. Diehl v. Totten (N. Dak.) 1918A-884.

## (3) Appeals.

10. Denial of Jury Trial—Appeal not Triable by Jury. Const. art. 1, § 5, providing that the right to jury trial shall remain inviolate, guarantees only one jury trial; hence the Wis. Civil Court Act (Laws 1909, c. 549), which provides for jury trial in the civil court of Milwaukee, but authorizes the circuit court on appeal to affirm or modify judgments of that tribunal without jury trial, is valid. Reliance Auto Repair Co. v. Nugent (Wis.) 1917B-307.

#### d. Waiver and Loss of Right to Jury Trial.

- 11. Validity of Statute Permitting Waiver. Jury trial is not a universal right, existing in all proceedings and as to all litigation. Moreover, it may be waived, and the acceptance of statutes which contain provisions for the settlement of difficulties without a jury operates as such waiver. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.
- 12. Effect. Submission of an action of assumpsit to the court in lieu of a jury upon evidence so brought into the case, is equivalent to a joinder in a demurrer to evidence, and the judgment, upon a writ of error thereto is treated and dealt with as a judgment upon a demurrer to evidence. Wilson v. Shrader (W. Va.) 1916D-886.

## 2. EXCLUSION FROM SERVICE.

13. A summary order barring persons from serving as jurors, because they returned a verdict of acquittal, where it is thought by the public that there should

have been a conviction, is void, no law authorizing it, even under the maxim salus populi suprema lex; it not being necessary, or useful, for exclusion of unfit jurors from juror service, and the infliction of vunishment not being permissible, unless denounced by the legislature, and unless preceded by trial. Teat v. Land (La.) 1916C-1208. (Annotated.)

#### Note.

Power of court to exclude person from jury service. 1916C-1209.

- 3. SUMMONING AND ATTENDANCE OF JUROR.
- a. Selection and Summoning of Regular Panel.
- 14. Panel Temporarily Excused—Right to Recall. Where jurors of the original panel have not been finally discharged but have merely been temporarily excused and have drawn their compensation for services rendered, they can be required to return and sit in any case properly before the court. State v. Giudice (Iowa) 1917C—1160.

## b. Special Venire.

15. Drawing Additional Jurors—Power in Vacation. Under Iowa Code, § 347, authorizing the judge either before or during the term to order additional jurors, an order directing the drawing of additional jurors is within the court's discretion, though made in vacation. State v. Giudice (Iowa) 1917C-1160.

## 4. COMPETENCY OF JURORS.

#### Bias or Prejudice.

- 16. Prejudice Against Race of Accused. A juror who entertains a prejudice against the nationality of accused but none against accused personally, and who insists that he can accord him a fair and impartial trial, is not necessarily disqualified, though it is advisable to sustain a challenge against him for cause. State v. Giudice (Iowa) 1917C-1160. (Annotated.)
- 17. Reading Newspaper Accounts. Jurors who have read newspaper accounts of the offense charged and accused's connection therewith and have formed an opinion, but who are not acquainted with accused and who do not entertain any bias or prejudice against him, and who have no personal knowledge of the facts, and who assert that they can accord accused a fair and impartial trial, are not, as a matter of law, disqualified, and the trial court overruling challenges for cause does not abuse its discretion. State v. Giudice (Iowa) 1917C-1160.
- 18. Newspaper Publication. The mere fact that a newspaper article has been

published in relation to a case under consideration, and contains a misstatement, does not itself disqualify a juryman, even though he may have read the same. Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of evidence given under oath; and a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially, according to the evidence, and the court is satisfied that he will do so. State v. Gordon (N. Dak.) 1918A-442.

#### Note.

Prejudice against race or color of party to action as disqualifying juror. 1917C-1167.

#### b. Pecuniary Interest.

- 19. Loan to Assist Prosecution. One who loans money to another for the purpose of paying counsel to assist the solicitor general in the prosecution of a case of the state against one charged with murder is not disqualified to serve as a juror on the trial of such a case, where it does not appear that the juror has any interest in the prosecution or is otherwise disqualified. Bird v. State (Ga.) 1916C-205.
  - c. Business Connections With Party.
- 20. In an action by one dealer in automobiles against another, for damages sustained in a collision between their cars, a juror testified on his voir dire that he had dealt with plaintiff's firm at various times; that he owed plaintiff nothing at that time; and that he owned no car and was not negotiating with plaintiff for a car. It appeared that he had ordered a car from plaintiff's firm, for which he was to give his notes upon delivery, but which had not been delivered at the time of the trial. Held that, where the trial court was satisfied that the juror was competent and fair, he properly denied a new trial, especially as the juror's answers were literally true. Dishmaker v. Heck (Wis.) 1917A-400.

## d. Opinion Previously Formed.

21. Member of Grand Jury Indicting Defendant. One who served on the grand jury which returned an indictment is disqualified for service as a petit juror on the trial of a person thereby accused. State v. Cooper (W. Va.) 1917D-453.

(Annotated.)

#### Note.

Qualification as juror of member of grand jury indicting defendant. 1917D-456.

## . 1916C—1918B. 5. CHALLENGES AND OBJECTIONS. refus:

a. In General.

22. Procedure in Challenging. Where 12 jurors are called and sworn on their voir dire and examined, and part of them excused for cause, and both the state and the defendant are required to exercise or waive their right to peremptorily challenge the jurors remaining in the jury box, leaving those not challenged to be sworn to try the case before any additional jurors should be called to take the place of those challenged and excused, the procedure is proper. State v. Mewhinney (Utah) 1916C-537.

## b. Peremptory Challenges.

23. Where plaintiff sued two saloon keepers and the surety to recover on their bonds for injuries inflicted upon her by her father when intoxicated, the allownce of two peremptory challenges to each defendant is proper, since the three defendants may not present a joint defense, as the surety company can escape liability as never having executed its bond, etc., defenses not open to the individual defendants. Yonkus v. McKay (Mich.) 1917E-458. (Annotated.)

24. Though by the court deemed qualified upon voir dire and sworn as such juror, he not then recalling such former service, it is not error to excuse him from the panel of twelve, and in his stead to substitute another who upon examination was ascertained to be free from disqualification. State v. Cooper (W. Va.) 1917D-453.

(Annotated.)

## Note.

Right and manner of exercise of peremptory challenges by joint parties in civil actions. 1917E-461.

## c. Challenge for Cause.

# (1) What Constitutes.

25. What Constitutes. A mere objection to the withdrawal of a disqualified juror and the substitution of another upon due examination adjudged free from objection is not a challenge for cause. State v. Cooper (W. Va.) 1917D-453.

## (2) Waiver.

26. Failure to Object. One accused of a felony waives his right of challenge, and will not, after verdict, be heard to complain, if, with knowledge of the disqualification, he remains silent or refuses, when afforded an opportunity, to exercise his right thereto. State v. Cooper (W. Va.) 1917D-453.

## (3) Review of Findings.

#### (a) Discretion of Trial Court.

27. Finding on Challenge — Review. Where it appears on error assigned to the

refusal to sustain certain challenges for bias that the court might have found that the jurors challenged were fair, impartial, and conscientious men, the action of trial court in overruling the challenges will not be disturbed. State v. Mewhinney (Utah) 1916C-537.

28. Withdrawing Juror—Surprise—Evidence as to Nature of Injuries. Where plaintiff was injured internally, it is not an abuse of discretion to refuse to withdraw a juror, after defendant claims surprise because there was no allegation in statement of claim of an internal injury, where no bill of particulars was asked for, and the statement is broad enough to cover the injuries proved at the trial. Cohen v. Philadelphia Rapid Transit Co. (Pa.) 1917D-350.

## 6. CUSTODY AND CONDUCT OF JURY.

## a. Custodian.

29. Bailiff Member of Former Jury. Where, in a city's action against an auctioneer to recover the statutory penalty for conducting his business without a license, one who, upon a former trial in which the jury disagreed, had been a member thereof, and had voted for conviction, acted as bailiff, in the absence of showing that he influenced the jury, or that the rights of defendant were prejudiced in any manner, there is no error. Kimmins v. Montrose (Colo.) 1917A-407.

30. Witness for Prosecution as Bailiff. It is manifestly improper for one who is a material witness for the state in a prosecution for murder, to have charge as bailiff of the jury impaneled to try the case, or to be with or have any communications with such jury. Especially is this true when such party continues to remain with such jury after he has been removed as such bailiff by the court, at the instance of the defendant on trial. Owens v. State (Fla.) 1917B-252. (Annotated.)

### Note.

Prejudice of officer as disqualifying him from acting as custodian of jury. 1917B-254.

#### b. Communication With Court.

31. In an action in which the court submitted a question as to punitive damages, the jury, after retiring to deliberate, were unable to decipher the word "punitive," in such question, and thereupon the foreman entered the courtroom, where another case was on trial, and asked the meaning of the word, to which the judge replied, "punitive, by way of punishment." These proceedings in the courtroom were in an ordinary tone of voice, and were heard and taken down by the official reporter. Held, that while all communications between the court and jury should be in the open courtroom, and free from even a suspicion of

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secrecy, there was nothing in the facts stated requiring a new trial. Dishmaker v., Heck (Wis.) 1917A-400.

(Annotated.)

#### Note.

Private communication by trial judge with jury during deliberations as ground for new trial. 1917A-403.

## c. Separation of Jurors.

- 32. Exclusion of Jury During Argument of Law Question. It is not a violation of the right to trial by jury guaranteed by the Kan. Const. art. 1, § 2, for the court to exclude the jury from the courtroom during the argument as to the admissibility of evidence. People v. Becker (Kan.) 1917A-600.
- 33. Necessity of Excluding Outside Influences. An impartial jury, selected and kept free from all outside or improper influences, is necessary to a fair and impartial trial. Owens v. State (Fla.) 1917B-252.
- 34. In a prosecution for crime which has resulted in a conviction, where it is made to appear that the jury was not kept free from outside or improper influences, and there is a sharp conflict in the evidence upon material points, the judgment may be reversed. Owens v. State (Fla.) 1917B-252.
- 35. Separation of Jury. As the Ky. Civil Code does not confer upon the court authority to put a jury in charge of an officer and require them to remain together until the case has been finally submitted, it is discretionary with the court if it has the inherent power to do so, and hence a party cannot complain that the jury were allowed to separate for the evenings and for meals up to submission. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A—1164.

### d. Misconduct of Jurors.

#### (1) Use of Intoxicants.

- 36. The occasional taking of intoxicants in a moderate quantity by jurors is not misbehavior, warranting the granting of a new trial. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 37. The intoxication of a single juror, coupled with other scandalous behavior, where not shown to have been procured by respondent, is not, where the juror was not intoxicated at the hearing or when the cause was submitted, ground for new trial. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.

# (2) Taking Papers and Exhibits to Jury Room.

38. Examination of Articles not in Evidence. In a trial for felony, if the bailiff

in charge of the jury, with the help of some of the jurors and without the order of the court removes a quantity of miscellaneous articles of which some as exhibits have been received in evidence, and some have not, from the courtroom to the jury room, and such articles are there examined and considered by the jury in arriving at their verdict, such conduct will vitiate the verdict, and a new trial should be awarded. Roberts v. State (Neb.) 1917E-1040.

39. Taking Out Papers—Calculation of Damages. The matter of permitting plaintiff to send out to the jury a calculation of items of damages claimed, is within the trial court's discretion, where the paper contains no items not supported by evidence and the jury are instructed that the calculations are not evidence but are merely to be used as an aid to their own calculation. Armstrong v. Philadelphia (Pa.) 1917B-1082.

## (3) Reading Newspapers.

40. Under Ariz. Pen. Code 1913, § 1063, providing that the jury may be placed in charge of officer, whose duty it is to keep jurors together until reconvention of court, to suffer no person to speak to them, nor to do so himself on any subject connected with the trial, and section 1064, requiring the jury to be admonished not to converse among themselves on any subject connected with the trial, or to anyone else, or to form or express any opinion until the cause is finally submitted, it is error to permit one juror to have in his possession and read to the others a newspaper account, reciting a former charge of larceny against one of the defendants. Babb v. State (Ariz.) 1918B-925.

(Annotated.)

# (4) Affidavit of Jurors to Prove Misconduct.

- 41. Affidavits held not to show attempt to corrupt the jury, or any misconduct on the part of the jury warranting new trial. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 42. Affidavits of jurors are not admissible to show misconduct, although they can be received to show there was no misconduct. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.

#### 7. DUTY TO FOLLOW INSTRUCTIONS.

43. Duty to Follow Instructions. The instructions of the court, right or wrong, are binding upon the jury, if applicable within the issues. Smith v. Barnes (Mont.) 1917D-330.

JURY TRIAL.

Right to jury trial, see Jury, 1-12.

#### JUSTICES OF THE PEACE.

Bias as ground for change of venue, see Venue, 5.

- 1. Defect in Removal Proceedings—Effect. The defect in proceedings for the removal of a cause from a justice's court to the circuit court, which will operate to the exclusion of a defendant from the benefit of the statute as to the trial in the circuit court, cannot be raised by request for a general affirmative charge. Phillips v. Phillips (Ala.) 1916D-994.
- 2. Invalid Judgment—Precedure for Vacation. Where judgment is rendered by a justice of the peace on insufficient service, defendant's remedy is by motion to vacate before the justice who tried the case. S. Lowman & Co. v. Ballard (N. Car.) 1917B-899.
- 3. Removal of Cause—Verification of Petition. Under Ala. Code 1907, § 4283, providing that any defendant in a suit for forcible entry and detainer may remove the action from a justice to the circuit court on filing a sworn petition, it is not necessary tor all of several defendants to sign and verify the petition, but it is sufficient where the petition shows the required facts verified by any defendant. Phillips v. Phillips (Ala.) 1916D-994.

JUSTIFIABLE HOMICIDE. See Homicide, 2.

JUSTIFICATION.
How pleaded, see Pleading, 24.

JUVENILE COURTS.
Proceedings in, see Infants, 26-38.

KNOWLEDGE.

See Notice.

KNOWLEDGE OF LAW.
Presumption as to, see Evidence, 137.

LABOR.

See Work and Labor.

LABOR AGENTS. See Labor Laws, 23.

#### LABOR COMBINATIONS.

- 1. Legality of Labor Unions.
- 2. Strikes.
- 3. Boycotts.
- 4. Agreements With Employer.
- 5. Blacklisting.
- 6. Forbidding Membership.

Injunction to restrain, see Injunctions, 30-31.

Suit to enjoin officers, see Parties to Actions, 7-9.

## 1. LEGALITY OF LABOR UNIONS.

- 1. A combination to procure concerted breaches of contract by plaintiff's employees constitutes a violation of plaintiff's legal rights, though the measures resorted to stop short of physical violence or coercion through fear of such violence. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461. (Annotated.)
- 2. Workingmen have a right to form unions and to enlarge their membership by inviting other workingmen to join, but this right, like all other rights, must be exercised with reasonable regard for the conflicting rights of others. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461. (Annotated.)

#### 2. STRIKES.

3. The right of employees to strike gives no right to a third party having no agency for the employees to instigate a strike, even though they have a grievance. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461. (Annotated.)

## 3. BOYCOTTS.

4. Sufficiency of Complaint. In a complaint for the wrongful publication of a false statement that plaintiff was discharged from defendant's employment as locomotive engineer for intimidating other employees, the use of the word "boycott," which means "a conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business or to injure the business of any one by wrongfully preventing those who would be customers from buying anything from or employing the representatives of such business, by threats, intimidation, or other forcible means," is insufficient to charge a definite actionable wrong, in the absence of allegations of what constituted the boycott. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638. (Annotated.)

## 4. AGREEMENTS WITH EMPLOYER.

5. Plaintiff was operating a nonunion mine under a mutual agreement, assented to by every employee, that it would not recognize the union, and that if any man wanted to become a member of the union he might do so, but could not be a member and remain in its employ. Defendants, with full notice of this working agreement and without any agency for the employees, but as representatives of an organization of mine workers in other states and in order to require the operation of the mine as a union mine, sent their agent to the mine, who with full

notice of and for the very purpose of subverting the status arising from the working agreement and subjecting the mine to union control, proceeded, without physical violence, but by persuasion accompanied by deceptive statements, to induce the employees to join the union, and at the same time to break their agreement with plaintiff by remaining in its employ after joining, and this was done, not for the purpose of enlarging the membership of the union, but of coercing plaintiff through a strike, or the threat of one, into recognition of the union. It is held that the purpose and the methods resorted to were unlawful and not justified as a fair exercise of the right to increase the membership of the union, and plaintiff was entitled to an injunction against such acts; the damage resulting from a strike being regarded as irremediable at law. Hitchman Coal, etc. Co. v. Mitchell (U.S.) 1918B-461. (Annotated.)

#### 5. BLACKLISTING.

- 6. While the violation of Rem. & Bal. Wash. Code, § 6565, making blacklisting punishable as a misdemeanor, and defining the term, is a sufficient basis for a civil action for damages, the mere allegation that plaintiff has been blacklisted is not sufficient, without alleging facts constituting the act of blacklisting as defined by the statute, and that such acts have caused the injury charged. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638. (Annotated.)
- 7. In a complaint for the publication of false statements as to the cause of plaintiff's discharge as a locomotive engineer, the use of the word "blacklist," which means a "list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list, or those among whom it is intended to circulate," is insufficient to charge a definite actionable wrong, where there is no allegation that defendant made, kept, or circulated such list, or that plaintiff's name was entered thereon. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638. (Annotated.)
- 8. Complaint Insufficient. A complaint, in an action for the wrongful publication of a false statement, that plaintiff was discharged from defendant's employment as locomotive engineer for intimidating other employees while in the performance of their duties, which alleged that the letter containing the statement was circulated with intent to injure plaintiff, destroy his reputation, and deprive him of confidence, and for the purpose of preventing him from seeking or securing

employment, and to ruin him in his profession, but which failed to allege that such effects were actually produced, that plaintiff was ever refused employment by reason of the false record, that the damages alleged resulted from the acts of defendant as charged in the complaint, that defendant and other companies had conspired to furnish information to each other, or that defendant had furnished any information to others, and containing, as the only allegation charging defendant with conduct damaging plaintiff, that defendant had refused to furnish plaintiff with a clearance which would enable him to secure other employment, but setting out no facts raising a legal duty to furnish it, is insufficient to state a cause of action on the case for a wrongful interference with plaintiff's pursuit of an occupation. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638. (Annotated.)

#### Note.

Legality of Blacklisting Agreement. 1917A-644.

#### FORBIDDING MEMBERSHIP.

- 9. Right of Employer to Forbid Membership. An employer is acting within his lawful rights in making nonmembership in a union a condition of employment, and no explanation or justification for such course is needed. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.
- 10. The right of an employer to make nonmembership in a union a condition of employment is a part of the constitutional rights of personal liberty and private property which cannot be taken away even by legislation, unless through some proper exercise of the paramount police power. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.
- 11. Injunction Against Officer Possibility of Injury to Complainant. Where one attempting to organize the employees of a mine was acting as agent of an organized body of men united in a purpose to close the mine unless the proprietor would make it a union mine, and who lacked the power to carry out that purpose only because they had not, as yet, persuaded a sufficient number of the miners to join with them, and employed such agent with the very object of securing the support of the necessary number of miners, the right to an injunction against his activities is not dependent on whether he had power or authority to shut down the mine. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.

## LABOR LAWS.

- 1. In General, 494.
- 2. Limiting Hours of Employment of Women, 494.
- 3. Limiting Hours of Labor, 494.
- 4. Regulation of Wages, 496.
- 5. Labor Agents, 496.
- 6. Weekly Rest Day, 496.

## 1. IN GÉNERAL.

- 1. The right to labor and to employ labor is subject to reasonable limitations necessary to promote the health, general welfare, and intelligence of the citizens, and the peace and good order of the state; U. S. Const. Amend. 14, not being designed to limit the right of the state under its police power to prescribe such regulations. State v. Bunting (Ore.) 1916C-1003. (Annotated.)
- 2. Immigration Importation of Contract Labor—Alien Seaman. It is not a violation of Immigration Act of Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900 (3 Fed. St. Ann. [2d ed.] 654) making it a misdemeanor to prepay the transportation or assist in the importation of contract laborers into the United States, for the operators of a merchant vessel flying the American flag to bring aliens from China to the port of San Francisco under contract to join the crew of such vessel, since, while the public and private vessels of every nation, while on the high seas and without the territorial limits of any state, are subject to the jurisdiction of the state to which they belong and are in many respects considered a part of its territory, a merchant vessel flying the American flag is not a part of the United States within the immigration laws, nor is a sailor whose home is on the sea a contract laborer within those laws. Scharrenberg v. Dollar Steamship Co. (Fed.) 1917C-258. (Annotated.)

#### Notes.

Soliciting or importing alien contract labor as crime. 1917C-261.

Validity of statute regulating employment of adult females in other respects than number of hours of labor. 1916D-1065.

## 2. LIMITING HOURS OF EMPLOY-MENT OF WOMEN.

- 3. A statute prohibiting night work for women will not be adjudged unconstitutional merely because some of the women, within the protection of the statute, oppose the protection. People v. Charles Schweinler Press (N. Y.) 1916D-1059.

  (Annotated.)
- 4. A statute prohibiting night work for women cannot be adjudged invalid merely because in exceptional cases it may prevent employment of some women at night

under such conditions as would be productive of no substantial harm, for the legislature must legislate in general terms. People v. Charles Schweinler Press (N. Y.) 1916D-1059. (Annotated.)

5. Prohibition of Night Work by Women—Validity. N. Y. Labor Law (Consol. Laws, c. 31) § 93b, added by Laws 1913, c. 83, prohibiting any woman from being employed or permitted to work in any factory before 6 o'clock in the morning or after 10 o'clock in the evening, is a valid exercise of the police power to protect the health of women, rendered necessary as disclosed by the commission created by the legislature to consider and report on the subject reporting a widespread belief that such work is so injurious to the health of woman that it ought to be prohibited both for their own sakes and for the sake of their offspring, and is not invalid as depriving one of liberty or property without due process of law, or as denying the equal protection of the law. People v. Charles Schweinler Press (N. Y.) 1916D-1059.

# LIMITING HOURS OF LABOR.

- 6. Ore. Laws 1913, c. 102, prohibiting the employment of any person in any mill, factory, or manufacturing establishment more than 10 hours in a day, can be sustained only under the police power, since the right to labor or employ labor on terms stipulated by the parties is a property right guaranteed by U. S. Const. Amend. 14, providing that no state shall make any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny the equal protection of the law. State v. Bunting (Ore.) 1916C-1003. (Annotated.)
- 7. The limitation of Ore. Laws 1913, c. 102, prohibiting employment of labor for more than 10 hours in one day to mills, factories, and manufacturing establishments, is not an unconstitutional discrimination. State v. Bunting (Ore.) 1916C-1003. (Annotated.)
- 8. In Ore. Laws 1913, c. 102, prohibiting the employment of labor in mills, factories, and manufacturing establishments for more than 10 hours per day, a proviso permitting employees to work overtime not to exceed three hours in a day at the rate of time and a half the regular wage does not render the whole act void. State v. Bunting (Ore.) 1916C-1003.

  (Annotated.)
- 9. Ore. Laws 1913, c. 102, prohibiting the employment of any person in any mill, factory, or manufacturing establishment for more than 10 hours in one day, except night watchmen, persons engaged

in making necessary repairs, and, in cases of emergency, providing that employees may work overtime not to exceed three hours in a day at the rate of time and one-half of the regular wage, is a proper police regulation, and does not violate the constitution of the United States or of the state. State v. Bunting (Ore.) 1916C-1003.

(Annotated.)

- 10. Contract to Work More Than Legal Day. A city employee, who entered into a special contract to work ten hours per day for extra wages, cannot, after accepting such wages without protest, seek to recover additional compensation on quantum meruit on the ground that he could not be legally required to work more than eight hours. Woods v. Woburn (Mass.) 1917A-492.
- 11. Mass. St. 1899, c. 344, § 1, establishing the eight hour day for city employees, which is substantially the same as the federal statute, must be given the construction previously given to the federal statute, that it does not prohibit a special agreement between the city and its employees for a longer day's work. Woods v. Woburn (Mass.) 1917A-492.
- 12. Public Works. The legislature can determine the number of hours which shall constitute a day's work for cities and other governmental subdivisions. Woods v. Woburn (Mass.) 1917A-492.
- 13. Power of State. The hours of labor in industries in which too many hours of service in one day would be injurious to the health and well-being of the operatives may be reasonably regulated by the state under the police power, and this power legitimately exercised can neither be limited by contract nor bartered away by legislation. State v. Bunting (Ore.) 1916C-1003. (Annotated.)
- 14. Construction of Statute. A special agreement by a city employee to work ten hours per day, instead of eight hours, as provided by Mass. St. 1899, c. 344, § 1, was not affected by the subsequent eight hour laws (St. 1906, c. 517, § 5; St. 1907, c. 570; St. 1909, c. 514, § 41; and Rev. Laws, c. 106, § 20), since statutes are construed to apply only to the future, and not to the past, unless a contrary purpose is indicated by express language or necessary implication, and there is nothing in those acts to indicate an intent to apply them to existing contracts. Woods v. Woburn (Mass.) 1917A-492.
- 15. Impairing Obligation of Contract—Contract of Municipality. Where a city owns and operates its water plant as a private commercial venture, the property is held in its strictly proprietary capacity, and its contracts with relation thereto are probably protected by the constitutional provisions for the protection of con-

tracts of individuals, and it will not be presumed, in the absence of plain language requiring it, that the legislature intended subsequent eight hour acts to apply to an existing contract with an employee of the waterworks department and thereby to raise a serious constitutional question. Woods v. Woburn (Mass.) 1917A-492.

- 16. The eight-hour laws (St. Mass. 1906, c. 517; St. 1907, c. 570; St. 1909, c. 514, §§ 37-43), which apply only to cities which have accepted the provisions of Rev. Laws, c. 106, § 20, do not apply to a city which had accepted the earlier statute (St. 1899, c. 344). Woods v. Woburn (Mass.) 1917A-492.
- 17. Validity of Statute. An hours-ofservice law may be limited to employees in mills, factories, or manufacturing establishments, as is done by Ore. Laws 1913, c. 102, § 2, without invalidating the law as making an unconstitutional discrimination. Bunting v. Oregon (U. S.) 1918A-1043. (Annotated.)
- 18. A regulation of hours of servicenot of wages-and one, therefore, which the state, in the exercise of its police power, could consistently with due process of law enact, is what was made by the provisions of Ore. Laws 1913, c. 102, § 2, purporting to have been enacted as a health measure, that "no person shall be employed in any mill, factory, or manufacturing establishment in this state more than ten hours in any one day except watchmen and employees when engaged in making necessary repairs or in case of emergency where life or property is in imminent danger," notwithstanding a proviso to such section that "employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage." Bunting v. Oregon (U. S.) 1918A-1043. (Annotated.)
- 19. Eight Hour Railway Law. Interstate railway carriers are not denied the due process of law guaranteed by U. S. Const. 5th Amend. (9 Fed. St. Ann. 288) by the provisions of the Act of September 3, 5, 1916 (39 Stat. L. 721, c. 436, Fed. St. Ann. Pamph. Supp. No. 8, p. 139), fixing a permanent eight-hour standard workday for employees engaged in the operation of trains upon such railways, creating a commission to observe during a period of not less than six nor more than nine months the operation and effect of such standard workday and to report its findings to the President and Congress within thirty days thereafter, and forbidding the carriers, pending such report, and for a period of thirty days thereafter, to pay such employees for eight hours' work a wage less than the existing standard day's wage,

with pro rata pay for all necessary overtime. Wilson v. New (U. S.) 1918A-1024. (Annotated.)

20. Singling out employees engaged in the movement of trains, as is done by the Act of September 3, 5, 1916 (39 Stat. L. 721, c. 436, Fed. St. Ann. Pamph. Supp. No. 8, p. 139), fixing a permanent eighthour standard working day for such employees of interstate railway carriers, and temporarily regulating their wages, does not render the statute invalid as denying the equal protection of the laws, where such employees were those concerning whom alone a dispute as to wages existed, out of which arose the threat of the interruption of interstate commerce by a strike, to prevent which the statute was enacted. Wilson v. New (U. S.) 1918A-1024.

(Annotated.)

21. The exemption of railways independently owned and operated, not exceeding 100 miles in length, electric street railways and electric interurban railways, from the operation of the provisions of the Act of September 3, 5, 1916 (39 Stat. L. 721, c. 436, Fed. St. Ann. Pamph. Supp. No. 8, p. 139), fixing a permanent eighthour standard working day for employees engaged in the operation of trains upon interstate railway carriers, and temporarily regulating the wages of such employees, does not invalidate the act as denying the equal protection of the laws. Wilson v. New (U. S.) 1918A-1024.

(Annotated.)

#### 4. REGULATION OF WAGES.

22. Regulation of Wages of Employees Carriers - Validity. Congress, fronted with the imminent interruption of interstate commerce by a threatened general strike of railway employees, the outcome of a dispute over a wage standard, can, in the exercise of its power over com merce, fix such a permanent standard working day for employees engaged in the operation of trains upon interstate railway carriers, and make such a temporary wage regulation, as is done by the Act of September 3, 5, 1916 (39 Stat. L. 721, c. 436, Fed. St. Ann. Pamph. Supp. No. 8, p. 139), which establishes a permanent eight-hour standard for a day's work by such employees, creates a commission to observe during a period of not less than six nor more than nine months the operation and effect of such standard workday and to report its findings to the President and Congress within thirty days thereafter, and forbids the carriers, pending such report, and for a period of thirty days thereafter, to pay such employees for eight hours' work a wage less than the existing standard day's wage, with pro rata for all necessary overtime. Wilson v. New (U.S.) 1918A-1024.

(Annotated.)

## 5. LABOR AGENTS.

23. Employment Agencies-Regulation-Scope of Act. The Wash. Employment Agency Law (Laws 1915, p. 1), entitled "An act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof," provides in section 1 that the welfare of the state depending on the welfare of its workers demands that they be protected from conditions that result in their being liable to imposition and extortion. Section 2 makes it unlawful for any employment agent or his representative, or any other person, to demand or receive from any person seeking employment any remuneration or fee for furnishing employment or information leading thereto; while section 3 makes such act an offense. It is held that, as a "worker" is one who performs manual labor, and as the statute, if it applied to agencies for the employment of persons in the professions, might be unconstitutional as exceeding the police power, the statute does not apply to the operator of a teachers' agency whereby, for a percentage of the year's salary and a small filing fee, position were secured. Huntworth v. Tanner (Wash.) 1917D-676.

(Annotated.)

#### 6. WEEKLY REST DAY.

24. N. Y. Laws 1913, c. 740, § 8a, giving to laborers in factories and mercantile establishments one day of rest in seven, is not rendered unconstitutional by the unconstitutionality of Laws 1914, c. 396, amending it, and providing for exemption from its operation certain classes of employees in the discretion of the commissioner of labor. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051.

(Annotated.)

25. The legislature may confer upon an administrative board or official the duty to determine whether in any case conditions exist upon which an exemption from N. Y. Laws 1913, c. 740, § 8a, giving laborers in factories and mercantile establishments one day of rest in seven, is based, and to prescribe some standard by which the board or official is to decide. People v. C. Klinck Packing Co. (N. Y.) 1916D—1051. (Annotated.)

26. N. Y. Laws 1914, c. 396, exempting from the operation of Laws 1913, c. 740, § 8a, giving laborers in factories and mercantile establishments one day of rest in seven, "if the commissioner of labor in his discretion approves, [employees] engaged in the work of any industrial or manufacturing process necessarily continuous, in which no employee is permitted to work more than eight hours in any calendarday," is unconstitutional, as a general delegation of legislative power to the com-

missioner of labor; he being authorized to decide as to the exemption of employees in his discretion, and subject to no restraining rules imposed by the statute. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051. (Annotated.)

- 27. N. Y. Laws 1914, c. 388, exempting from the operation of Laws 1913, c. 740, § 8a, giving to laborers in factories and mercantile establishments one day of rest in seven, "employees in dairies, creameries, milk condensaries, milk powder factories, milk sugar factories, milk shipping stations, butter and cheese factories, ice cream manufacturing plants, and milk bottling plants, where not more than seven persons are employed," is within the legislative power as being based on a reasonable classification, since so long as there is real difference in the situation, interest, and capacity of different classes of citizens, such difference may be made the basis of legislative classification. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051. (Annotated.)
- 28. In determining the constitutionality of N. Y. Laws 1913, c. 740, § 8a, giving to laborers in factories and mercantile establishments one day of rest in seven, the court cannot determine whether the statute is the wisest and best way to effect the legislative purpose, but can merely ascertain whether the provision on its face seems reasonable, and whether its natural consequences will be in the direction of the betterment of the public health and welfare. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051. (Annotated.)
- 29. The question what measure of leisure should be given to laborers in factories and mercantile establishments, for the promotion of public health and welfare, was for the legislature, in enacting N. Y. Laws 1913, c. 740, § 8a, giving such laborers one day of rest in seven, and is not subject to revision by the courts, unless its determination was palpably unreasonable. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051. (Annotated.)
- 30. Laws N. Y. 1914, c. 512, exempting from the operation of Laws 1913, c. 740, § 8a, giving laborers in factories and mercantile establishments one day of rest in seven, when necessary to preserve property, life, or health, subject to determination by the industrial board, employees in "power houses, generating plants, barns, storage houses, sheds and other structures, owned or operated by a public service corporation, other than construction or repair shops subject to the jurisdiction of the public service commission under the public service commission law," is an exemption of employees based on obvious reasons and grounds of classification, and is constitutional; the powers conferred on the industrial board being so limited in extent and so governed by the rules pre-

scribed by the statute itself as to be clearly within the power of the legislature. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051. (Annotated.)

- 31. Validity. N. Y. Laws 1913, c. 740, § 8a, providing for one day of rest in seven for all laborers in factories and mercantile establishments, and that only certain specified classes of employees may labor on Sunday, cannot be sustained as constitutional as a statute enforcing the religious observance of any day. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051. (Annotated.)
- 32. N. Y. Laws 1913, c. 740, § 8a, providing for one day of rest in seven for laborers in factories and mercantile establishments, is not so disconnected with the probable promotion of public health and welfare, and so extravagant and unreasonable, that its enactment is beyond the jurisdiction of the legislature in the exercise of its legitimate police power. People v. C. Klinck Packing Co. (N. Y.) 1916D-1051. (Annotated.)

#### Note.

Validity of statute requiring weekly rest 'day for employees. 1916D-1058.

#### LABORER.

Defined, see Mechanics' Liens, 10.

## LABORER'S LIEN.

See Liens, 4.

#### LABOR UNIONS.

See Labor Combinations.

#### LACHES.

See Limitation of Actions.

As defense against setoff, see Bankruptcy, 8.

As defense to reformation of deed, see Rescission, Cancellation and Reformation, 5.

As defense to cancellation, see Rescission, Cancellation and Reformation, 18-20.

- 1. Setting Aside Gift. Where plaintiffs, in a suit to set aside a gift causa mortis, knew as much about the facts 12 years before as when suit was commenced, their acquiescence in the gift for that time was laches. Baber v. Caples (Ore.) 1916C-1025.
- 2. Delay in Proceeding Against Nuisance. Where conditions creating a nuisance by the operation of a brick manufacturing plant over a period of many years are gradual and cumulative in their character, and the nuisance is a continuing one, laches do not defeat injunctive relief. Face v. Cherry (Va.) 1917E-418.
- 3. Proof Obscured by Delay. He who, without adequate excuse, delays asserting his rights until the proofs respecting the

transaction out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what is asserted to be justice to him is not injustice to his adversary, has no right to relief. Soper v. Cisco (N. J.) 1918B-452.

4. What Constitutes—Delay in Concluding Suit. The plaintiff in an action in the nature of a creditor's bill, is not guilty of laches in reducing his claim to judgment, where he has been diligent in prosecuting his claim, although more than ten years have elapsed before judgment is obv. Fosha tained. Underwood 1917A-265.

## LANDLORD AND TENANT.

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Liability of lessee for injury by defects in

dock, see Negligence, 10-12. Liability of landlord for injury t ant's guest, see Negligence, 83.

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Duty to patrons of lessee of amusement device, see Theaters and Amusements.

## 1. CREATION AND EXISTENCE OF RELATION.

1. Occupant of House as Servant or Tenant. The relation of landlord and tenant does not exist between an employer and an employee who is furnished a house as part compensation for his services, and, where he voluntarily leaves the employment, his right to the use of the house immediately ends. Lane v. Au Sable Electric Co. (Mich.) 1916C-1108. (Annotated.)

Notes.

Person occupying premises of employer as part of compensation as tenant of owner. 1916C-1111.

Legal status of owner of apartment house. 1917A-256.

#### 2. LEASES.

#### In General.

- 2. Oil and Gas-Nature of Leases-Applicability of General Statutes. Gas and oil leases and contracts are apart by themselves. They partake of the nature of both "sale" and "lease"; and they have features which may not be applied to The law referring to sales and either. leases found in the code cannot be unreservedly applied to them. Gulf Refining Co. v. Hayne (La.) 1917D-130.
- 3. But the law in the code will be applied to oil and gas leases by the courts in cases where it can be applied. Gulf Refining Co. v. Hayne (La.) 1917D-130.

#### b. Implied Covenants.

- 4. Quiet Enjoyment. As against a lessor, or any one holding under him, a covenant of quiet enjoyment of the premises is implied in a lease silent on that subject. Stewart v. Murphy (Kan.) 1917C-612. (Annotated.)
- 5. A written lease which recites that the lessor "doth hereby let" and which contains a covenant against subletting by

the lessee, that the lessee will not "let or demise, or in any manner dispose of the hereby demised premises, or any part thereof, for all or any part of the term hereby granted, to any person or persons whatever," does not create an implied covenant for quiet enjoyment. May v. Levy (N. J.) 1917C-619. (Annotated.)

- 6. In case of a demise, a covenant of quiet enjoyment is implied for from the fact of the letting, it will be presumed that the landlord had the right to lease, and that he agreed to protect the lessee against eviction, either by title paramount or his own acts. Northern Brewery Co. v. Princess Hotel (Ore.) 1917C-621. (Annotated.)
- 7. The implied covenant of quiet enjoyment arising in case of a lease is not in violation of Ore. L. O. L. § 7105, declaring that no covenant shall be implied in any conveyance of real estate, for a lease of land is not a conveyance. Northern Brewery Co. v. Princess Hotel (Ore.) 1917C-621. (Annotated.)

#### Note.

Implication of covenant for quiet enjoyment in lease. 1917C-615.

- 3. POSSESSION AND USE OF PREMISES.
- a. Tenant's Right to Possession Generally.
- 8. Duty to Put Tenant into Possession. Where, at the time plaintiffs leased certain premises to defendants, plaintiffs were in actual possession of the whole, being owners in fee of a portion and holding over as lessees of the residue, they were not bound to put defendants into actual possession, but it was sufficient that they had the premises open to entry without any obstacle in the form of a superior right to prevent defendants from obtaining actual possession. McGhee v. Cox (Va.) 1916E-842.
- 9. Putting Lessee into Possession—What Constitutes. A lessee, working upon the leased premises on the first day of his term, does not thereby obtain possession thereof, where the premises are in the rightful possession of a prior tenant. Stewart v. Murphy (Kan.) 1917C—612.

## b. Condition of Premises.

10. Liability of Landlord. A landlord ordinarily owes no duty to look after the safety of the leased premises, but where he retains possession and control of common passageway, he must keep them as safe as they were or appeared to be at the commencement of the tenancy. Gallagher v. Murphy (Mass.) 1917E-594.

## Note.

Duty to maintain fire escapes. 1916E-629.

- c. Use of Premises.
- (1) Use of Walls for Advertising Purposes.
- 11. Rights of Tenant. Where a lease is of "the lower floor and shed" of a brick building, the lessee has the right to use reasonably the columns or walls of the building for advertising his business, as by painting a sign thereon, etc., unless such use is unusual, unreasonable, or harmful as against the objection by the landlord that he wishes himself to use the columns for advertising his own business in the same building. Snyder v Kulesh (Iowa) 1916C-481.

#### (Annotated.)

Note.

Right of tenant of building to use of front wall for advertising purposes. 1916C-482.

#### (2) Use by Lessor.

12. Rights of Tenant - Particular Use of Premises - Occupying Premises at Night. A lease of premises on shares, reserving to the lessor two rooms in the dwelling on the premises until a dwelling could be rented or a place secured for storage, under which the lessor's furniture, etc., was moved into two rooms, and the key to the outside door of one of which was kept by him, did not give the lessor the right to occupy the rooms as a residence or for sleeping purposes, or any purpose, except to care for or remove the property, during reasonable hours; and hence he had no right to be there with a lighted lamp between 7:30 and 8 o'clock in the evening to arrange the furniture for removal. Oleson v. Fader (Wis.) 1917D-314.

#### d. Building Restrictions.

13. Duty to Provide Fire Wash. Laws of 1909, p. 43, regulating buildings used for hotels, section 11 section 11 (Rem. & Bal. Code, § 6040) of which imposes a penalty upon every owner, manager, agent, or person in charge of a hotel for failure to comply with the act, does not require the owner of a building, leased for a long term to a tenant who is conducting a hotel on the premises, under a lease which did not require the owner to make repairs or equip the building for such purpose, to pay for the installation of a fire escape, as required by the city under the authority of that act; the term "owner of the hotel" referring to the owner of the hotel business and not to the owner of the building in which it was conducted. Clarke v. Yukon Investment Co. (Wash.) 1916E-625.

(Annotated.)

## e. Repairs.

14. Right of Tenant to Repair at Landlord's Expense—Waiver. Under Cal. Civ.

Code, § 1942, providing that if within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair them himself if the cost is not greater than one month's rent, and deduct the expense from the rent, this right to make repairs at the expense of the lessor is waived by an express provision to that effect in the lease. Arnold v. Krigbaum (Cal.) 1916D-370.

15. Duty of Landlord to Repair. In the absence of a covenant to repair or to keep the property in condition for intended use, there is no liability upon the lessor to do so. Clarke v. Yukon Investment Co. (Wash.) 1916E-625.

# f. Injury to Tenant's Property by Fire.

16. A tenant, occupying a part of a building under a written lease, may continue to hold under the lease, although the part occupied has become uninhabitable by reason of a partial destruction by fire. O'Neal v. Bainbridge (Kan.) 1917B-293.

# g. Liability of Lessor for Personal Injuries.

17. Injury to Third Person. The provisions of the Housing, Town Planning, etc., Eng. Act of 1909, by virtue of which a landlord is required to keep the premises in habitable condition, are for the sole benefit of the tenant, and the landlord is not liable to a third person injured by reason of the defective condition of the premises. Ryall v. Kidwell (Eng.) 1916C—815. (Annotated.)

18. A tenant's guest may recover for injuries due to the negligence of the land-lord. Gallagher v. Murphy (Mass.) 1917E-594.

19. At the expiration of a tenancy, whether with or without actual change of possession, a landlord may lawfully enter and make necessary repairs; and his neglect so to do renders him liable for injuries resulting from defects then existing in the premises demised. Hill v. Norton (W. Va.) 1917D-489.

## h. Duty to Light.

20. Duty to Light Common Hallways. In the absence of a contract or statutory obligation to do so, the landlord of a tenement house need not light common passageways. Gallagher v. Murphy (Mass.) 1917E-594. (Annotated.)

Duty of landlord to light passageway common to tenants. 1917E-596.

# 4. ASSIGNMENT OR SUBLETTING.

21. Effect of Assignment — Liability of Lessee for Rent. A lessee, who has not

agreed to pay rent on assignment with the landlord's consent, is relieved of further obligation to pay rent, which is thereafter due from the assignee who has come into privity of estate with the landlord, but the liability of a lessee who expressly agrees to pay rent remains, notwithstanding an assignment with the landlord's consent, since there is no privity of contract between the landlord and the assignee, and he is a surety for the assignee's payment of rent; the term "express agreement" meaning, not merely a promise in exact words to pay a given sum as rental, but language necessarily importing the lessee's undertaking to pay Samuels v. Ottinger (Cal.) the rent. 1916E-830. (Annotated.)

22. Under a lease for the term of ten years at a monthly rental payable in advance, providing that the lessee shall pay all bills for water, gas, and electricity and all taxes on improvements, and requiring the lessee to insure for the joint benefit of himself and the lessor to secure payment of rent; that improvements shall be security for rent, that the lessee holding over shall be a tenant from month to month paying rent as under the lease and with the right to sublease, there is a contract or covenant to pay a stipulated rental from the obligation of which the lessee is not released by his assignment, so that he is liable for the rent with interest from the day it fell due. Samuels v. Ottinger (Cal.) 1916E-830.

(Annotated.)

23. If a lessor, with knowledge of a breach by the lessee of the restriction against assignment of the lease, permits the assignee to remain in possession of the premises and accepts subsequently accruing rents from him, the breach is waived. Kanawha-Gauley Coal, etc. Co. v. Sharp (W. Va.) 1916E-786.

24. Although a lessee assigns the lease with the lessor's assent, he nevertheless remains liable on his express covenant to pay rent, notwithstanding rent is accepted from the assignee, unless the lessor expressly agrees to release him and substitute the new tenant in his stead. Kanawha-Gauley Coal, etc. Co. v. Sharp (W. Va.) 1916E-786. (Annotated.)

25. Where a lease was assigned without the consent of the lessor, in violation of a covenant therein, but the lessor, with knowledge of the assignment, thereafter received rents due from the lessee for several months, and until it elected to terminate the lease by giving notice according to its terms, and made no objection to the subletting or assignment, the covenant was waived. McGhee v. Cox (Va.) 1916E-842.

26. Since a covenant against assignment of a lease without the lessor's consent is

for the sole benefit of the lessor and his assigns, a breach of the restriction by the lessee is not available to an assignee of the lease in defense to an action for rent. McGhee v. Cox (Va.) 1916E-842.

(Annotated.)

- 27. While the mortgagee of a term after foreclosure is regarded as the assignee and is liable on the real covenants, the right to hold him on such covenants should be clearly established, since otherwise great hardship may be imposed on the mortgagee, and this is especially true in a suit in equity, which is the landlord's only remedy on such covenants after the assignee has gone out of possession. Gibbs v. Didier (Md.) 1916E-833. (Annotated.)
- 28. Where a mortgage of a leasehold which required the lessee to pay taxes left the title in the mortgagor until default, and there was no default until the taxes for a certain year became legally payable, the landlord cannot hold the mortgagee, as assignee of the lease, for those taxes. Gibbs v. Didier (Md.) 1916E-833. (Annotated.)
- 29. The owner of a building leased same to a corporation for a period of three years at a stipulated rental of \$75 per month. The lessee, after the expiration of about one year, by parol agreement, assigned the lease. The assignee took possession of the demised premises, paid the purchase price for the lease, and performed the covenants thereof by paying for a time the monthly rentals to the lessor, as provided in the lease contract; but, before the expiration of the lease, the assignee abandoned the premises and refused to pay the rents for the unexpired term. Held, that the assignment of the lease was in violation of the statute of frauds, and void (section 1089, Comp. Laws Okla. 1909), but that the acts of the assignee relieved it from the operation of the statute, and that the assignee was liable to the lessor for the full term of the lease. Tyler Commercial College v. Stapleton (Okla.) 1916E-837.

(Annotated.)

- 30. The assignee of a lease is liable to the lessor by reason of privity of estate for rents on the demised premises, so long as the privity of estate continues. Tyler Commercial College v. Stapleton (Okla.) 1916E-837. (Annotated.)
- 31. An assignee cannot, by mere abandonment of possession of the premises, without an assignment of the lease, avoid liability for rents. Tyler Commercial College v. Stapleton (Okla.) 1916E-837.

  (Annotated.)

#### Note.

Effect of assignment of lease or sublease by tenant on liability for rent. 1916E-788.

#### 5. RENT.

- a. Rights and Liabilities in General.
- 31½. Transfer of Reversion—Right to Rent. Transfer of the reversion will not carry rents already accrued. Barber v. Watch Hill Fire District (R. I.) 1916D—191. (Annotated.)
- 32. Implied Contract to Pay Rent. An obligation to pay rent, without an express agreement thereto, arises from the mere occupancy of the premises as tenant. Samuels v. Ottinger (Cal.) 1916E-830.

#### Note.

Person to whom rent is payable, in absence of governing statute, in case of sale, mortgage or other grant of reversion. 1916D-192.

#### b. Determination of Amount.

- 33. Effect of Eviction of Tenant. Where, at the suit of the landlord, the tenant was evicted, and a receiver, appointed by the court, took possession of the premises, the tenant's liability for rent then ceased, and the landlord can, on foreclosure of a chattel mortgage to secure the rent, recover only that already accrued. Northern Brewery Co. v. Princess Hotel (Ore.) 1917C-621.
- 34. Effect of Re-entry by Lessor—Rents Subsequently Accruing. Under Md. Code Pub. Civ. Laws, art. 75, § 73, providing that where there is one-half year's rent in arrears and the lessor has the right to re-enter for the nonpayment he may, without formal demand or re-entry, serve a copy of a declaration in ejectment for the recovery of the premises, the landlord cannot, in an action thereunder, recover as rent instalments falling due after the copy of the declaration was served, but the right to the rent and taxes due prior to that time is not extinguished by the action. Gibbs v. Didier (Md.) 1916E-833.

#### c. Exemptions from Seizure.

35. Exemptions — What Constitutes "Tool or Instrument"—Wagon. A wagon used by a teamster in making his living is a "tool or instrument," exempt from seizure for rent, under article 2705 of the La. Civil Code. Schwartz v. Dennis (La.) 1917D-94. (Annotated.)

#### d. Actions.

#### (1) Right to Maintain.

36. Understanding That Compensation is Expected. Where plaintiff, suing for the rent of a fence on his land by the defendant for advertising purposes, had made no contract or such use with the defendant who immediately, upon notice that he would be charged compensation, ceased to make use of the fence, plaintiff

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cannot recover, since, to maintain assumpsit for the use and occupation of land, something in the nature of a demise must be shown, or some evidence establishing the relation of landlord and tenant, which can only spring from agreement, express or implied. Stevenson v. Donnelly (Mass.) 1917E-932.

## (2) Defenses.

- 37. Mortgage of Reversion Right to Rent. A tenant of the mortgagor under a lease executed subsequently to the mortgage, upon which mortgage default has been made, by attornment and payment of the rent accruing subsequently to the mortgagee, disentitles the mortgagor from recovering such rent from the tenant. Hinck v. Cohn (N. J.) 1916D-200.
- 38. Failure to Repair. A lessor's covenant to repair and the lessee's covenant to pay rent are usually considered as independent covenants, and unless the covenant to repair is expressly or impliedly made a condition precedent to the covenant to pay rent, the breach of the lessor's covenant does not justify the nonpayment of rent. Arnold v. Krigbaum (Cal.) 1916D-370.
- 39. Disturbance of Possession. Plaintiffs, being lessees of a quarry on a railroad right of way, assigned the same to defendants, and shortly thereafter the railroad company refused to permit further operations, unless defendants paid the wages of a watchman while work was being done in the quarry. This defendants refused to do, and thereupon ceased operating the quarry, and alleged such fact as a breach of plaintiffs' contract in defense of an action for rent. Held, that defendant's rights as to the operation of the quarry with or without a watchman depended on the construction of the written contract between plaintiffs and the railroad company, and not on the contention of either party with reference thereto, and hence the railroad company's claim constituted no defense to defendant's liability for rent. McGhee v. Cox (Va.) 1916E-842.

## (3) Evidence.

40. In a suit for rent where the defendant in his specification of defenses set up that there was no such person as the alleged plaintiff in the suit, the evidence is held not to justify a finding that the plaintiff was a fictitious person. Baldauf v. Nathan Russell (N. J.) 1917D-1191.

(Annotated.)

#### 6. TERMINATION OF LEASE.

## a. Eviction.

#### (1) Remedy of Tenant.

41. Rights of Transferee of Reversion— Entry for Nonpayment of Rent. A purchaser of the reversion is liable for trespass in removing the property of a tenant for the nonpayment of rent accruing before the transfer. Barber v. Watch Hill Fire District (R. I.) 1916D-191.

#### Note.

Right of tenant to recover damages in case of eviction by title paramount. 1916D-1147.

## (2) Damages.

- 42. Damages—Refusal to Permit Tenant to Occupy Loss of Profits. Loss of profits, when they can be ascertained, is a proper measure of damages for wrongfully refusing to permit a tenant to occupy the premises covered by a lease. O'Neal v. Bainbridge (Kan.) 1917B-293.
- 43. Eviction by Title Paramount—Damages. Where a lessor understood, at the time of the making of the lease, the use which the lessee intended to make of the premises, and knew that alterations and repairs were made in pursuance of that understanding, the lessor is liable to the lessee, evicted by a third person having superior title, for the necessary expenses incurred in making the alterations and repairs. Wolf v. Megantz (Mich.) 1916D—1146. (Annotated.)

### b. Surrender of Premises.

44. Termination by Consent. The cancellation of a lease, by act of the parties, must have the consent of both lessor and lessee. O'Neal v. Bainbridge (Kan.) 1917B-293.

## c. Option to Terminate.

- 45. Written notice, on which a lease provides that the lessee may terminate it, is waived, where the lessee gives oral notice, and the lessor does not object thereto, and by his words and conduct leads the lessee reasonably to believe the informality is waived. Citizens' Bank Bldg. v. L. & E. Wertheimer (Ark.) 1917E-520. (Annotated.)
- 46. Construction. Under a lease for a saloon providing that if prohibition be established, the lessee may at his option terminate it, petition of adult inhabitants for issuance of license being filed on the day the statute became operative, notice of termination given within ten days after withdrawal of the petition is in a reasonable time. Citizens' Bank Bldg. v. L. & E. Wertheimer (Ark.) 1917E-520.

(Annotated.)

### d. Notice to Quit for Nonpayment of Rent.

47. Notice to Quit — Sufficiency. A notice to a tenant to pay rent overdue or surrender possession, under Cal. Code Civ.

Proc. § 1161, signed by the lessor's "attorney," is not insufficient because of its failure to show whether the person signing it is the lessor's attorney at law, or her attorney in fact. Arnold v. Krigbaum (Cal.) 1916D-370.

## e. Destruction of Building.

48. Whether or not a building has been totally destroyed is ordinarily a question of fact for the jury. O'Neal v. Bainbridge (Kan.) 1917B-293.

#### Note.

Right to interpose set-off or counterclaim in action by landlord to recover demised premises. 1916D-372.

## 7. RENEWAL OF LEASE.

- 49. Holding Over Renewal of Covenants. Where a lessee for years holds over after the expiration of his term, and becomes a tenant from year to year, the tenancy is subject to all the covenants and stipulations contained in the original lease, so far as they are applicable to the new condition of things. Barber v. Watch Hill Fire District (R. I.) 1916D-191.
- 50. Covenant for Perpetual Renewal of Lease. Covenants in a lease for continual renewals, while not favored, because tending to create a perpetuity, are valid and enforceable if explicit and clear. Burns v. New York (N. Y.) 1916C-1093.

(Annotated.)

- 51. A covenant in a lease by a city for 21 years to renew it at its expiration for 21 years, "with a like covenant for future renewals of the lease as is contained in this indenture," is one for future renewals in perpetuity. Burns v. New York (N. Y.) 1916Č-1093. (Annotated.)
- 52. Four renewals of a lease for 21 years are a practical construction of a covenant of the original lease, to be given great weight by a court, as one for future renewals in perpetuity. Burns v. New York (N. Y.) 1916C-1093. (Annotated.)

#### Note.

Construction of covenant in lease for renewal as covenant for perpetual renewal. 1916C-1096.

# 8. ESTOPPEL OF LESSEE TO DENY LESSOR'S TITLE.

53. Right to Crops. Where on a conveyance of leased land the landlord's interest in a growing crop is reserved, the rule that a tenant cannot deny his landlord's title does not prevent the tenant from defending an action by the grantee for the value of such crop on the ground that it has been delivered to the grantor. Willard v. Higdon (Md.) 1916C-339.

#### Note.

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## LAPSING OF LEGACIES.

See Wills, 249, 250.

## LARCENY.

- 1. Subjects of Larceny, 503.
- 2. Prosecutions, 503.
  - a. Indictment, 503.
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  - d. Questions for Jury, 504.

#### 1. SUBJECTS OF LARCENY.

1. Animals ferae naturae, while they are reclaimed, are the subject of larceny. Graves v. Dunlap (Wash.) 1917B-944.

## (Annotated.)

#### 2. PROSECUTIONS.

#### a. Indictment.

- 2. Duplicity. A count of an indictment charging that defendant, "at the time and place named, nineteen head of calves, of the goods, chattels, and property of owners to the grand jury unknown, then and there being found, did then and there unlawfully, etc., steal, take," etc., is not bad for duplicity, as it prima facie discloses that the larceny occurred at the same time and place, and constituted but a single transaction. State v. Klasner (N. Mex.) 1917D-824.
- 3. Indictment Sufficient. An indictment charging that defendant and others did unlawfully and feloniously take, steal, and carry away, of the personal goods and chattels of a railroad company, bailee, 4,500 pounds of clover seed, of the aggregate value of \$600, sufficiently charges grand larceny. Levi v. State (Ind.) 1917A-654.

#### b. Evidence.

- 4. In a prosecution against an employee for larceny of his employer's corn, evidence that the employee was trusted with property of his employer is outside the issues. State v. Pitt (N. Car.) 1916C-422.
- 5. An exception to a charge that an intent to steal may be inferred from the larceny alone as being improper under the circumstances of the case is not sufficient to direct the court's attention to a complaint that the court charged that the only way the intent can be determined is from the surrounding circumstances, thus excluding from consideration the defendant's testimony concerning his intent. State v. Lapoint (Vt.) 1916C-318.

## c. Variance.

6. Owner of Property Alleged to be Unknown. Where, upon the trial, witnesses testify that certain known parties owned the alleged stolen animals, and the indictment charges that the owners of the animals are unknown to the grand jury, it is incumbent upon the state to prove that the names of the owners were unknown to the grand jury and could not, by reasonable diligence, have been ascertained. State v. Klasner (N. Mex.) 1917D-824.

7. Materiality. Although proof of ownership of a stolen cow in A. B., Jr., is deemed a variance from an indictment alleging ownership in A. B., it is not ground for reversal under Wyo. Comp. St. 1910, § 6166, prohibiting acquittal on the ground of variance unless material. Harris v. State (Wyo.) 1917A-1201.

8. Name of Person Aggrieved Alleged to be Unknown. Where the name of the owner of an alleged stolen animal is alleged in the indictment to be unknown, it is not incumbent upon the state to prove, in the first instance, affirmatively, that such fact was unknown to the grand jury; but it must show that such name is unknown, or prove such a statement of facts or circumstances as render the alleged unknown fact uncertain, in which event such fact is presumed to have been unknown to the grand jury. But if there is evidence tending to show that the grand jury did know, or could by the exercise of reasonable diligence have known or ascertained, the name of the true owner, or that it was negligent or perverse in not alleging what was at its command to know, then the burden is upon the state to show that the grand jury did not know such alleged unknown name. State v. Klasner (N. Mex.) 1917D-824.

## d. Questions for Jury.

9. "Recent"-Meaning of Term. Where pieces of cloth and several pairs of trousers were stolen from a tailor shop, the question whether their possession by the defendant over a month later was so recent as to justify an inference of guilt was for the jury. State v. Stanton (Annotated.) (Iowa) 1918A-813.

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Definitions of legislature adhered to, see Statutes, 63-65.

- 1. Scope of Legislative Power. Legislature is intrusted with the general power to make laws at its discretion, and is not a special agency for the exercise of specifically defined legislative powers. Gherna v. State (Ariz.) 1916D-94.
- 2. Power of Legislature Generally. The legislature has plenary power in all matters of legislation, except as limited by the constitution. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

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## 1. NATURE AND ELEMENTS.

#### a. In General.

- 1. Liberty of Speech—Criminal Libel Statute. Rem. & Bal. Wash. Code, § 2424, is not violative of Const. U. S. Amend. 1, providing that Congress shall make no law, abridging the freedom of speech or of the press, which imposes a limitation upon the power of Congress only. State v. Haffer (Wash.) 1917E-229.
- 2. Rem. & Bal. Wash. Code, § 2424, does not violate Const. art. 1, § 5, providing that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right. State v. Haffer (Wash.) 1917E-229.
- 3. Libel or Slander of Corporation. The distinction between libel and slander obtains as fully with respect to corporations as to individuals. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.
- 4. Defamatory Words Language not Imputing Crime. A libel, as applicable to individuals, is a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead or the reputation of one alive, and to expose him to public hatred, contempt, or ridicule; any written slander, though merely tending to render the party liable to disgrace, ridicule, or contempt, being sufficient to constitute a libel though it does not impute any definite infamous crime. Brown v. Elm City Lumber Co. (N. Car.) . 1916E-631.

#### Note.

Newspaper cartoon as libel. 1917E-190.

## b. Publication.

- 5. Every repetition of a slander, or the publication thereof by a newspaper, is a republication, rendering each person so repeating or republishing liable, as well as the initial one. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 6. Dictation to Stenographer. The dictation of a letter to a stenographer employed by a person or corporation in its business is not a sufficient publication of matters therein alleged to be libelous per se, in the absence of any repetition by the person or stenographer to other persons. Cartwright-Caps Co. v. Fischel (Miss.) 1917E-985. (Annotated.)
- 7. What Constitutes. Where complainant sought to collect a claim through a firm of attorneys against defendant, the sending of a letter containing an alleged libel by defendant to complainant's attorneys constituted a sufficient publication. Brown v. Elm City Lumber Co. (N. Car.) 1916E-631.

#### Notes.

Publication of libel by communication to stenographer. 1917E-987.

Liability of author of libel or slander for repetition or republication by others. 1916E-908.

#### c. Malice.

- 8. Malice as Essential to Libel. Malice is not an essential element of civil libel, as the civil action for libel is an action for damages in which compensatory damages only are recoverable, which would be the same, regardless of the motive of the publication. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 9. In a civil action for libel, malice is material only on the question of punitive or exemplary damages. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 10. False Statement to Defeat Candidate. A slanderous charge which injured the professional reputation of a candidate for office may be made with actual malice which implies a desire and intention to injure, although defendant's only desire was to defeat the candidacy. Pattangall v. Mooers (Me.) 1917D-689.
- 11. What Constitutes Malice. "Malice" in fact, which destroys the defense of privileges, means that the defamatory words, though spoken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege, but from some other motive; the term "duty" in this connection including both legal and social obligations, which cannot be performed, unless creating a privileged occasion. Doane v. Grew (Mass.) 1917A-338.
- 12. The "malice" imputed to a publisher of a libel is not personal ill will, but merely legal malice implied from wilfully and wantonly doing an unlawful act which results in injury to another. Flanagan v. Nicholson Pub. Co. (La.) 1917B-402.

#### Note.

Malice as essential element of cause of action for slander of title, 1916D-317.

## d. Damages.

13. Repetition by Others. The initial slanderer or libeler is not responsible, in an action of slander or libel, for such repetitions and republications of the libel or slander. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.

(Annotated.)

14. Loss of Election as Element of Damage. Special damages cannot be predicated upon failure of election to office, as damages in such connection are necessarily too remote and speculative to

justify serious consideration. Taylor v. Moseley (Ky.) 1918B-1125.

(Annotated.)

15. Special Damages for Libel. Where the language of an alleged libel is not actionable per se, the plaintiff can recover only upon proof of special damages which are the natural, immediate, and legal consequence of the charge, and due exclusively to its publication by defendant. Taylor v. Moseley (Ky.) 1918B-1125.

# 2. WORDS CONSTITUTING LIBEL OR SLANDER.

#### a. In General.

16. To render a publication concerning a corporation "libelous per se," it must reasonably and naturally appear that it was of a nature to deprive the corporation of patronage or trade, or to render it odious and contemptible in the estimation of those with whom it did have or might reasonably expect to have business dealings, but it is not necessary that the publication misrepresent the character or condition of the corporation's marketable products, the methods by which its internal affairs are conducted, its capacity, or business dealings toward the public, or its products, its attitude, its business, or its stability, so as to affect its credit. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.

17. A publication, charging that a tobacco company placed a negro foreman over white girls, that they quit work and reported the trouble to the union, was libelous per se. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.

18. Charge That Name of Employer was on "Unfair List." A charge that, on refusal of a tobacco company to remove a negro foreman placed over white girls, the company was placed on the unfair list by the local union, and this action was ratified by the tobacco workers' international union, and that the advertising cards of the company were printed in "scab" shops, so as to display its contempt for organized labor, in connection with matter of inducement that the company employed only union labor, that it received from the union the right to place its label on its products, and had obligated itself to patronize only union shops, that it dealt fairly with its employees and had a good reputation with organized labor and wage-earners, and innuendo that the effect of these publications was to destroy the company's good reputation with organized labor and the public, as the operator of a union factory, is libelous. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.

(Annotated.)

19. Words Libelous Per Se. If a written or printed publication tends to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, ridiculous, or contemptible, it is "libelous per se," though spoken words are "slanderous per se" only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform duties of an office or employment, prejudice him in his profession or trade, or tend to disinherit him. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.

20. In determining whether particular words are actionable per se, the same rule does not apply to libel as to slander. Dwyer v. Libert (Idaho) 1918B-973.

(Annotated.)

21. A written communication of a character conducive to blacken the reputation of the person referred to, or excite ridicule or wrath against him, or destroy public confidence in him, is actionable, without proof of special damage. Dwyer v. Libert (Idaho) 1918B-973.

## b. Construction of Words.

22. Interpretation of Language—Understanding of Hearers. Defamatory language is to be interpreted as it would be actually understood by the hearers, taking into consideration the surrounding circumstances. Pattangall v. Mooers (Me.) 1917D-689.

23. Interpretation of Defamatory Language. Where a newspaper published an article concerning plaintiff, who was a resident of New Orleans and an international vice-president of a labor union, and who used his influence at Washington to assist San Francisco to obtain the Panama Fair as against New Orleans, stating that he was a traitor and a dangerous and suspicious character and should be driven out of town and given the cold shoulder by all self-respecting Orleanians, the words must be construed in the connection in which they were used, and not given the meaning they ordinarily possess. Flanagan v. Nicholson Pub. Co. (La.) 1917B-402.

## c. Charging Commission of Crime.

24. Actionable Words — Imputation of Crime. If words are used imputing the commission of a crime, they are actionable per se, and may be made the basis of recovery of general damages without alleging and proving special damages. Viss v. Calligan (Wash.) 1918A-819.

25. Imputation of Forgery — Language Construed. To say to an attorney, "the

contract you claim to have with this man was not signed by him, and he is here to tell you," is not actionable per se, as imputing a forgery. Fensky v. Maryland Casualty Co. (Mo.) 1917D-963.

#### Note.

Sending anonymous letter as criminal offense. 1917C-699.

- d. Holding up to Ridicule and Contempt.
- 26. Charge of Hypocrisy as Libel. It is libelous per se to charge falsely that a person is a hypocrite. Newby v. Times-Mirror Company (Cal.) 1917E-186.
- 27. Charging Wilful Falsehood. A written publication, charging one with wilful falsehood in the matter of a serious business transaction, must necessarily expose him to contempt and lower him in the common estimation of citizens, and is therefore actionable per se. Dwyer v. Libert (Idaho) 1918B-973.

#### e. Affecting Trade, Business or Profession.

- 25. The publication of a false report by a mercantile agency to its patrons, to the effect that a company with but \$50,000 capital had been sued for \$230,000 on account of "money advanced," can have no other result than that of casting doubt and suspicion on the financial standing of such company, and consequently injuring its business. Pacific Packing Co. v. Bradstreet Co. (Idaho) 1916D-761.
- 29. Criticism of Condition of Restaurant. Under Rem. & Bal. Wash. Code, § 2424, defining libel against a living person as every publication by writing, printing, etc., tending to expose him to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence, or to injure any person or association in his business or occupation, a newspaper publication charging that plaintiffs' cafeteria was unclean, unsanitary, and not well ventilated, that, if it were not for the big rotary fan in the kitchen, nothing could live, not even a microbe, that its tables, floors, etc., were damp and covered with food scraps, that its ice box and fish box were old, saturated wooden traps filled with a general mixture of eatables, tends to injure the plaintiffs in their partnership business by implying that their cafe was an unwholesome place and unfit for public patronage and is libelous per se. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 30. Imputation of Fraudulent Dealing. A complaint in an action for libel against a newspaper, alleged that defendant, in purporting to report the proceedings had before the referee in bankruptcy in the matter of the bankruptcy of Knight, Yancey & Co., which company

- was reported to have issued and disposed of spurious bills of lading for cotton, stated that a witness testified that Mr. Knight intimated that others knew of the fake bills of lading, that the witness "was closely questioned as to a loan of \$5,000 made to a Mr. Waterman [plaintiff], agent for a Mobile steamship line. It developed that the general belief is that Waterman is abroad and does not intend to return," and that "the information disclosed that several large ship-ments of cotton had been made by the way of the line represented by Waterman. It is also brought to light that several spurious bills of lading are held upon which cotton was supposed to have been routed via the lines represented by Waterman"-and alleged that the article implying that plaintiff was a fugitive, etc., was false, etc., that it was given wide circulation, and plaintiff was greatly damaged in his business as shipping agent, and deprived of the opportunity of completing profitable and honorable business connections with the organization of a steamship company, etc. Held, that the complaint stated a cause of action for libel. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 31. Charge of Unfair Treatment of Labor. A publication, charging that a tobacco company paid an average wage less than its competitors, required its employees to work a greater number of hours per day, and that the sanitary conditions of its rivals were better than those of the company, is not libelous per se. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.
- 32. Prejudice to Attorney in Profession. Slanderous words directly tending to the prejudice of one in his profession are actionable per se, though not applied directly by the speaker to the party's profession; hence a slanderous charge that an attorney who was seeking political preferment, and who had represented and opposed measures pending before the legislature, received a sum of money from the supporters of a measure to procure its passage, and thereafter received a sum of money from the opponents to defeat its passage, and did so, is slanderous per se, tending directly to destroy all confidence in him as an attorney. Pattangall v. Mooers (Me.) 1917D-689.

#### Note.

Publication that employer has been placed on "unfair list" of labor union as libelous. 1918B-570.

## f. Political Criticism.

33. Language Libelous Per Se — Attributing Statement to Candidate for Office. In a suit for libel, the language of an affidavit stating that plaintiff, a candi-

date for office, had said that he had been pandering to the Catholics as long as he was going to, but that if he did run again he could give the priests \$10 for their picnics and they would see to it that he got all the votes, is not actionable per se. Taylor v. Moseley (Ky.) 1918B-1125.

## g. Defaming a Dead Person.

34. Defamation of Deceased Person. Rem. & Bal. Wash. Code, § 2424, providing that every malicious publication otherwise than by mere speech, which shall tend to expose the memory of one deceased to hatred, contempt, etc., shall be libel, and declaring such publication a misdemeanor, eliminates common-law and statutory limitations existing at the time it was passed, and the offense is committed though the libelous publication concerns one who died before birth of any one now living, regardless of whether it injures living relatives and friends. State v. Haffer (Wash.) 1917E-229.

(Annotated.)

#### Note.

Liability for defamation of deceased person. 1917E-234

35. As used in Rem. & Bal. Wash. Code, § 2424, the word "memory" means memory of a person existing in the minds of the living, whether or not such memory rests upon the actual personal knowledge of the living or upon historical or traditional knowledge. State v. Haffer (Wash.) 1917E-229. (Annotated.)

#### h. Imputing Unchastity to Male.

36. Imputing Adultery to Man. Spoken words imputing to a male school teacher the commission of adultery, not spoken of him in respect to his calling, are not actionable in the absence of special damage. Jones v. Jones (Eng.) 1917A-1032.

(Annotated.)

Words imputing immoral conduct to man as actionable libel or slander. 1917A-1043.

#### 3. PRIVILEGED COMMUNICATIONS.

### a. In General.

37. Political Criticism. A libelous newspaper article is not privileged within Cal. Civ. Code, § 47, subd. 3, merely because about a person active in promoting his own political views. Newby v. Times-Mirror Company (Cal.) 1917E-186.

## b. In Respect to Judicial Proceedings.

38. Statement by Attorney in Judicial Proceedings. The parties were members of the bar. Words clearly slanderous were addressed to the plaintiff by the

defendant in a pending proceeding in a police court. The defendant justifies upon the ground that they were uttered by him as counsel in a cause then and there pending, and as such were privileged. Held, that the rule of privilege invoked and enunciated in the case of Munster v. Lamb, 11 Q. B. Div. 588, commonly designated as the English rule, has been quite generally repudiated in this country, and is not the law of this state. La Porta v. Leonard (N. J.) 1917E-167.

(Annotated.)

39. Held, further, that the privilege invoked does not extend to the limit of protecting counsel in giving utterance to slanderous expressions against counsel, parties, or witnesses, which expressions have no relation to or bearing upon the issue or subject-matter before the court. La Porta v. Leonard (N. J.) 1917E-167. (Annotated.)

40. Held, further, that where it appeared upon the trial that the plaintiff had previously at the same hearing given utterance to slanderous remarks concerning the defendant, it was proper to have such remarks considered by the jury, upon the question of the existence of malice or provocation in mitigation of damages, and that the refusal of the trial court to so charge was error. La Porta v. Leonard (N. J.) 1917E-167. (Annotated.)

41. Testimony of Witness. Words spoken in the course of a judicial proceeding, though such as to impute a crime to plaintiff, and therefore actionable per se if spoken elsewhere, are not actionable if they are applicable and pertinent to the subject of inquiry. Viss v. Calligan (Wash.) 1918A-819. (Annotated.)

42. Words spoken voluntarily for the purpose of defamation, and not in response to questions propounded, are not privileged, although used in the course of a judicial proceeding. Viss v. Calligan (Wash.) 1918A-819. (Annotated.)

43. Complaint to Magistrate. If the defendant in good faith stated that he wanted plaintiff arrested immediately for stealing his stand of bees, and was disclosing what he believed to be the facts for the purpose of advising the justice of the peace in whose presence the statement was made, he would be protected by the rule of privilege, but the rule is otherwise if the statements were made in bad faith. Viss v. Calligan (Wash.) 1918A-819.

44. Complaint Against Public Officer. Where a complaint has been made against D., a public officer, who thereupon requests that the complaint be filed in writing, in order that he may be heard thereon, he thereby creates a privilege in the paintiff, conditioned upon good faith and the absence of malice. Dwyer v. Libert (Idaho) 1918B-973. (Annotated.)

#### Notes.

Statement in response to extra judicial assertion of civil liability as actionable libel or slander. 1916E-633.

Privilege of attorney from prosecution for libel or slander for statements made in judicial proceedings. 1917E-169.

Testimony of witness as privileged within law of libel and slander. 1918A-822.

## c. Concerning Candidate for Office.

- 45. Criticism of Candidate—Malice. If defendants in good faith and believing them true, uttered false statements concerning plaintiff, a candidate for governor, no express malice is shown, despite the falsity of the statement and their intention to injure plaintiff, for defendants had the right to use their utmost endeavors to defeat plaintiff's candidacy. Egan v. Dotson (S. Dak.) 1917A-296.
- 46. S. Dak. Const. art. 6, § 5, declares that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right; while in all trials for libel the truth, when published with good motive and for justifiable ends, shall be sufficient defense. S. Dak. Civ. Code, § 29, defines "libel" as a false and unprivileged communication exposing any person to hatred, contempt, ridicule, or obloquy, or which has a tendency to injure him in his occupation, while section 31, subd. 3, defines a "priviléged communication" as one without malice, to a person interested therein, or by one who is also interested, or by one who stands in such relation as to afford a reasonable ground for supposing the motive for the communication innocent. Held that, under the statute, a charge made against a candidate for public office is privileged if the person making it believes in the truth of the charge and has probable ground for his belief. Egan v. Dotson (S. Dak.) (Annotated.) 1917A-296.
- 47. When a person becomes a candidate for a public office, his qualifications and fitness may be freely and fully discussed, and such discussion and criticism, so long as it is made in good faith without express malice, is privileged, but the publication of false charges of specific acts of culpable dishonesty against an attorney who is a candidate for office which tend directly to injure him in his profession and defame his reputation for integrity is not privileged. Pattangall v. Mooers (Me.) 1917D-689. (Annotated.)
- d. Communication by One Owing Duty to Another.
- 48. Common Interest in Subject-matter, "Qualified privilege" extends to all communications made in good faith upon any subject-matter in which the party com-

- municating has an interest or in reference to which he has a duty to a person having a corresponding interest or duty, although the duty be not a legal one, but of a moral or social character of imperfect obligation; and it arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty. Southern Ice Co. v. Black (Tenn.) 1917E-695.
- 49. Statement in Response to Assertion Defendant lumber company having shipped a car load of hay to complainant, he claimed a shortage and placed his claim with attorneys for collection. They wrote defendant lumber company, and in reply received a communication denying any shortage and closing with a statement that it was just a case where the writer thought complainant wanted to get \$10 allowance on a car of hay. Held, that such statement was not only strictly true, but was not an improper manner of characterizing complainant's claim, and was not therefore libel-ous. Brown v. Elm City Lumber Co. (N. Car.) 1916E-631. (Annotated.)
- 50. Where a complainant, through his attorneys, made claim on defendant lumber company for a shortage in a shipment of hay and defendant company replied, denying any shortage and stating that in its opinion it was just a case where complainant wanted to get \$10 allowance on a car of hay, the case was one of qualified privilege, and complainant could not recover for an alleged libel contained in the letter to his attorneys, in the absence of proof of malice. Brown v. Elm City Lumber Co. (N. Car.) 1916E-631.

(Annotated.)

- 51. Altercation Over Property Rights. A communication made in the course of an altercation concerning personal or property rights and bearing some reasonable relation to the subject-matter of the controversy, is privileged, and it should be left to the jury to say whether the defendant has abused his privilege. Alderson v. Kahle (W. Va.) 1916E-561.
- 52. Statement by Guardian in Interest of Estate. False statements made by a guardian of an insane ward to relatives of his ward, imputing dishonesty and crime to another who is making a claim against the ward and his estate, are not within the rule of absolute privilege. Marney v. Joseph (Kan.) 1917B-225.

(Annotated.)

53. Neither will the false statements above referred to be conditionally privileged if they were not written or spoken in good faith in the performance of the guardian's duty and without a malicious purpose, nor if the statements include libelous matter not pertinent to the subject within the privilege of the guard-

ian to write and publish. Marney v. Joseph (Kan.) 1917B-225.

(Annotated.)

#### Notes.

Statement by fiduciary with respect to subject-matter of trust as privileged within law of libel and slander. 1917B-227.

Communication to relative or member of family as privileged within law of libel and slander. 1917E-895.

- e. Communications Between Mercantile Agency and Subscriber.
- 54. Credit Report. The secretary of an unincorporated association of tradesmen organized for the exchange of credit information among its members acts in answering an inquiry by a member as the confidential agent of the individual member and a qualified privilege attaches to his report. London Association v. Greenlands (Eng.) 1916E-535.

  (Annotated.)

55. Report of Mercantile Agency. The report of a mercantile agency to its patrons on the credit and financial standing of a business concern is not a privileged communication. One who conducts the business of selling information concerning the affairs of others is responsible for the consequences of his acts, and liable in damages for the publication of libelous matter. Pacific Packing Co. v. Bradstreet Co. (Idaho) 1916D-761.

(Annotated.)

## Note.

Report of mercantile agency as privileged within law of libel and slander. 1916D-764.

## f. Loss of Privilege.

- 56. Effect of Presence of Bystanders. Where the presence of bystanders at a conversation between husband and wife is a mere casual incident, not in any sense sought for by the defendant, the latter will not be deprived of the privilege. Conrad v. Roberts (Kan.) 1917E-891.
- 57. Presence of Person not Interested. In action for oral slander by statement of one servant to another in the course of his employment that plaintiff was dishonest, the privilege was not lost because of the presence of the bookkeeper and his assistant; they being present because they were keeping the books in which would be entered the settlement based on the alleged dishonest act. Southern Ice Co. v. Black (Tenn.) 1917E-695.

#### Note.

Fact that conversation is overheard by third person as affecting privilege of communication within law or slander. 1917E-699.

- g. Communications Between Husband and Wife.
- 58. Communication Between and Wife as Privileged. In an action for slander the defendant pleaded a qualified privilege that the words were spoken in a conversation with her husband at a time when she understood her husband was liable to be arrested for his conduct with the plaintiff and another woman where he lived, and that it would result in disgrace being brought upon their family, and that she desired to warn him in the protection of his own interests as well as that of the family. Held, that an instruction charging that if a third person overheard what was said the matter was not privileged unless such person was a mere eavesdropper, was error. Conrad v. Roberts (Kan.) 1917E-891.

(Annotated.)

- h. Communications by Creditor to Debtor.
- 59. Letter Mailed to Person Defamed Thereby. A letter written by defendant corporation to plaintiff concerning a business transaction between them, and urging payment for machinery sold to plaintiff, sent under seal and for plaintiff's inspection alone, is privileged, and alleged libelous statements therein does not constitute actionable libel. Cartwright-Caps Co. v. Fishel (Miss.) 1917E-985.
- i. Application to Public Officer or Body.
  60. Petition to Revoke License. Such petitions are privileged only in the absence of malice on the part of the petitioners. McKee v. Hughes (Tenn.) 1918A-459.

  (Annotated.)
- 61. Where a number of residents of a town petitioned the mayor and board of aldermen to revoke the defendant's license as a general merchant on the ground that his store was a public nuisance, pursuant to which the board illegally revoked the license, but the petition was signed and presented without malice and in the honest belief that the board had power to act, defendants are not liable for plaintiff's loss occasioned by the revocation, since their action was a lawful exercise of the right to apply by address to government authorities for the redress of grievances secured by Const. Tenn. art. 1, § 23. McKee v. Hughes (Tenn.) 1918A-459. (Annotated.)
- 62. Complaint Against Public Officer. A complaint against a public officer, filed with a body having a right to discharge him, is conditionally privileged upon good faith and the absence of malice. Dwyer v. Libert (Idaho) 1918B-973.

Note. (Annotated.)

Petition for legislative or executive action as privileged within law of libel and slander. 1918A-462.

## j. Matters of Public Interest.

63. Sanitary Condition of Restaurant. Defendant's newspaper publication that plaintiffs' cafeteria was unclean, unsanitary, and not well ventilated does not fall within the rule of qualified privilege, so as not to be libelous per se, as the publication is not of matters relating to appeals for public patronage, which class relates to those who are in a sense public characters, such as seekers for office, artists, inventors, showmen, and such others as by appeal to the public by advertisement in the special sense directly challenge public criticism of their claims. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

(Annotated.)

64. Report on Charges Against Army Officer. A report of the Army Council vindicating an army officer from charges made publicly against him is of such public interest that a privilege attaches to its general publication by the council. Adam v. Ward (Eng.) 1917D-249.

(Annotated.)

65. Comment on Matter of Public Interest. Where plaintiff, a resident of New Orleans, and an international vice-president of a labor union, used his influence at Washington to aid San Francisco to secure the Panama Fair as against New Orleans, which contest attracted great public interest in New Orleans and in the state, severe comment on such acts, which included a designation of plaintiff as traitor by a New Orleans newspaper, was privileged as comment on a news matter of general public interest and on the acts of one who had in that connection made himself a public figure subject to such attack. Flanagan v. Nicholson Pub. Co. (La.) 1917B-402. (Annotated.)

#### Note.

Comment on matter of public interest as libel or slander. 1917B-409.

#### k. Character of Servant or Employee.

66. Where a former employer is asked as to the character of the servant, and makes a statement that he has information as to a fact, as distinguished from a statement that the fact exists, his privilege does not depend on whether he in good faith believes the fact, or ought to have believed it, or was reckless and careless in believing it; his statement being entirely privileged if it is to the effect that information has come to him and is honestly made, his good faith not consisting in believing the fact, but in giving the information that the needs of the privileged occasion demand. Doane v. Grew (Mass.) 1917A-338.

(Annotated.)

67. Statement as to Character of Servant. When inquiry is made of a person

as to the character and capabilities of a former servant, the privileged occasion is not confined to facts of which the former employer knows of his own knowledge, nor to the giving of information which he has fully investigated, but extends to hearsay, which the person inquired of honestly believes to be true. Doane v. Grew (Mass.) 1917A-338. (Annotated.)

68. Where inquiries are made as to the character and capabilities of a former servant, the occasion is privileged, and privilege is a defense to an action for slander, though the words spoken are not in fact true, unless malice is shown. Doane v. Grew (Mass.) 1917A-338.

Note. (Annotated.)

Statement with respect to character of domestic servant as privileged. 1917A-342

#### 4. ACTIONS.

# a. Who may Maintain.

- 69. A corporation may maintain an action for slander or libel, but only when the words complained of injure it in a business way, since it is only in respect to business that a corporation can be affected or injured. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.
- 70. Person Inaccurately Designated. When a publication as a whole is plainly directed at a person or corporation, the person or corporation so assailed may maintain an action for libel as if he or it were particularly named or described, though the name has not been accurately designated in the publication. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.
- 71. Right of Action by Owner. A libelous publication relating to plaintiffs' partnership business, designating the name under which it was carried on, did not state a cause of action in favor of the plaintiffs as individuals, but as partners, and the publisher cannot escape liability for libel because it did not mention the name of either plaintiff. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

#### Note.

Right to maintain separate actions for separate statements of same libel or slander by same person. 1917A-250.

#### b. Persons Liable.

## (1) In General.

72. A corporation is not liable, without proof of malice, for damages for slander spoken by one servant to another while acting within the scope of his authority and in the interest of the master, but not actually authorized to speak the slanderous words; such words being quali-

fiedly privileged. Southern Ice Co. v. Black (Tenn.) 1917E-695.

73. Liability of Corporation. A corporation may be liable in a civil action for damages for publishing a malicious libel. Southern Ice Co. v. Black (Tenn.) 1917E-695.

#### Note.

Liability of corporation for libel or slander. 1917D-967.

## (2) Joint Liability.

74. Where a number of persons working together to a common end publish a libel, they are jointly liable, as well as severally. Finnish Temperance Soc. v. Riavaaja Pub. Co. (Mass.) 1916D-1087.

#### c. Defenses.

- 75. Statutory Action. The common-law defenses of privilege in actions for defamation are available in actions for statutory slander. Alderson v. Kahle (W. Va.) 1916E-561.
- 76. Truth as Defense. At common law, the truth of a libelous charge is usually a complete defense in a civil action for damages. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 77. Humorous Publication. That a libelous newspaper article tends to cause merriment or is a facetious rejoinder to adverse criticism by others does not justify it. Newby v. Times-Mirror Company (Cal.) 1917E-186.
- 78. Truth as Justification—Proof of Act Without Criminal Intent. As regards truth of the assertion of an alleged libel that the plaintiff was accused of a felony in altering a public record, it is enough that at his request the judgment book clerk marked out a satisfaction of judgment though for the purpose of bringing about justice and preventing a fraud; the intent in defacing the record being, under Cal. Pen. Code, §§ 113, 114, immaterial. Newby v. Times-Mirror Company (Cal.) 1917E-186.

## d. Pleading.

# (1) Complaint or Declaration.

- 79. That the complaint, in an action for libel, is objectionable for indefiniteness as to the manner of the publication, is not ground for demurrer, but it is amenable to a motion to make more specific. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638.
- 80. Complaint Sufficient. A complaint, in an action for publishing false statements as to the cause of plaintiff's discharge from defendant's employment as a locomotive engineer, setting out a letter stating that he was discharged for intimidating other employees in the per-

- formance of their duties, states a cause of action for libel; the words of the letter being actionable per se. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638.
- 81. Necessity of Alleging Special Damages. Where libelous statements are actionable per se, plaintiff is entitled to such general damages for humiliation, injured feelings, and mental sufferings as would naturally result from the publication, but cannot recover special damages without alleging them. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638.
- 82. Innuendo Defined. An innuendo in a complaint for libel means the same as "id est," "scilicet," or "aforesaid," being merely explanatory of the subject-matter sufficiently expressed before. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 83. In a complaint for libel, the office of the innuendo is to explain the subject-matter, and hence, if the language averred to have been used does not itself constitute a libel, no words contained in the innuendo can make it actionable. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 84. Inducement and Colloquium. In an action for libel, matters of inducement and colloquium averred by way of introduction must be facts and circumstances, and not mere statements; arguments, or conclusions, which show that the words in question are actionable. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- . 85. Where the words set out in the complaint in an action for libel are not actionable per se, the complaint must allege facts as inducements and colloquia to show the sense in which the language was used, etc. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 86. Action by Partnership for Libel. In an action for a newspaper libel relating to a cafeteria conducted by plaintiffs, a complaint in the name of the plaintiffs as copartners is not a misjoinder, and the defendant, without demurring for misjoinder, is entitled to construe it as an action for damages to the partnership business. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 87. Amendment—Complaint for Libel. In an action for libel, the court may properly permit plaintiff to amend his complaint so as to allege by way of inducement his trade, business, etc. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 88. Necessity of Specifying Offense. It suffices, in a common-law count for defamation to charge in appropriate terms and connection, the use of such words as

"thief" and "robber," and it is not necessary to charge accusation of the commission of a specific offense. Alderson v. Kahle (W. Va.) 1916E-561.

- 89. Necessity of Colloquium. If words used are not actionable per se, the pleader, by way of colloquium, must state such extrinsic facts as will show the slanderous meaning of the words used. Fensky v. Maryland Casualty Co. (Mo.) 1917D-963.
- 90. Office of Innuendo. It is not the purpose of an innuendo, in a petition for slander, to enlarge the words actually used, but its office is to state in what meaning the language was used. Fensky v. Maryland Casualty Co. (Mo.) 1917D—963.
- 91. Sufficiency of Colloquium-Showing Imputation of Forgery. A petition by an attorney for slander, alleging, by way of colloquium, that plaintiff was asserting rights under a contract signed by M, and that this contract evidenced a lien which plaintiff had on a cause of action on which M had against a corporation, and that defendant was vitally interested in such cause of action as indemnitor, and that defendant had knowledge of plaintiff's contract, and that agents of defendant, in the course of their employment, while calling on plaintiff in reference to the contract, stated that "the contract you claim to have with this man was not signed by him, and he is here to tell you," is sufficient to show a charge of forgery or a claim of right under a known forged instrument, and hence states a cause of action. Fensky v. Maryland Casualty Co. (Mo.) 1917D-963.
- 92. Amendment—Addition of Innuendo. If words originally charged are not actionable per se, they cannot by amendment be enlarged in their meaning merely by addition of an innuendo. Irvine v. Barrett (Va.) 1917C-62.
- 93. Necessity of Alleging Special Damage. Where publications are libelous per se, it is not essential to a good cause of action that special damage should be alleged; but, if the publication is not so obviously defamatory that the inference of injury may be drawn, it can only be made actionable when the complaining party pleads and proves that it has in fact damaged him. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.
- 94. Allegation of Time and Place of Slander. Mo. Rev. St. 1909, § 1837, providing that the petition in an action for slander need not state any extrinsic facts to show the application to the plaintiff of the defamatory matter, but it shall be sufficient to state generally that the same was spoken of or published concerning plaintiff, does not so change the commonlaw rule as to relieve plaintiff from the

- necessity of alleging when and definitely stating where the publication was made; and, where the petition is defective in this respect, plaintiff may be required, on motion to make more definite and certain, to set forth when and where and to whom the alleged defamatory words were published. Anderson v. Shockley (Mo.) 1918B-500. (Annotated.)
- 95. Suit in Several Publications—Necessity of Separate Counts. Where plaintiff, in an action for slander, desires to rely on separate publications of defamatory words, he must separately plead every such publication in separate counts of the petition. Anderson v. Shockley (Mo.) 1918B-500.
- 96. Necessity of Pleading Publication. In an action for slander, there can be no recovery for a publication which is not pleaded. Anderson v. Shockley (Mo.) 1918B-500.
- 97. Splitting Cause of Action Several Publications of Same Libel. Every separate publication of a libel is a distinct offense for which a separate action will lie, and the rule prohibiting the splitting of causes of action does not require a party to unite his several rights of action for distinct publications. Cook v. Conners (N. Y.) 1917A-248.
- 98. Allegation of Falsity. Where the matter published is libelous per se, it is not incumbent upon the plaintiff to allege its falsity; that being a matter of defense which, under Rem. & Bal. Wash. Code, § 293, must be alleged and proven as such. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

(Annotated.)

- 99. Complaint for Libel Sufficient. Held that, under the liberal rule of pleading adopted in this state, the demurrer to the complaint in this case should have been overruled, as the allegations of the complaint are sufficient to put the defendant corporation on its defense. Pacific Packing Co. v. Bradstreet Co. (Idaho) 1916D-761.
- 100. Defamatory Language Report of Mercantile Agency. Language in the report of a mercantile agency as follows: "The Pacific Packing Company has been sued in the superior court of Los Angeles county, California, by the Pacific Fruit Auction Company for the sum of \$230,000 for money advanced"—if false and maliciously made, is libelous, and therefore actionable, without alleging in the complaint any other than general damages. Pacific Packing Co. v. Bradstreet Co. (Idaho) 1916D-761.
- 101. Office of Inducement and Innuendo. In determining whether a publication charging that a tobacco company was placed on the unfair list and had its ad-

vertising printed in scab shops, is libelous per se, the court will consider matter in the petition set out by way of inducement and innuendo. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.

(Annotated.)

#### Note.

Sufficiency of complaint in action for slander with respect to averments of publication and of time and place. 1918B-504.

## (2) Plea or Answer.

102. Rumors as to Truth of Charge—Admissibility. The presumption of malice arising from the publication of a false defamatory charge is not rebutted by proof that the publisher had reason to believe the charge was true; hence evidence of rumors of the truth of the charge is properly rejected. Pattangall v. Mooers (Me.) 1917D—689.

## (3) Issues, Proof and Variance.

103. That defendant repeated an alleged slander concerning plaintiff to persons who were confessedly acting as plaintiff's agent and at her request was admissible to prove malice, though not actionable in itself. Doane v. Grew (Mass.) 1917A-338.

104. Where the petition, in an action for slander, charges that the defamatory words were spoken at a particular time and place in the presence of a particular person, evidence that defendant, in the presence of persons other than this person, at a different time and place, spoke of and concerning plaintiff defamatory words of like import to those charged, is competent as tending to show express malice in augmentation of damages. Anderson v. Shockley (Mo.) 1918B-500.

105. Where the defense consists of a general denial and a plea that the matter was privileged, the defendant may, notwithstanding neither justification nor mitigating circumstances has been pleaded, prove the truth, or may prove conduct of the plaintiff justifying the atterance of the words. Conrad v. Roberts (Kan.) 1917E-891.

106. Truth of Charge — Proof Under General Denial. In such an action where the plaintiff for the purpose of showing malice proves the utterance of words not alleged in the petition, the defendant may then prove the truth of these matters under a general denial, or may offer evidence showing conduct of the plaintiff which would excuse or justify the language. Conrad v. Roberts (Kan.) 1917E-891.

107. Proof of Colloquium and Innuendo. In actions for libel and slander, facts al-

leged as inducement or colloquia are traversable, and must be proved, while the innuendo is not traversable, and hence need not be proved. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.

108. Libel on Partnership — Damage to Individual Members. In an action for a newspaper libel relating to a cafeteria operated by plaintiffs as copartners, to recover damages for injury to their business, evidence as to the standing and reputation of one of the plaintiffs and of his family in the community is immaterial, since injury to the reputation and feelings of either partner, as an individual, is not an issue. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

109. Malice — How Proved. Malice in fact may be proved, not only by evidence that defendant made the alleged untrue defamatory statements out of hatred for plaintiff, but by evidence that defendant under circumstances of privilege went outside the privilege. Doane v. Grew (Mass.) 1917A-338.

110. Proof of Time and Place. The plaintiff, in an action for slander, should not be held to strict accuracy in his proof of the time of publication, so long as the variance between his proof and the allegation does not bring the case within the statute of limitations, or mislead defendant to his injury, or amount to a palpable fraud on the court. Anderson v. Shockley (Mo.) 1918B-500.

111. Where the petition, in an action for slander, charges that the defamatory words were spoken at a certain place, on a certain date, in the presence and hearing of a certain witness, plaintiff cannot recover, unless the evidence shows that the words were spoken as charged, though it appears that the same words were spoken to other parties at different times and places. Anderson v. Shockley (Mo.) 1918B-500.

## e. Trial.

112. Amendment as Ground for Continuance. In an action for libel, a trial amendment by a specific allegation that the publication was false presented no new issue, where the complaint averred the opposite of the published charges and the answer alleged their truth, so that the defendant's motion for a continuance is properly denied. Wilson v. Sun Pub. Co. (Wash.) 1917B—442.

113. How Urged at Trial. In slander action, the question of qualified privilege, although not expressly urged upon the trial judge, is properly raised by motion for directed verdict for defendant, as such motion presented the question of liability upon the entire record. Southern Ice Co. v. Black (Tenn.) 1917E-695.

#### f. Evidence.

## (1) Presumptions and Burden of Proof.

- 114. Burden of Proof as to Malice. Where defendant pleads privilege as a defense to slander, the burden is on plaintiff to prove malice, and not on defendant to show that the words were privileged, for which she was not answerable. Doane v. Grew (Mass.) 1917A-338.
- 115. Right of Recovery—Nominal Damages Presumed. Plaintiffs, in an action for the publication of words actionable per se, are at least entitled to nominal damages, unless the published charges were true. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 116. Malice Imputation as Between Editor and Publisher. Where the editor and publisher of a newspaper were both sued for libel, and it did not appear that they had entered into a conspiracy, proof of actual malice on the part of one of them will not be imputed as to the other; for one might have published the libel in good faith, while the other was actuated by malice. Egan v. Dotson (S. Dak.) 1917A-296.
- 117. Burden of Proving Truth of Charge. In a libel case the defendant has the burden of proving the truth of the charges. Egan v. Dotson (S. Dak.) 1917A-296.
- 118. Judicial Notice of Unions. The court will take notice that union labor constitutes a large, influential, and well-organized body of the laboring people of the state and country, that the wage-earners, including those who are members of the union, compose a large part of the population, and that labor unions have adopted and promulgated rules and regulations for the protection and guidance of labor, which are carefully observed by the members. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560. (Annotated.)
- 119. Malice Avoiding Privilege Burden of Proof. In slander action, where defendant has a qualified privilege, the burden of proof is on the plaintiff to show that the words were used to express malice toward him. Southern Ice Co. v. Black (Tenn.) 1917E-695.
- 120. Presumption of Damages. The law presumes damages resulting from the utterance of insulting words, made actionable by the statute, as it does where the words are actionable per se; so that, to recover, proof of actual or pecuniary loss is unnecessary. Boyd v. Boyd (Va.) 1916D-1173.
- 121. Presumption Against Malice. In addressing such a petition to the municipal authorities, the petitioners are presumed to act without malice; the burden being on the party complaining to show

the contrary. McKee v. Hughes (Tenn.) 1918A-459. (Annotated.)

122. The presumption of knowledge of the law cannot be made the basis of imputed bad faith on defendants' part in presenting such petition to the board for the abatement of a condition not a nuisance per se which could be legally abated only by judicial proceedings. McKee v. Hughes (Tenn.) 1918A-459.

#### (Annotated.)

(Annotated.)

#### (2) Admissibility of Evidence.

- 123. Reputation of Plaintiff—Receiving Proof Out of Order. In an action for slander plaintiff was permitted over defendant's objections to offer evidence in chief of her reputation and character. Held, that the evidence was not admissible in chief, but since it only tended to prove a fact which the law will presume, its admission was not material. Conrad v. Roberts (Kan.) 1917E-891.
- 124. Republication by Others. In an action against a newspaper for libel, evidence that the alleged libelous article was republished by other newspapers is not admissible, and is not rendered so because the same reporter who reported to defendant also reported it to the other papers. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 125. Evidence as to Damages Inadmissible. In such action, evidence that one of the plaintiffs had bought his half interest for \$6,500, and that the latter, when he sold, received "for the whole outfit" \$3,500, without indicating whether that represented one-half of the sale price or the whole sale price, is inadmissible, especially where it appeared that, prior to the publication, plaintiffs' business was already falling off at a rate not accelerated by the publication. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 126. Relevancy—Justification of Reflection of Chastity of Female. On a trial for delivering to a 15-year old girl an anonymous letter reflecting on her integrity, chastity, etc., evidence that on the night before the delivery of the letter accused was seen hugging and kissing-such girl is properly excluded, in the absence of any showing that this was with her consent or permission, as otherwise such conduct would not have reflected on her. Bradfield v. State (Tex.) 1917C-696.
- 127. Identity of Person Libeled Evidence—Testimony of Readers as to Their Understanding. In case of doubt as to the person intended by the writer of a libel, it is competent to show the understanding of persons to whom it was published as to the person referred to; the question being not what person the writer

in his own mind intended to mention, but what person the readers of the libel were reasonably caused to understand was therein intended. Garrison v. Newark Call Printing, etc. Co. (N. J.) 1917C-33.

(Annotated.)

128. Such understanding may be shown by the testimony of the persons to whom the libel was published. Quaere, whether it may be shown by evidence of their declarations. Garrison v. Newark Call Printing, etc. Co. (N. J.) 1917C-33.

(Annotated.)

- 129. On this point it was competent to show that plaintiff, claiming to have been libeled as to her matrimonial fidelity, found it necessary to appear oftener with her husband in public than ordinarily would have been required. Garrison v. Newark Call Printing, etc. Co. (N. J.) 19170-33.
- 130. Evidence of Damage. In an action of libel, evidence otherwise competent and tending to show that by reason of the publication plaintiff became the subject of an unsavory publicity is proper. Garrison v. Newark Call Printing, etc. Co. (N. J.) 1917C-33.
- 131. Previous Discussion of Subjectmatter of Libel. On the question of damages for a newspaper libel, it was competent to show that a scandal with which the libel connected plaintiff had been a matter of public notoriety and newspaper comment when it first occurred. Garrison v. Newark Call Printing, etc. Co. (N. J.) 19170-33.
- 132. Other Publications. Where defendants assert that their charges concerning plaintiff, a candidate for office, were privileged, because made in good faith and under a belief of truth, evidence showing other publications of the charge should be received not only in mitigation of damages, but in support of the claim of privilege. Egan v. Dotson (S. Dak.) 1917A-296.
- 133. Where, in an action for slander, the court instructed that, to entitle plaintiff to recover, the evidence must show that the defamatory words stated in the petition were spoken by defendant of and concerning plaintiff at the time and place and in the presence of the witness alleged, the refusal of an instruction that evidence of defendant's having spoken concerning plaintiff, at a different time and place and in the presence of others, defamatory words similar to those charged, could be considered as tending to prove express malice, required reversal of a judgment for defendant. Anderson v. Shockley (Mo.) 1918B-500.

### Note.

Admissibility of testimony of readers or hearers of libel or slander as to their understanding of identity of person defamed. 1917C-36.

### (3) Sufficiency of Evidence.

- 134. Malice—Evidence too Remote. In an action for alleged slander, evidence that plaintiff, on applying for a position as nurse to certain persons, and referring them to defendant for character, received word in each case that her services were not required, was too remote to show defendant's state of mind toward plaintiff. Doane v. Grew (Mass.) 1917A-338.
- 135. Evidence of Malice Sufficient. In an action for slander, in which defendant claimed privilege, evidence held to require submission of the question of defendant's malice to the jury. Doane v. Grew (Mass.) 1917A-338.
- 136. Repetition by Initial Libeler. In an action for libel, a repetition by defendant of the libelous words is evidence of malice, and may thereby aggravate the damages. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 137. Evidence of Damage Insufficient. In an action for a newspaper libel charging plaintiffs' partnership cafe was hot, dirty, unsanitary, and poorly ventilated, evidence considered and held not to show any actual damages to plaintiffs' business. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.
- 138. Evidence of Malice Conclusiveness. That defendants disliked plaintiff, a candidate for public office, whom they charged with offenses and moral turpitude, does not show malice, although it is competent evidence on that question. Egan v. Dotson (S. Dak.) 1917A-296.
- 139. Truth as Justification Charge of Hypocrisy. Evidence in libel that at plaintiff's request to frustrate fraud of a party, satisfaction of judgment against whom plaintiff had just entered, the clerk marked out the satisfaction, is insufficient to sustain any implied finding that plaintiff was a hypocrite or in the habit of altering public records, but merely shows he was in error as to the lawful method of correcting the attempted fraud. Newby v. Times-Mirror Company (Cal.) 1917E-186.
  - g. Province of Court and Jury,
- 140. The question of good faith and malice is one for the jury. Dwyer v. Libert (Idaho) 1918B-973.

(Annotated.)

141. Words Used in Qualified Sense—Question for Jury. The sense in which actionable words were used, when the utterance thereof has been attended by facts and circumstances indicating their use in a qualified sense, so as to make

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them convey, to those who heard them, a meaning different from the one ordinarily accorded them, is a question for jury determination. Alderson v. Kahle (W. Va.) 1916E-561.

142. Question for Jury—Truth of Libel—Conflicting Evidence. In an action for a newspaper libel, where there was conflicting evidence as to the truth of the charges set up in justification, their truth is a question for the jury. Wilson v. Sun Pub. Co. (Wash.) 1917B—442.

143. Exceeding Privilege—Question for Jury. On an issue as to whether slanderous words were in excess of a privileged occasion, the question for the jury in each case depends or may depend on the form in which the defamatory words have been put by the defendant, taken in connection with the knowledge or information which defendant had as to the defamatory statements. Doane v. Grew (Mass.) 1917A—338.

### h. Instructions.

144. In an action against a newspaper for libel, it is error to charge, "I charge you that under the law of Alabama this defendant, the Age-Herald Publishing Company, is responsible for the publication of any libel which may result in actionable injury", since it authorized a recovery for publications made by other newspapers than defendant. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900. (Annotated.)

145. Repetition of Libel. In the absence of evidence that one to whom defendant spoke slanderous words repeated them to any other person, requested instruction precluding recovery for repetition by such person is properly refused. Viss v. Calligan (Wash.) 1918A-819.

146. As to Privilege. In an action by a candidate for office for libel published concerning him, instructions that defendants, who pleaded privilege, set up in their answer various grounds which did not constitute a defense, but might be considered in mitigation of damages, and that any evidence which does not prove the truth of the charge can be considered only in mitigation of damages, being contrary to other instructions and to the rule of law which makes such a communication privileged if made in good faith on reasonable grounds, are prejudicial. Egan v. Dotson (S. Dak.) 1917A-296.

(Annotated.)

147. Instruction as to Malice Misleading. An instruction that, to constitute actual or express malice, which plaintiff, a candidate for office, who claimed to have been libeled, must show to recover, he must establish that in publishing the articles the defendants made use of the privilege which is accorded to all news-

papers to discuss the moral character of candidates for a public office as governor as a cover for publishing false statements, is misleading. Egan v. Dotson (S. Dak.) 1917A-296.

148. Assumption of Fact. An instruction in a libel case which assumed the falsity of the publication was erroneous. Egan v. Dotson (S. Dak.) 1917A-296.

149. Privilege of Political Criticism. In an action for slander, where defendant claims that the statements were privileged comment on plaintiff's qualifications as a candidate for office, an instruction that every man has a right honestly and truthfully to comment about any person, that public interest demands that the qualifications of candidates may be openly discussed, but that the privilege does not protect false statements maliciously made, or untrue accusations uttered for the purpose of character injury, or false charges of dishonesty in the man's profession made with reckless indifference as to its truth and a desire to injure, is sufficiently favorable to defendant. gall v. Mooers (Me.) 1917D-689. Pattan-

150. Requested Instructions Covered by Charge. In an action for slander, the court refused defendant's request charging that it was for the jury to determine whether the words were spoken concerning plaintiff's profession as an attorney at law, remarking that he had covered that point, and informing the jury that they should construe the slanderous charge according to its ordinary meaning. Defendant further requested charges that the fact that plaintiff was a candidate for office rendered the communication made with reference to such candidacy qualifiedly privileged, and plaintiff could recover only by showing actual malice, and that plaintiff could not recover if defendant spoke the words in good faith. In passing on these requests the court remarked that the jury had heard the testimony and arguments of counsel upon the request, and that it was for them to show under the instructions given how those words were spoken and for what purpose. It is held that, in view of the other instructions and the remarks of the court, the refusal of defendant's request was not error. Pattangall v. Mooers (Me.) 1917D-

151. Mitigation of Damages. Instructions given in an action for slander so drawn as to limit the effect of mitigating circumstances to the inquiry as to the existence of actual malice, deprive the defendant of the benefit of the consideration of such facts by the jury in the ascertainment of the amount of the damages and are erroneous. Alderson v. Kahle (W. Va.) 1916E-561.

152. Ignoring Defense of Privilege. Where, in an action for libel, there were

special pleas by defendant alleging that the matter was privileged and evidence to support them, charges to find for plaintiff if the jury were reasonably satisfied that plaintiff had been injured in the manner averred in the complaint are erroneous. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.

153. Newspaper Cartoon as Libel. An implied finding that a newspaper cartoon would not to an ordinary reader bear the meaning that plaintiff in libel was a hypocrite posing as a reformer is unwarranted, it being headed, "And These are Our Leading 'Reformers,'" below it being, "All hypocrites are sinners, but, thank God, all sinners are not hypocrites," and the persons, other than plaintiff, shown, being portrayed as engaged in transactions disreputable, dishonest, or ridiculous, and plaintiff with a sinister expression. Newby v. Times-Mirror Company (Cal.) 1917E-186. (Annotated.)

### i. Damages.

154. Mental Distress. Mental distress resulting from the speaking of words actionable per se is a proper element of general damages. Viss v. Calligan (Wash.) 1918A-819.

155. Excessiveness of Damages. There is no exact rule by which general damages for libel or slander can be measured, and the amount must be left largely to the judgment of the jury, so that, unless the damages are so large that the court can say that the jury was actuated by passion or prejudice, the amount found by the jury will not be disturbed. Viss v. Calligan (Wash.) 1918A-819.

156. Libel Causing Defeat of Candidate. The only damages plaintiff can recover are those contemplated by S. Dak. Code, § 29, defining libel as a false unprivileged communication, exposing a person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned, or which tends to injure him in his occupation, and a libeled candidate for office cannot recover damages because the charges prevented him from receiving the nomination. Egan v. Dotson (S. Dak.) 1917A-296.

157. Mitigation of Damages—Bad Reputation of Plaintiff. In an action for slander, defendant may in mitigation of damages show that plaintiff's reputation as a man of integrity was bad. Pattangall v. Mooers (Me.) 1917D-689.

158. In an action for slander, where defendant desired to show the bad reputation of plaintiff in mitigation of damages it must be proven by testimony as to his general reputation, and not by evidence of specific accusations of misconduct. Pattangall v. Mooers (Me.) 1917D-689.

159. Intoxication as Mitigation. In such cases, intoxication of the defendant at the time of his use of the slanderous words is a mitigating circumstance, proper for the consideration of the jury in estimating the damages. Alderson v. Kahle (W. Va.) 1916E-561. (Annotated.)

160. Provocation as Mitigation. Provocation by the plaintiff, inducing the utterance of the slanderous words, is a mitigating circumstance also. Alderson v. Kahle (W. Va.) 1916E-561.

161. Damage to Partnership Business. In an action for a libelous newspaper publication relating to a cafeteria conducted by plaintiffs as copartners, where there is little evidence of injury to the reputation of either partner, as an individual, and no evidence as to the injury of the separate business of either, the only damages recoverable are such as resulted in injury to the partnership business itself and to the partners in their joint capacity. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

162. Punitive Damages—When Allowed. Punitive or exemplary damages are not recoverable, except where specifically authorized by statute. Wilson v. Sun Pub. Co. (Wash.) 1917B-442.

#### Notes.

Intoxication as justification or mitigation of slander. 1916E-564.

Loss of election or appointment to office as element of damages for libel or slander. 1918B-1130.

### j. Appeal and Error.

163. Physical Effect of Libel on Plaintiff—Evidence Held Harmless. Evidence that the plaintiff was rendered "nervous" as a result of a libel held not harmful, in view of its being restricted at the trial and in the instructions to the jury, to mental agitation and disturbance. Garrison v. Newark Call Printing, etc. Co. (N. J.) 1917C-33.

164. Harmless Error in Instruction. Where the controversy is as to whether slanderous words were spoken, an instruction that, if the words were material or relevant to any issue involved in the trial during which they were spoken, there could be no recovery, is not prejudicial, even if erroneous. Viss v. Calligan (Wash.) 1918A-819. (Annotated.)

#### 5. CRIMINAL LIABILITY.

#### Actionable Words.

165. Anonymous Letters—Criminal Liability for Sending—What Constitutes Sending. Pen. Code Tex. 1911, art. 1182, providing that if any person shall send, or cause to be sent, deliver, or cause to be delivered, to any other person any anony-

mous letter reflecting upon the integrity, chastity, virtue, etc., of such person or any other person, the person so "sending" the letter shall be guilty of a misde-meanor, is violated where the writer of the letter himself delivers it to the person to whom it is addressed, in view of Code Cr. Proc. 1911, art. 25, requiring its provisions to be liberally construed to attain the object intended; Rev. St. 1911, art. 5502, subd. 6, requiring the court to look to the intention of the legislature; Pen. Code 1911, art. 9, requiring that code and all other criminal laws to be construed according to the plain import of the language without regard to the usual distinction between penal and other laws; and article 10, providing that words specially defined shall be understood in that sense. and other words in the sense in which they are understood in common language. Bradfield v. State (Tex.) 1917C-696.

(Annotated.)

### b. Indictment.

166. Description of Letter Sent by Accused. Under Tex. Pen. Code 1911, art. 1182, making it a misdemeanor to send an anonymous letter "reflecting" on the integrity, chastity, etc., of any person, a complaint and information charging the sending of a letter which "reflects" upon a person named is not defective. Bradfield v. State (Tex.) 1917C-696.

167. A complaint and information for sending an anonymous letter reflecting upon a person's integrity, chastity, etc., need not contain the letter, in view of Tex. Code Cr. Proc. 1911, art. 453, requiring only such certainty as will enable accused to plead the judgment in bar of another prosecution; article 460, providing that it shall be sufficient to charge the offense in ordinary and concise language and with such certainty as will give defendant notice of the offense charged and enable the court to pronounce judgment; and article 474, providing that it is sufficient to use other words conveying the same meaning as the words used in a statute or including the sense of the statutory words. Bradfield v. State (Tex.) 1917C-696.

### 6. SLANDER OF TITLE.

168. Slander of Title—Malice as Essential. "Slander of title" being defamation of title to property by one who falsely and maliciously disparages it, thereby causing its owner some special pecuniary loss or damages, one taking a deed of property as security, merely carelessly relying on the grantor's false representation that he had an interest therein, is not liable for such slander; malice being lacking. Fearon v. Fodera (Cal.) 1916D-312. (Annotated.)

#### LICENSE.

Revocation of license to sever, see Fixtures, 6, 7.

Liability of railroad for injury to engineer's guest, see Master and Servant, 367.

Injury to licensee on wharf, see Negligence, 14-16, 21.

Duty toward licensee, see Railroads, 78-81. Rights of ticket holder, see Theaters and Amusements, 5.

1. Owners of Premises—Licensees—Children. A child of an employee of a cotton mill, falling into a drain into which the mill discharged the hot waters from the boilers when cleaning them, is a licensee, where the drain is situated in an open square, made by the buildings and employees' tenement houses, in which the employees and children are wont to congregate, though the drain is obscured by slag and briars. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.

#### LICENSES.

See Automobiles, 6-14; Hawkers and Peddlers, 2; Intoxicating Liquors, 2, 16, 44-46, 51-53, 70-75; Physicians and Surgeons, 3, 12, 13.

Dog licenses, see Animals, 10.

Practicing without license, see Attorneys, 6. 7.

Conducting auction without license, see Auctions and Auctioneers, 3.

Tax on foreign corporations, see Corporations, 160.

Excessive penalty, see Fines and Penalties, 1.

Hunting licenses, see Fish and Game, 4-9, 15, 18.

Itinerant food venders, see Food, 8-12. Wholesale dealer in soft drinks, see Interstate Commerce, 4.

Dealer, meaning of, see Junk Dealers and Junk Shops, 1, 2.

Colorable license as sale, see Monopolies,

Recovery of fee paid by mistake, see Payment, 12.

Payment of taxes as prerequisite to license, see **Taxation**, **86**.

- 1. Discretionary Power of Legislature—Discrimination. The state has a wide discretionary power in imposing license taxes, and unless there can be no substantial basis for discriminations made in classifications and in fixing the amount of license taxes, so that such discriminations must be regarded as purely arbitrary and unreasonable under every conceivable condition in practical affairs, the courts will not interfere with legislative regulations of such matters. State v. Philips (Fla.) 1918A-238.
- 2. Occupations Subject to Tax—Extracting Turpentine. Miss. Laws 1912, c. 110,

- levying a "privilege tax" or "occupation fee" upon persons pursuing the business of extracting turpentine from standing trees amounting to one-fourth of one cent each year for each cup or box, is in effect a "property tax," and violates Const. 1890, § 112, declaring that taxation shall be uniform and equal throughout the state, and that property shall be taxed in proportion to its value. Thompson v. McLeod (Miss.) 1918A-674. (Annotated.)
- 3. Transient Merchants' License Tax-Validity. Acts 35th Gen. Assem. c. 62, imposing license taxes upon transient merchants, declares that, upon complaint to the county auditor that any person is doing business as a transient merchant in any city or town of such county, the auditor shall require of such merchant and he shall furnish a bond in the sum of \$1,000, conditioned that, if he do not continue business for the period of a year, he shall pay the license fee and all claims against him growing out of such business, but that, if he shall continue to conduct the particular business for the period of one year, he shall be held to be a permanent merchant not subject to the tax. There was no provision as to who might make the complaint, as to its verification, nor was hearing, notice, or opportunity of defense provided for. It is held that, while "due process of law" does not necessarily mean judicial proceedings, it always means some prescribed course of legal proceedings, and hence the act is bad as tending to take property without due process of law, for any merchant upon the complaint of any person might be required to give a bond or pay the license tax, and in such case to avoid payment of the license tax could not dispose of his business within a year. State v. Osborne (Iowa) 1917E-497. (Annotated.)
- 4. Iowa Acts 35th Gen. Assem. c. 62, declaring that, whenever it appears that a stock of goods has been brought into any county by a person who has not previously conducted a merchant business therein and it is claimed that such stock is to be closed out at reduced prices, such fact shall be prima facie evidence that such person is a transient merchant, is discriminatory in so far as it does not apply the same test to merchants if the merchant has ever in the past conducted a business in the county, and thus may impose a license tax on one transient merchant, and not on the other. State v. Osborne (Iowa) (Annotated.) 1917E-497.
- 5. While the legislature may impose occupation taxes upon merchants of a particular class, Iowa Acts 35th Gen. Assem. c. 62, which attempted to impose license taxes upon transient merchants only when doing business in cities and towns, is bad because unequal. State v. Osborne (Iowa) 1917E-497. (Annotated.)

- 6. Iowa Acts 35th Gen. Assem. c. 62, §§ 2, 5, 8, imposing license taxes upon transient merchants and including all persons, firms, and corporations, both principal and agent, who do and transact any temporary or transient business in one locality or more, or by traveling from place to place sell goods, wares, or merchandise, expressly excepts from its operation the selling of goods by commercial travelers and by "selling agents" in the usual course of business, and also the selling of farm garden products. No standard is fixed by which the officer issuing the license may differentiate between the agent who by sections 2 and 5 is forbidden to transact a temporary business without a license and the selling agent who by section 8 is exempted from such obligation. It is held that the statute is bad because making an unauthorized delegation of legislative powers to the license officer, for an agent employed by a traveling or transient merchant to sell his goods is certainly a "selling agent." State v. Osborne (Iowa) 1917E-497. (Annotated.)
- 7. Iowa Acts 35th Gen. Assem. c. 62, \$2, requiring any transient merchant desiring to do business in any county to first procure a license, and in sections 1 and 5 limiting its scope to transient merchants seeking to do business in cities and towns, and who for the purpose of carrying on such business hire, lease, or occupy a building, structure, or car for the exhibition and sale of goods, is bad, as discriminatory, because not applying to the similar merchants selling goods from vacant lots, etc. State v. Osborne (Iowa) 1917E-497. (Annotated.)
- 8. The manner and method provided for the enforcement of an act providing for license taxes must, whether it be intended to raise revenue or establish a police regulation, be consistent with due process of law. State v. Osborne (Iowa) 1917E-497.
- 9. Under the bill of rights, guaranteeing all persons the right to acquire, possess, and enjoy property, license taxes upon merchants cannot be upheld under guise of the police power, where they are so exorbitant as to deprive owners of property of the right to dispose of it. State v. Osborne (Iowa) 1917E-497.
- 10. Where a license tax imposed under guise of the police power is intended to raise revenue or accomplish some ulterior motive, the courts will hold it unauthorized and void. State v. Osborne (Iowa) 1917E-497.
- 11. A license fee enacted as a police regulation for an occupation of a harmless nature must have some fair relation to the cost of issuing the license and expense of police supervision. State v. Osborne (Iowa) 1917E-497.
- 12. Excessive License Taxes. Where license taxes are imposed upon an occupa-

tion of harmless character under the guise of the police power, the license fee must not be so exorbitant or oppressive as to prohibit the occupation or create a monopoly for the benefit of a few. State v. Osborne (Iowa) 1917E-497.

- 13. Necessity of Uniformity of License Taxes. Where the classification of occupations subjected to license taxes is valid, the taxes must, under Iowa Const. art. 1, §§ 1, 6, and art. 3, § 30, be uniform and bear equally upon each individual or person subjected to the tax. State v. Osborne (Iowa) 1917E-497.
- 14. Power to Classify Occupations. While the legislature has discretion to select and classify the occupations or different kinds of business for which license fees shall be exacted, the classification should not be unnatural or unreasonable. State v. Osborne (Iowa) 1917E-497.
- 15. Peddler's License Tax—Validity. An ordinance imposing a license on peddlers having no regular place of business in the city, but who solicit therein orders for the sale and future delivery of tea, coffee, spices, etc., cannot be sustained as an exercise of the police power. Ideal Tea Co. v. Salem (Ore.) 1917D-684.
- 16. Power of Municipality—Discrimination Against Nonresidents. Iowa Const. art. 1, § 20, forbidding laws granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens, restricts the legislature and is a limitation on the common council of a city, and prevents any discrimination against nonresidents of a city in occupation or license taxes. Ideal Tea Co. v. Salem (Ore.) 1917D-684.
- 17. Employment Agencies—Validity of Regulation. The enforcement by the attorney general and county prosecuting attorney of the provisions of the Washington employment agency law (Wash. Laws 1915, c. 1), making it criminal to collect fees from workers for furnishing them with employment or with information leading thereto, may be restrained by a court of equity at the instance of persons conducting employment agencies under municipal licenses who assert that their business will be destroyed, contrary to U. S. Const. 14th Amend. (9 Fed. St. Ann. 392) by the enforcement of such statute. Adams v. Tanner (U. S.) 1917D-973.

(Annotated.)

18. Prohibition, not regulation, is what is accomplished by the provisions of the Washington agency law (Wash. Laws 1915, c. 1), making it criminal to collect fees from workers for furnishing them with employment or information leading to such employment, although fees may still be collected from those seeking workers. Adams v. Tanner (U. S.) 1917D-973. (Annotated.)

19. The right of the individual under U. S. Const. 14th Amend. (9 Fed. St. Ann. 392) to engage in a useful and lawful business is unwarrantably infringed by the provisions of the Washington employment agency law (Wash. Laws 1915, c. 1), enacted in the purported exercise of the police power, which make it criminal to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee for furnishing such person with employment or with information leading thereto. Adams v. Tanner (U. S.) 1917D-973.

(Annotated.)

- 20. Trading Stamps—Imposition of License Tax—Validity. There is such a difference between the selling of goods accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, and the selling of goods without such inducements to purchasers, that the imposition upon the former business of an additional license tax for each place in each and every county in which said business is conducted, as is done by Florida Laws 1913, c. 6421, § 35, does not offend against the equal protection of the laws clause of the federal constitution. Rast v. Van Deman, etc. Co. (U. S.) 1917B—455.
- (Annotated.)
  21. The permission, if any, granted by
  the amendment of the Act of July I,
  1902 (32 Stat. at L. 715, c. 1371, 3 Fed.
  St. Ann. 748), § 2, to U. S. Rev. Stat.
  § 3394, to inclose in packages of tobacco
  redeemable coupons, profit-sharing certificates, etc., does not extend to retail sales
  of such packages within a state so as to
  invalidate state restrictions upon such
  sales. Rast v. Van Deman, etc. Co. (U.
  S.) 1917B-455. (Annotated.)
- 22. The delivery by a Florida merchant of coupons, profit-sharing certificates, or other evidence of indebtedness or liability redeemable in premiums, in connection with sales of merchandise at retail, is not interstate commerce so as to be protected against the imposition of a state license tax, although the coupons may have been inserted in the retail packages by the manufacturer or shipper outside the state, and are redeemable outside the state, either by such manufacturer or shipper, or by some other agency outside the state. East v. Van Deman, etc. Co. (U. S.) 1917B-455. (Annotated.)
- 23. Detectives—Bond of Private Detective—Right of Third Person to Sue. Under Mass. Rev. Laws, c. 108, §§ 36, 37, respectively, providing for the licensing of private detectives and the giving of a bond for the proper discharge of the services which they may, by virtue of such licenses, have, making it a misdemeanor to engage in the business of private detec-

tive work without license, the bond is solely for the benefit of the detective's employees, and a third person, with no contractual relations with the detective, cannot recover against his bondsman. Frost v. American Surety Co. (Mass.) 1917A-583. (Annotated.)

24. "Wholesale Vender"— Meaning of Term. A person engaged in the business of purchasing cattle, slaughtering them, and selling the beef and other products from the slaughtered animals to dealers, is a "wholesale vender" of merchandise, within the Pa. Act of May 2, 1899 (P. L. 184), which imposes a mercantile license tax on wholesale venders. Commonwealth v. Consolidated Dressed Beef Co. (Pa.) 1917A-966.

25. "Dealer" — Meaning of Term. A purchaser of material for resale is a "dealer" within the Pa. Act of May 2, 1899 (P. L. 194), providing for the imposition of a mercantile license tax upon dealers in goods, wares, and merchandise. Commonwealth v. Consolidated Dressed Beef Co. (Pa.) 1917A-966.

(Annotated.)

- 26. Complaint for Violation of Act Negativing Exceptions. The fact that the complaint upon which applicant was convicted contained an allegation that defendant (applicant) was not an ex soldier or sailor of the United States honorably discharged does not warrant the granting of the writ of habeas corpus, since, as the proviso relating to such persons does not relieve them from payment of the state license tax imposed by the act, but merely from local license fees, such allegations are mere surplusage. Matter of Gilstrap (Cal.) 1917A-1086.
- 27. Necessity of Uniformity. The provisions of the constitution requiring all taxes to be uniform and to be levied and collected under general laws, which shall prescribe such regulations as shall insure a just valuation of all property, refer to taxation according to the commonly accepted meaning of that term, and do not apply to license or registration fees. Matter of Kessler (Idaho) 1917A-228.
- 28. Occupations Subject to Hotel or Lodging-house. The business of keeping a hotel, lodging-house, or rooming-house is one so far affecting the public health, morals, or welfare that it is competent for the legislature, in the exercise of the police power, to authorize municipal authorities to require persons conducting such a business to obtain a license. Cutsinger v. Atlanta (Ga.) 1916C-280.

  (Annotated.)

29. The conferring by the legislature, in general terms, of the power to grant or refuse licenses of the character mentioned in the preceding headnote, in the discretion of the municipal council, without pre-

scribing the bounds of such discretion, will not ipso facto render the grant of power void, as being an effort to confer arbitrary power, but will be treated as authorizing the municipal authorities to exercise a reasonable discretion in the grant or refusal of such licenses. Cutsinger v. Atlanta (Ga.) 1916C-280.

(Annotated.)

30. After the thirteenth section of the Ga. act approved August 19, 1912 (Acts 1912, pp. 562, 573), had provided that the keepers of hotels, lodging-houses, and rooming-houses in Atlanta should apply to the mayor and general council for a license, which might be granted or refused in the discretion of that body, if by the further provision that "their action in the premises shall be final" it was intended to confer arbitrary power upon the mayor and general council, by declaring that even for an arbitrary or capricious use of such power there could be no resort to the courts for relief, it would be violative of the Fourteenth Amendment to the constitution of the United States, and also of the clause of the state constitution which declares that no person shall be deprived of life, liberty, or property except by due process of law. If it be construed to mean that the municipal officers can use a reasonable administrative discretion in regard to the granting or refusing of the licenses mentioned (which are licenses under the police power), and that their action shall be final in the sense that no appeal lies to any other body or court for the purpose of reviewing their action, the provision will not be violative of the clauses of the state and federal constitutions mentioned.

Applying the rule that where an act of the legislature is susceptible of two constructions, under one of which it would be unconstitutional and under the other constitutional the latter is to be preferred, the construction last hypothetically stated in the preceding note will be placed upon the clause of the act under consideration. Cutsinger v. Atlanta (Ga.) 1916C-280. (Annotated.)

31. Blue Sky Law. The equal protection of the laws is not denied by the provisions of Ohio Gen. Code, §§ 6373-1 to 6373-24, forbidding dealing in corporate or quasi corporate securities without a license, by reason of the fact that the statute discriminates between cases where more or less than 50 per cent of an issue of bonds is included in a sale to one person; between securities which have and those which have not been authorized by the state public service commission; between securities issued by certain corporations organized under the state laws and those which are not; between an owner who sells his securities in a single transaction and one who disposes of them in

successive transactions; between a bank or trust company that sells at a commission of not more than 2 per cent and one which sells at a higher commission; between securities which have and those which have not been published in regular market reports; between single sales of \$5,000 or more and smaller transactions; between securities upon which there has and has not been a default as to principal or interest; between cases where the information required is or is not contained in a standard approved manual; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid 90 per cent of his selling price; and discriminates against securities when any part of the proceeds is to be applied in payment for patents, services, good will, or for property outside of the state; against securities issued by taxing subdivisions of other states; against securities which have not from time to time for six months been published in the regular market reports or the news columns of a daily newspaper of general circulation in the state; and discriminates where the securities are or are not of manufacturing or transportation companies in the hands of bona fide purchasers on a specified date if such companies were on that date and at the time of sale going concerns; where the disposal is or is not made for a commission of less than 1 per cent by a licensee who is a member of a stock exchange and who is conducting an established and lawful business in the state, regularly open for public patronage; where the securities are or are not those of a common carrier or of a company organized under the state laws and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which securities are based is located within the state; and provides for such delays in the issue of a license and in the subsequent conduct of business thereunder as to hinder substantially, and in many cases to prevent, sales. Ha Jones Co. (U. S.) 1917C-643. Hall v. Geiger-

(Annotated.)

32. Congressional inaction leaves the state free to impose such an indirect or incidental burden upon interstate commerce as may result from the provisions of Ohio Gen. Code, §§ 6373-1 to 6373-24, forbidding dealers from disposing or offering to dispose of corporate or quasi corporate securities "within the state" without first having obtained a license from a specified state official. Hall v. Geiger-Jones Co. (U. S.) 1917C-643.

(Annotated.)

33. Dealing in corporate or quasi corporate securities without first securing a license from a specified state official, obtainable only upon an application setting

out certain information respecting the applicant's business, with references establishing good repute, may be forbidden by a state, in the exercise of its police power, as is done by Ohio Gen. Code, §§ 6373-1 to 6373-24, notwithstanding the declarations of U. S. Const. 14th Amend. (9 Fed. St. Ann. 416, 538), that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws. Hall v. Geiger-Jones Co. (U. S. 1917C-643. (Annotated.)

34. Dealers in corporate securities cannot successfully urge against the validity of the provisions of Ohio Gen. Code, \$\$6373-1 to 6373-24, making a license a condition precedent to dealing in corporate or quasi corporate securities, that while the statute in form prohibits sales, it at the same time necessarily prevents purchases, and thereby shields contemplating purchasers from the loss of property by the exercise of their own defective judgment, and puts them, as well as the sellers, under guardianship. Hall v. Geiger-Jones Co. (U. S.) 1917C-643.

(Annotated.)

- 35. Merchants—Validity of Regulation. The Wash. Commission Merchants' Law (Rem. & Bal. Code, §§ 7024-7035) is not invalid because requiring a small license fee from such person; the fee not being oppressive. State v. Bowen & Co. (Wash.) 1917B-625. (Annotated.)
- 36. Failure to Pay License Fee—Injunction Against Continuing Business. Where it appeared that the manager of the defendant telegraph company had been convicted for not paying the city license as required, and it was not shown wherein an action at law to recover the license would prove ineffective, a bill to enjoin the company from carrying on intrastate business from that office until payment of the license is without equity, and should be dismissed. Postal Telegraph-Cable Co. v. Montgomery (Ala.) 1918B-554.
- 37. Provisions for Revocation—Validity. Section 6346-1 et seq., General Code (106 Ohio Laws, p. 281), is a constitutional exercise of police power by the general assembly of Ohio. The provision in section 6364-2 of said act, in so far as it relates to the revocation of a license issued pursuant to the act, is reserved for future consideration in cases in which such question may properly be raised. Wessell v. Timberlake (Ohio) 1918B-402. (Annotated.)
- 38. Construction of Statute. If the body of an act relating to occupation licenses is in its terms broad enough to cover county as well as territorial licenses, the fact that one proviso attached thereto is limited to territorial licenses does not require the limitation of a second proviso

which is general in its terms. In re Kalana (Hawaii) 1916D-1094.

#### Notes.

Validity of statute or ordinance licensing or regulating hotels, lodging or rooming houses, or the like. 1916C-290.

Private detectives. 1917A-584.

Meaning of "deal" or "dealer." 1917A-

Right of person entitled to license or evidence thereof to do act for which license is required. 1917B-145.

State or municipal regulation of transient merchants. 1917E-505.

Validity of license tax imposed on owner of premises for extracting mineral or turpentine therefrom or cutting timber thereon. 1918A-678.

#### LICENSE TAXES.

See Licenses.

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### LIENS.

See Mechanics' Liens.

Of attorneys, see Attorneys, 36-42. Effect of bankruptcy, see Bankruptcy, 16. Of chattel mortgage, see Chattel Mort-

gages, 15-28.

Of execution, see Executions, 6, 7. Discharge of lien by minor's disaffirmance,

see Infants, 14. Innkeeper's lien, see Innkeepers, 11.

Judgment lien, see Judgments, 23-29. No jury as of right in suit to enforce, see Jury, 8.

Rights of owner of land subject to lien, on paying lien, see Subrogation, 10,

Liens for taxes, see Taxation, 87-89.
Of special assessments, priority, see Taxation, 124, 125.

tion, 124, 125. Vendor's lien, see Vendor and Purchaser, 16-19.

- 1. For Advancements Subsequently Acquired Property. Advancements made on the faith of certain property may give rise to an equitable lien, and such a lien may attach to property to be created, and not in being at the time of the agreement, and does not depend upon possession, but may exist by implication growing out of facts and circumstances creating the equitable right. Sieg v. Greene (Fed.) 1917C-1006.
- 2. Fine and Costs. Kirby's Ark. Dig. § 2467, providing that the real and personal property of one charged with a criminal offense shall be bound from the time of his arrest or the finding of an indictment against him, whichever shall first happen, for the payment of all fines and costs which he may be adjudged to pay, creates a lien upon such property, not only in the hands of accused, but in the hands of any other person possessing or holding

- it, after the arrest or indictment found, until accused is discharged or fines and costs adjudged against him are paid, which lien also attaches to the accused's after-acquired property. Western Tie, etc. Co. v. Campbell (Ark.) 1916C-943.
- 3. Failure to Record Subjection to Subsequent Liens. Under Kirby's Ark. Dig. § 2467, binding the property of an accused from the time of his arrest or the finding of an indictment against him to the payment of fines and costs adjudged against him, and section 5396 providing that every mortgage shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, the state after indictment had a valid lien for fines and costs prior to a mortgage of property of accused, executed after the indictment, but not recorded until several months after execution. Western Tie, etc. Co. v. Campbell (Ark.) 1916C-943.
- 34. Removal of Property Subject to Lien—Validity of Statute. Section 5140 of the Idaho Revised Codes, which provides for the recovery of damages from any one who eloigns certain property on which a lien exists for labor performed, is constitutional and valid. Anderson v. Great Northern R. Comm. (Idaho) 1916C-191.
- 4. A statute (Tdaho Rev. Codes, § 5125) which confers a lien in favor of laborers who perform work upon or aid in obtaining or securing "sawlogs, spars, piles, cordwood, or other timber," is sufficiently broad and comprehensive to confer a lien in favor of persons who work upon or assist in obtaining or securing railroad ties, and the words "other timber" are sufficiently comprehensive to include ties. Anderson v. Great Northern R. Co. (Idaho) 1916C-191. (Annotated.)
- 5. The purpose and intent of section 5140 of the Idaho Revised Codes is to render every person who injures, destroys, or removes any of the property therein described on which a lien exists liable for the amount of the claim held against the property, or, if the property be of less value than the lien claimed, then it allows the claimant the damages which he has sustained by reason of the removal or destruction of the particular property. Anderson v. Great Northern R. Co. (Idaho) 1916C-191.
- 6. Persons Furnishing Supplies—Validity of Statute. Chapter 226, Idaho Sess. Laws 1911, giving a lien on logs in favor of a person furnishing supplies, groceries or feed to a contractor or board to an employee is invalid, void, and inoperative, for the reason that it does not provide for any notice to the owner of the property on which the lien is to attach, and affords him no means or method of protecting himself against such claim, and does not provide a method of procedure

for taking his property for such claim by "due process of law," and does not give such property owner the "equal protection of the law." Anderson v. Great Northern R. Co. (Idaho) 1916C-191.

- (Rev. Idaho Codes, 7. The statute § 5125), confers the same lien in favor of every person "performing labor upon" sawlogs, etc., as it confers on every person who assists in "obtaining or securing" such material. Anderson v. Great Northern R. Co. (Idaho) 1916C-191.
  - (Annotated.)
- 8. Logger's Lien - Persons Entitled. Section 5125 of the Idaho Revised Codes, which provides that "every person performing labor upon, or who shall assist in obtaining or securing, sawlogs, spars, piles, cordwood, or other timber, or in obtaining or securing the same," is sufficiently broad and comprehensive to confer a lien upon laborers who work in the employ of a contractor in moving a large quantity of railroad ties a distance of a couple hundred feet from the place where they were piled upon the railroad company's right of way and loading them upon cars for transportation. Anderson v. Great Northern R. Co. (Idaho) 1916C-(Annotated.)
- 9. Loan of Purchase Money. A lien upon land is acquired by one who lends money for its purchase, under a promise that he is to receive a mortgage, and in the meantime is given the undelivered deed to hold as security for the performance of that agreement. Warren Mortgage Co. v. Winters (Kan.) 1916C-956.

By whom and for what labor or services logger's lien may be claimed. 1916C-198. Priority as between purchase-money mortgage and other lien or claim. 1916C-945.

### LIFE ESTATES.

Acceleration of remainder, see Remainders and Reversions, 18.

- 1. Right to Recover for Injury to Inheritance. While the life tenant may recover for injury by negligence of a stranger not only to the life estate, but to the remainder, it is not on the theory of waste, but of trusteeship. Rogers v. Atlantic, etc. Co. (N. Y.) 1916C-877. (Annotated.)
- 2. Right of Life Tenant to Recover for Taxes and Improvements. Where the surviving spouse is tenant for life of the homestead of the deceased spouse and also administrator of her estate, he cannot charge the estate with taxes paid by him upon the homestead nor with the value of improvements placed by him thereon. Nordlund v. Dahlgren (Minn.) 1917B-941. (Annotated.)

- 3. Duty to Pay Taxes. It is the duty of a tenant for life in possession, and enjoying the rents and profits of land, to pay the taxes thereon. Jinkiaway v. Ford (Kan.) 1916D-321.
- 4. Conveyance by Life Tenant. A life tenant's purported conveyance of a fee is effective to pass the life interest of the grantor. Vidmer v. Lloyd (Ala.) 1917A-576. (Annotated.)
- 5. The recognized exception to the principle that provisions against alienating life interests are void is in the case of a conveyance for the benefit of a married woman for her separate estate. Lee v. Oates (N. Car.) 1917A-514.

#### Notes.

Validity of conveyance of life estate. 1917A-579.

Right of life tenant to recover damages for injury both to life estate and to inheritance. 1916C-881.

#### LIFE INSURANCE.

- 1. Insurable Interest, 526.
- 2. Payment of Premiums, 528.
- 3. Warranties and Representations, 528. 4. Construction of Policy, 528.
- - a. In General, 528.
  - b. Beneficiaries, 528.
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  - d. Cause of Death, 530.
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- 7. Action on Policy, 532.
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Interest in policy as asset of bankrupt, see Bankruptcy, 10.

Contracts of associations, see Beneficial Associations, 1-7.

Maintaining policy of lunatic, see Insanity, 17.

#### 1. INSURABLE INTEREST.

- Insurable Interest Necessity. One who has no insurable interest in the life of another cannot be the beneficiary in a policy issued upon his life and cannot collect the insurance upon the insured's death. Metropolitan L. Ins. Co. v. Nelson (Ky.) 1918B-1182.
- 2. Insurable Interest of Creditor. creditor, to the extent of his debt, has an insurable interest in the life of his debtor. Metropolitan L. Ins. Co. v. Nelson (Ky.) 1918B-1182.
- 3. Payment of Premiums by Beneficiary -Lack of Insurable Interest.

there was no understanding between insured procuring a life policy, and the beneficiary having no insurable interest at the time of the issuance of the policy, the beneficiary, paying some of the premiums until the death of insured, can recover on the policy as against the objection that it was a wagering contract. Langford v. National Life, etc. Ins. Co. (Ark.) 1917A-1081. (Annotated.)

- 4. Necessity—Policy Taken Out by Insured. One may take out a life policy on his life and make it payable to one having no insurable interest in his life. Langford v. National Life, etc. Ins. Co. (Ark.) 1917A-1081.
- 5. Where a person procures insurance upon the life of another, it is the general rule that he must prove an insurable interest in such life in order to recover upon such policy; but, where a person insures his own life and appoints another to receive the proceeds of such insurance, the appointee establishes a prima facie right to recover by proving the contract of insurance and the happening of the event upon which it is to become payable. If facts exist which preclude such recovery they are matters of defense. Christenson v. Madson (Minn.) 1916C-584.

(Annotated.)

- 6. Necessity and Nature of Insurable Interest. One taking out a policy of insurance in the life of another person for his own benefit must have an interest in the continuance of the life of the insured; an "insurable interest" being such an interest arising from the relations of the parties as will justify a reasonable expectation of advantage or benefit from the continuance of the insured's life though it is not necessary that such advantage be capable of pecuniary estimation. Crismond's Admx. v. Jones (Va.) 1917-155.
- 7. Son-in-Law and Father-in-Law. son has an insurable interest in his father's life, so that the father's assignment of a policy in consideration that the son assume the payments thereon, prior to Va. Code, 1904, § 2859a, permitting assignment of a policy for a valuable consideration without regard to the assignee's insurable interest, is valid; but a son-in-law has no insurable interest in his father-inlaw's life, and hence the assignment of a policy to him in consideration that he assume the payments thereon is invalid, except in so far as acquiesced in by the adult children of insured uniting with him in the assignment. Crismond's Admx. v. Jones (Va.) 1917C-155. (Annotated.)
- 8. As Between Spouses or Parent and Child. Based exclusively upon affinity, a wife has an insurable interest in her husband and the husband in his wife; and based exclusively upon consanguinity, a

father has an insurable interest in his child and a child in the life of its father. Crismond's Admx. v. Jones (Va.) 1917C-155.

- 9. As Between Husband and Wife. In such case the wife is entitled to reimbursement from the proceeds of the policy for the amount of the premiums paid by her with interest; the benefit thereof having been obtained by the husband in consideration of and by reason of the marriage. Schauberger v. Morel's Admr. (Ky.) 1917C-265. (Annotated.)
- 10. Divorce Between Insured and Beneficiary-Effect. Under Ky. St. § 2121, providing that upon final judgment of divorce from the bond of matrimony the parties shall be restored, such property not disposed of at the commencement of the action as either obtained from or through the other before or during the marriage in consideration thereof, and Civ. Code Prac. § 425, requiring every such judgment to contain an order restoring such property, where a husband procures a life insurance policy on his own life naming his wife as beneficiary, but reserving to himself the right to change the beneficiary, and the parties are afterward divorced by a judgment of a court of competent jurisdiction, the wife is there-by divested of all interest in the policy, and cannot claim the proceeds upon the husband's death, though all of the premiums thereon were paid by her. Schauberger v. Morel's Admr. (Ky.) 1917C-(Annotated.)
- 11. Effect of Divorce. Where a woman, after the termination of her insurable interest by divorce from her husband, nevertheless continued until his death to pay premiums on a policy on his life in which she had been beneficiary, she is entitled, on his death, to recover from the insurance company only the amounts paid by her as premiums, with interest. Western, etc. Life Ins. Co. v. Webster (Ky.) 1917C-271.
- 12. Where a woman, living with a man as his wife under a formal but illegal murriage, had him procure a policy on his life containing a change of beneficiary clause and she paid the premiums therefor, a judgment annulling her marriage as void ad initio terminates her insurable interest in his life; Ky. St. § 2121, as to restoration of property to either spouse upon divorce "from the bond of matrimony," not applying. Western, ctc. Life Ins. Co. v. Webster (Ky.) 1917C-271.
- 13. What Relationship Creates Insurable Interest. "Insurable interest" is not dependent upon who pays the premiums, but solely upon the relationship which the parties bear toward each other, which must be such as will justify a reasonable

expectation of advantage or benefit, to the party obtaining the insurance, from the continuance of the insured life. Western, etc. Life Ins. Co. v. Webster (Ky.) 19170-271.

- 14. What Constitutes Insurable Interest—Putative Wife. Where a man and woman life together as husband and wife, either has an insurable interest in the life of the other irrespective of whether there is a valid marriage. Western, etc. Life Ins. Co. v. Webster (Ky.) 1917C-271.

  (Annotated.)
- 15. Wagering Contracts. A policy taken out on the life of another, by one who pays all the premiums, is void unless the person taking it out has at that time an insurable interest in the life of the other, since otherwise it would be a wagering contract and against public policy. Western, etc. Life Ins. Co. v. Webster (Ky.) 1917C-271.

#### Notes.

Relationship by affinity as supporting insurable interest in life. 1917C-158.

Effect of divorce upon rights of beneficiary in insurance. 1917C-269.

Selection by insured of beneficiary not having insurable interest in former's life as against public policy. 1916C-587.

Right of insurance beneficiary having no insurable interest in life of insured to keep contract alive for his own benefit. 1917A-1085.

#### 2. PAYMENT OF PREMIUMS.

16. Effect of Failure to Pay Premiums. The obligation of a life insurance contract, in the absence of contract or statute otherwise providing, is conditional upon the payment of premiums as they become due, and if the policy be allowed to lapse, no recovery can be had thereon. Burke v. Prudential Ins. Co. (Mass.) 1917E-641.

### 3. WARRANTIES AND REPRESENTA-TIONS.

- 17. "Serious Illness." A representation by insured in his application that he has not had any "serious illness" means more than an illness which is temporary in its duration and not attended or likely to be attended by a permanent impairment of the health or the constitution, and more than an illness which was thought to be serious at the time of its occurrence and might have resulted in permanently impairing the health. Schas v. Equitable Life Assurance Soc. (N. Car.) 1918A-679. (Annotated.)
- 18. Where, in an action on a life insurance policy, the defense is that insured's statement in his application that

he had not had any serious illness was false, and the evidence was conflicting on whether he had been a victim of self-pollution, causing his health to be seriously impaired at the time of making the application, the question whether he misstated the condition of his health is for the jury. Schas v. Equitable Life Assurance Soc. (N. Car.) 1918A-679.

(Annotated.)

- 19. Fraudulent Misrepresentation—As to Interest of Beneficiary—Question for Jury. Whether insured, procuring a life policy payable to one having no insurable interest, perpetrated a fraud on insurer in his application stating that the beneficiary was a relative, held under the evidence for the jury. Langford v. National Life, etc. Ins. Co. Ark. 1917A-1081.
- 20. Misstatement of Age of Applicant. Under the express provisions of Code 1906, § 2676, a misstatement in a contract of life insurance, certificate, or policy of insured's age does not invalidate the contract, but merely limits the recovery to the amount which the premiums paid would have purchased at insured's actual age, reckoning according to the rate tables of the company. Coplin v. Woodmen of the World (Miss.) 1916D-1295.

#### Notes.

Meaning of term "severe" or "serious" illness in application for life insurance policy. 1918A-682.

Misstatement of name in application for insurance as avoiding policy. 1916D-

1297.

### 4. CONSTRUCTION OF POLICY.

#### a. In General.

21. Construction of Policy Against Insurer. Ambiguous provisions of a life insurance policy will be construed most strongly against the insurer and in favor of the insured. Krebs v. Philadelphia. Life Ins. Co. (Pa.) 1917D-1184.

#### b. Beneficiaries.

- 22. Beneficiary Persons Included in Term "Family." The deceased member was the stepfather of plaintiff, the designated beneficiary; they were members of the same household, when the certificate issued and at the time of the member's death; and he had voluntarily assumed to contribute to the support of the household. It is held that plaintiff was a proper beneficiary as one of the family of the deceased member and within the class of permitted beneficiaries under the Illinois statute. Anderson v. Royal League (Minn.) 1917C-691.
- (Annotated.)
  23. Defendant's by-law is not more restrictive than the statute, and, given a

liberal construction, its designation of an adopted child as a proper beneficiary embraces a stepdaughter who is of the same household with the member. But even were it held restrictive, the evidence shows the by-law to have been waived and defendant estopped from asserting that it excludes plaintiff. Anderson v. Royal League (Minn.) 1917C-691.

(Annotated.)

24. Change of Beneficiary. Under a life insurance policy reserving to insured the right, without the consent of the beneficiary, to change the beneficiary, the beneficiary had no vested right, but only a mere expectancy during the lifetime of insured, and insured's control over the policy was, subject to its terms, as complete as if he himself had been the beneficiary. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.

25. Under an ordinary policy of life insurance, in which there is no reservation of the right to cut off or modify the interest of the beneficiary, the policy and the money to become due thereunder belong, from the time it is issued, to the person named in it as the beneficiary, and insured is without power by deed, assignment, will, surrender of the policy for a new one, or by any other act of his, to transfer to any other person the interest of the person so named as beneficiary. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.

#### Note.

Persons included within the term "family" when used to designate beneficiaries in insurance policy or benefit certificate. 1917C-694.

#### c. Incontestable Clause.

26. Incontestable Clause-Application to Suicide-Time from Which Incontestable Clause Operates. Where a life insurance policy, dated October 1st, had an indorsement written thereon by the company's secretary, stating that the amount of the insurance would be carried as term insurance from August 1st to October 1st, all the provisions of the policy not inconsistent with that writing must be read into the contract for term insurance, since the writing was not a complete contract in itself, and, if any of the provisions are read into it, all consistent ones must be, so that the year during which by the terms of an incontestable clause the company did not assume the risk of suicide by the insured began to run from the date of the term insurance, not from October 1st, and after the lapse of one year from that date the suicide of the insured is no defense. Krebs v. Philadelphia Life Ins. Co. (Pa.) 1917D-1184.

(Annotated.)

27. Risks Included—Legal Execution of Insured. An ordinary life policy, which contained a provision that it should be incontestable within two years after date of issue, provided premiums have been paid, and except for fraud, does not cover death of insured as the result of execution for crime, though such risk was not excepted. Scarborough v. American National Ins. Co. (N. Car.) 1917D—1181.

28. Effect of Incontestable Clause. A clause in an ordinary life policy, providing that it should be "incontestable" after two years from its date, except for fraud, providing premiums have been paid, merely means that the provisions of the policy will not be contested, and is not a waiver by the insurance company of the right to defend against a risk, as that of execution of insured for crime, which was never assumed. Scarborough v. American National Ins. Co. (N. Car.) 1917D-1181.

29. Effect—Fraud of Insured. A provision in a life policy that it shall be incontestable after one year from its date, except for nonpayment of premiums and except as otherwise provided in the policy, does not expressly or impliedly except an action or defense based on fraud by insured, though the policy provides that, in the absence of fraud, all statements in the application shall be deemed representations and not warranties, and no such statement shall avoid the policy unless contained in the writ-

ten application. Dibble v. Reliance Life

Ins. Co. (Cal.) 1917E-34.

30. Words and Phrases — "All Contracts." Cal. Civ. Code, § 1688, providing that "all contracts" which have for their object the exemption of anyone from responsibility for his own fraud are against the policy of the law, includes life insurance policies, but does not render invalid a clause declaring that a policy shall be incontestable after one year from its date, though construed to preclude the defense of fraud by insured, for the object of the clause is only to provide a shorter term for maintaining a claim on the ground of fraud than is prescribed by limitations. Dibble v. Reliance Life Ins. Co. (Cal.) 1917E-34. (Annotated.)

31. Effect — Breach of Warranty. A provision in a life policy that it shall be incontestable after one year from its date, except for nonpayment of premiums, precludes any defense after the stipulated period on account of false statements warranted by insured to be true, though the statements were fraudulently made, unless fraud is expressly or impliedly excepted from the effect of the provision. Dibble v. Reliance Life Ins. Co. (Cal.) 1917E—34

32. Illness of Insured at Issuance of Policy. A provision in a life policy that

it shall not be contested after one year from its date, except for nonpayment of premiums, prevents insurer from contesting the policy after one year, on the ground that insured, when applying for insurance and at all times thereafter, was seriously ill, though the policy also provides that it shall not take effect until the premium is paid, while insured is in good health, and the policy shall have been duly issued. Dibble v. Reliance Life Ins. Co. (Cal.) 1917E-34.

33. Policy Issued to Employee of Insurer. An incontestable clause in a life policy issued to a trusted employee of insurer is as binding on insurer as if the policy had been issued to a stranger, for the parties sustain the same relation as in the ordinary case of life insurance. Dibble v. Reliance Life Ins. Co. (Cal.) 1917E-34.

34. Defense Based on Fraud. A clause in a policy of life insurance, providing that "this policy is incontestable from its date, except for nonpayment of premiums," precludes any defense after the stipulated period on account of false statements in the application for the policy, even though they were fraudulently made. Duvall v. National Ins. Co. (Idaho) 1917E-1112. (Annotated.)

35. Statute Making Policy Incontestable—Modification by Contract. Under the provisions of section 42, Idaho Sess. Laws 1911. p. 748, as amended by Laws of 1913, p. 406, § 22, it is provided that an insurance policy, so far as it relates to life or endowment insurance shall be incontestable after two years from the date of issue, except for nonpayment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war, etc. That provision of the statute does not prohibit the parties from contracting that the period of contestability shall be less than two years, nor from agreeing that the policy shall not be contestable after its delivery. Duvall v. National Ins. Co. (Idaho) 1917E-1112.

36. Effect on Attack for Fraud. Where a life policy provides that it shall be incontestable, except for nonpayment of premiums, after one year from date, the insurer, after the expiration of the year, cannot maintain a suit against the insured and the beneficiary to cancel the policy for the defendant's alleged fraud in procuring it. Philadelphia Life Ins. Co. v. Arnold (S. Car.) 1916C-706.

(Annotated.)

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37. Validity. A life policy, providing that it shall be incontestable, except for nonpayment of premiums, after one year from its date, is not objectionable as in conflict with the state statute of limitations, but is valid. Philadelphia Life Ins. Co. v. Arnold (S. Car.) 1916C-706.

#### Notes.

Effect of incontestable clause in life insurance policy in case of legal execution of insured. 1917D-1183.

Effect of incontestable clause in life policy on provision against suicide. 1917D-1186.

#### d. Cause of Death.

38. A fraternal benefit certificate provided that, if the holder died in consequence of the violation of the laws of the state, the certificate should be void. In an action on the policy the defense was interposed that the holder came to his death by a gunshot wound inflicted by another in self-defense when attacked by the insured. It was disputed who fired the first shot and who brought on the difficulty, and whether assured acted in self-defense. It is held that, under the evidence, the question as to whether deceased met his death in consequence of a violation of the state's criminal laws was for the jury. Bounds v. Sovereign Camp (S. Car.) 1917C-589. (Annotated.)

39. Violation of Law. Under a certificate of fraternal life insurance void if the member die in consequence of a violation of the state laws, if the facts are admitted, the question whether death was so caused is one of law; but, if the facts are denied or disputed, the question is one of fact. Bounds v. Sovereign Camp (S. Car.) 1917C-589. (Annotated.)

40. Effect of Suicide on Liability of Association—Meaning of "Suicide." Under the laws of Missouri (Rev. St. 1909, \$6945) providing that, in all suits upon policies of life insurance issued by any company doing business in that state to citizens of that state, it shall be no defense that insured committed suicide, unless it is shown that he contemplated suicide when applying for the policy, "suicide" is not used in its technical sense, but in its popular meaning of death by one's own hand, irrespective of mental condition, and includes all cases of self-destruction. Travelers' Protective Assoc. v. Smith (Ind.) 1917E-1088.

### Note.

Death while engaged in violating law within exception in life insurance policy. 1917C-592.

#### e. Control of Policy.

41. Where a life policy, taken out by a father on the life of his minor son, was made payable to the executors, administrators or assigns of the son, the father and mother, as guardians by nature, are not authorized to consent to a cancellation of the policy or to a change to a paid-up policy, before forfeiture for non-

payment of premiums. Burke v. Prudential Ins. Co. (Mass.) 1917E-641.

(Annotated.)

42. By Parent on Life of Child—Right to Control Policy. Under a policy taken out by a father on the life of his minor son, payable to the "executors, administrators or assigns of the insured," the son is the person insured and the beneficiary, with the right to custody of the policy in the father. Burke v. Prudential Ins. Co. (Mass.) 1917E-641. (Annotated.)

#### Note.

Right of parties in case of insurance procured by parent on life of minor child. 1917E-643.

### 5. PROOF OF DEATH.

- 43. Waiver of Defects. Where, after plaintiff's husband had been absent from home for more than seven years, she stated the case to the fraternal death benefit association of which he was a member as a proof of his death, such association not objecting to the proof as unsatisfactory or insufficient until it was offered in evidence on trial, the board of directors having rejected plaintiff's claim generally, and not having specifically pointed out any defect in the proof, any defect in such proof is waived when the board received and retained it, giving no notice that it was not satisfactory, calling for no further proof, and rejecting the claim in toto upon the proof made, since defendant's right to a proof of loss such as was required by its contract of insurance was one it could and did waive by pursuing a line of conduct justifying the conclusion that it was not intending to insist on a full compliance with the re-Werner v. Fraternal Bankquirements. ers' Reserve Soc. (Iowa) 1918A-1005.
- 44. Waiver of Proofs of Loss By Denial of Liability. A beneficiary certificate provided that no action upon it should be brought until proofs of death and of claimant's claim have been filed and passed upon by the executive committee of the order, nor unless brought within one year from the date of such action by the committee. Where the wrongful act of defendant dispenses with such proofs and there is accordingly no action by the committee, the contract provision has no application. Denial of liability in a pleading in a former action did not operate to set the contract limitation in motion. Dechter v. National Council (Minn.) 1917C-142.

## 6. ASSIGNMENT OF POLICY.

#### a. In General.

45. Necessity That Assignee Have Insurable Interest. The assignee of a policy

- of life insurance or of the proceeds thereof must have an insurable interest in the life of the insured. Crismond's Admx. v. Jones (Va.) 1917C-155.
- 46. Assignment by Wife of Insurance in Her Favor. As a wife designated as beneficiary in a policy on her husband's life, which reserved to the husband the right to change the beneficiary, had no vested right, but a mere expectancy only, she did not, by joining in her husband's assignment of the policy as security for his indebtedness, become a surety for him; the absolute right to assign the policy being lodged in him, and it was not necessary that she should receive a consideration for joining in the assignment in order to bind her. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298. (Annotated.)
- 47. Power to Make Second Assignment. Where, though an assignment of a \$15,000 life insurance policy as security for a debt recited that it was to secure an indebtedness of \$15,000, it was the intention to protect the assignee as to insured's entire liability to it, a letter subsequently written the assignee by him, directing that in case of his death the proceeds, after the satisfaction of a \$10,000 note, should be applied to relieve an accommodation indorser from liability on account of another note for \$6,000, was explanatory and confirmatory of the original intent, and passed by way of assignment whatever value the policy possessed after the delivery of the first assignment, as insured was not restricted to a single assignment of the policy, which by its terms was assignable. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.
- 48. Distinction Between Assignment and Change of Beneficiary. An "assignment" of a life insurance policy and a "change of beneficiary" are different things, as an "assignment" is the transfer by one of his right or interest in property to another, and rests upon contract, and, generally speaking, the delivery of the thing assigned is necessary to its validity, while the power to change the beneficiary is the power to appoint, and must be exercised in the manner agreed upon in the contract of insurance. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.
- 49. Right of Assignee to Reassign. Where insured, who had assigned the policy to secure an indebtedness to the assignee, wrote the assignee, directing it, in case of his death, to apply the proceeds in payment of a \$10,000 note, and the balance to relieve an accommodation indorser from liability on another \$6,000 note, such letter was sufficient authorization to the assignee to assign an interest in the policy to the executors of the accommodation indorser, who had been compelled to pay the note on which they were

liable, and they thereby acquired such a title as was necessary to enable them to hold the policy as collateral security for the debt which they had paid, and to sustain an action upon the policy. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.

- 50. Where a policy was assigned to secure certain notes held by the assignee, an assignment of an interest therein to the executors of an accommodation indorser on one of the notes, who were required to pay the note, was valid and binding on the beneficiary, in the absence of any authorization from insured to make such assignment; the policy having reserved the right to insured to change the beneficiary. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.
- 51. Renewal of Notes Secured by Assignment—Effect. Where a life insurance policy was assigned to a bank to secure insured's notes held by it, the renewal of such notes did not destroy the assignment, in the absence of any intention on the part of the insured and the bank that the renewal should have that effect. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B-298.
- 52. Validity of assignment—Consent of Insurer—Right of Third Person to Urge Nonconsent. Where, after the assignment of an insurance policy to secure an indebtedness, insured wrote the assignee relative to the disposition of the proceeds of the policy in case of his death, such letter, considered as an additional assignment, was not ineffective as against a beneficiary, though neither it nor a copy of it was filed with or assented to by the company, as required by the policy, as the provision in the policy requiring notice to the company was for its protection, and could not be set up by any one else to defeat an assignment made without compliance therewith. Mutual Benefit Life Ins. Co. v. Swett (Fed.) 1917B—298.

### Note.

Validity and effect of assignment by wife of insurance in her favor on life of husband. 1917B-302.

- b. Assignee Having no Insurable Interest
- 53. Effect of Want of Insurable Interest—Good Faith. While an assignment of a policy of insurance must, in any case, be characterized by good faith, yet good faith alone is not sufficient to sustain a policy of insurance, taken out upon the life of another by one who has no interest in the continuance of such life. Crismond's Admx. v. Jones (Va.) 1917C-155.

54. Assignee Without Insurable Interest. The rule of insurance law relative to insurable interest applies with equal force after a life policy is issued, and the beneficiary is changed by assignment or otherwise as it does to the naming of the beneficiary at the time of procuring the insurance. Metropolitan L. Ins. Co. v. Nelson (Ky.) 1918B-1182.

### 7. ACTION ON POLICY.

### a. Pleading.

55. Sufficiency. A count, in an answer in an action on a life policy which denies the issuance of the policy in consideration of an annual premium, is good as against a demurrer. Dibble v. Reliance Life Ins. Co. (Cal.) 1917E-34.

### b. Findings.

56. Immoral Relation Between Insured and Beneficiary. Under the evidence in this case, the court did not err in refusing to find that immoral relations existed between the insured and his beneficiary. Christenson v. Madson (Minn.) 1916C-584.

### c. Defenses.

- 57. Suicide While Insane. Where insurer, when sued on a life policy, proved the suicide of insured while sane, the beneficiary could prove that insured was insane when committing suicide, and thereby defeat the defense of suicide. Security Life Ins. Co. v. Dillard (Va.) 1917D-1187.
- 58. The defense of suicide of insured while sane is based on public policy, and cannot be waived intentionally or unintentionally by stipulations or defects in pleadings. Security Life Ins. Co. v. Dillard (Va.) 1917D-1187. (Annotated.
- 59. Effect of Suicide of Insured. Suicide of insured while sane defeats a recovery on the policy by the beneficiary, his wife, whether the suicide was or was not in contemplation of, or in any way dealt with by, the parties as a risk covered by the policy. Security Life Ins. Co. v. Dillard (Va.) 1917D-1187.

(Annotated.)

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- Interruption by conveyance, see Easements, 12.
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- CON-VALIDITY AND 1. NATURE, STRUCTION OF STATUTES.
- 1. Effect of Bar Statutory Right of Action. Where a right of action is given by statute, which further provides that suit shall be commenced within a specified time, or the right of action shall be extinguished, the right to recover depends on the action being commenced within the time limited, and, if it is not, not only the remedy but the right is extinguished. Osborne v. Grand Trunk R. Co. (Vt.) 1916C-74.
- 2. Retroactive Amendment of Statute -Validity. It is within the power of the legislature to amend a statute of limitation by shortening the time in which an existing cause of action may be barred, provided a reasonable time is given for the commencement of an action before the bar takes effect. Milbourne v. Kelley (Annotated.) (Kan.) 1916D-389.
- 3. Retroactive Operation. A statute of limitation operates prospectively, unless a legislative intent to give it a retrospective operation is clear. State v. General Accident, etc. Assurance Corp. (Minn.) 1918B-615.
- 4. The postponement of the time when a limitation statute becomes effective evidences an intent to make it of retrospective operation. State v. General Accident, etc. Assurance Corp. (Minn.) 1918B-615.

### 2. WHAT LAW GOVERNS.

- 5. Civ. Code Quebec, § 1053, provides that every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill, and article 17, § 11, declares that the word "person" includes bodies politic and corporate. The laws of Quebec also provide that an action for injuries under such statute shall be brought within one year. Held, that the limitation applied to the right as well as to the remedy, and hence, where plaintiff sued in Vermont under the statute for an injury occurring in Quebec, the action was governed by the lex loci, and, if not brought within the time specified, was unsustainable. Osborne v. Grand Trunk R. Co. (Vt.) 1916C-74.
- 6. Limitations Applicable Statutory Cause of Action. It is not essential that a limitation affecting a statutory right of action not existing at common law should be incorporated in the act creating the right; but it is sufficient if the limitation in another statute is so directed to the new liability so specifically as to warrant the conclusion that it qualifies the right. Osborne v. Grand Trunk R. Co. (Vt.) 1916C-74.

- 7. Nature of Action Bill in Nature of Bill of Review. Where, after the death of the life beneficiary of a trust, her heirs, without notice to complainant, who was her husband, obtained a decree terminating the trust and directing distribution of the trust fund to them, a subsequent bill brought by complainant to set aside such decree and to recover the property on the ground that it was distributable to him, alleging that he had no knowledge of the existence of the trust and had not been made a party to the prior proceedings because of fraudulent concealment on the part of the beneficiary's heirs of the fact that she died leaving a living husband, and that, on discovering the facts, he proceeded diligently to take action, is not a bill of review, but a bill in the nature of a bill of review, and is therefore not objectionable because not filed within a year from the entry of the final decree. Quinn v. Hall. (R. I.) 1917C-373.
- 8. Recovery of Excessive Allowance to Executor. Where an executor resigned in 1899 and was discharged of all liability on account of the estate, the owner of the residuary estate learning in March, 1909, that excessive commissions, costs, and allowances had been awarded the executor by the surrogate upon his yearly accountings, which the executor received in good faith, such owner's action to recover such excessive allowances is not one "to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery," which N. Y. Code Civ. Proc. § 382, subd. 5, provides is not barred until six years after the discovery by the plaintiff of the facts constituting the fraud, since, as the executor acted in good faith, the surrogate's decrees, if void in respect to the illegal allowances, are so, not because procured by fraud, but only because beyond the surrogate's jurisdiction. Spallholz v. Sheldon (N. Y.) 1917C-1017.

# 3. STATUTES APPLICABLE TO PARTICULAR ACTIONS.

- 9. Time to Attack Conveyance. Under Ky. St. § 1911, providing that all fraudulent and preferential transfers shall be subject to the control of courts of equity, upon petition filed wthin six months, where more than six months elapsed between the sale and transfer of corporate securities and the institution of an action by the assignee of the judgment creditor of the transferor, such sale and transfer cannot be thereafter attacked by the assignee. Husband v. Linehan (Ky.) 1917D-954.
- 10. Action to Set Aside Fraudulent Conveyance. Plaintiff, who loaned money to defendant in 1892, and who, after foreclosure and purchase of the property for

- \$200 in 1897, recovered judgment for the balance, and whose suit to set aside the judgment debtor's alleged fraudulent conveyance to his wife made in 1895, and confirmed by deed in 1898, was not brought until eleven years after judgment, is barred, either by the ten-year statute of limitations, N. Car. Revisal 1905, \$\frac{8}{3}\$\$ 391, 399, or the three-year statute, section 395, subsec. 9. Ewbank v. Lyman (N. Car.) 1917A-272.
- 11. Trespass. The right of action for trespass is barred in six years. Rollins v. Blackden (Me.) 1917A-875.
- 12. Action on Benefit Certificate. The statutes governing the time of bringing suits upon policies of insurance have no application in determining whether a suit upon a death benefit certificate of a fraternal society was prematurely brought. Werner v. Fraternal Bankers' Reserve Soc. (Iowa) 1918A-1005.
- 13. Action for Assault With Felonious Intent. A civil action for assault with intent to rape is an action for damages for an assault and battery with circumstances of aggravation which must, under section 13 of the code, be begun within one year after the cause of action accrued. Borchert v. Bash (Neb.) 1917A-116.

(Annotated.)

#### Notes.

Application of statute of limitations as between trustee and beneficiary of express trust. 1917C-1018.

What is civil action for assault within statutory limitation applicable thereto. 1917A-118.

### 4. COMPUTATION OF TIME.

a. When Statute Begins to Run.

### (1) In General.

14. N. Y. Code Civ. Proc. § 388, requiring actions not otherwise specially provided for to be commenced within ten years after the cause of action accrues, applies to every form of equitable action. Ford v. Clendenin (N. Y.) 1917A-658.

(Annotated.)

15. When Statute Begins to Run. Utah Comp. Laws 1907, § 3490, provides that an action is pending from its commencement until final determination upon appeal, "or until the time for appeal has passed, unless the judgment is sooner satisfied"; section 3307 provides that an appeal from a judgment or order directing the payment of money does not stay execution, unless a written undertaking be given; and section 3320 provides for restitution in case judgment is reversed or modified on appeal after its enforcement. Held, that a judgment became final so as to start the eight-year limitation against an action thereon from the time

it was rendered, where no appeal was taken, and not from expiration of the six months within which an appeal might have been taken; actions remaining ponding after judgment only for the purpose of enforcing them or to institute proceedings to review. Sweetser v. Fox (Utah) 1916C-620. (Annotated.)

16. A cause of action arises the moment an action may be maintained to enforce the legal right so that the statute of limitation then begins to run. Sweetser v. Fox (Utah) 1916C-620.

(Annotated.)

### (2) Fraud or Concealment.

- 17. Record as Constructive Notice of While the mere registration of the judgment debtor's deed, alleged to have been made in fraud of creditors, will not usually be constructive knowledge, yet where the deed under which the grantee claims to hold has been on the registry for more than eleven years before the action was commenced, the creditor who has herself foreclosed a deed of trust on the part of the debtor's property, and who has not been able to collect her judgment for the balance, and who knew of the debtor's embarrassed financial condition, is negligent in not having sooner examined the record and discovered the conveyance. Ewbank v. Lyman (N. Car.) 1917A-272. (Annotated.)
- 18. Right to Sue—Necessity of Prior Equitable Relief. That equitable relief must be secured before the party entitled thereto can sue at law does not of itself suspend the running of the six year statute of limitations (N. Y.) Code Civ. Proc. \$382, subd. 5), providing that a cause of action "other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery," is not deemed to have accrued until the discovery by the plaintiff of the facts constituting the fraud. Spallholz v. Sheldon (N. Y.) 1917C-1017.
- 19. Discovery of Fraud. N. Car. Revisal 1905, § 395, subsec. 9, providing that actions for relief on the ground of fraud or mistake shall be barred in three years, applies to an action to set aside a judgment debtor's alleged fraudulent conveyance, and the provision that the action is not to be deemed to have accrued until the discovery of the facts constituting the fraud, etc., means until the impeaching facts are known or should have been discovered in the exercise of reasonable business prudence. Ewbank v. Lyman (N. Car.) 1917A-272.

### Note.

Record of instrument as constructive notice of fraud. 1917A-267.

### (3) Trover.

- 20. When Cause of Action Accrues. The right of action in trover for the conversion of money deposited by an agent with the principal's consent does not accrue, within the meaning of the statute of limitations, until there is a demand of the agent for the money and a refusal by him. Williams v. Williams (Me.) 1916D-928.
- (4) Action to Recover Property Given in Consideration of Marriage.
- 21. Limitations do not begin to run against the rights of a husband to recover real estate conveyed for the benefit of his wife in consideration of marriage until judgment of divorce is entered. Anheier v. De Long (Ky.) 1917A-1239.

### (5) Action for Continuous Services.

- 22. Where plaintiff agreed to board decedent in return for his promise to leave her realty, and, when plaintiff moved to another home, the contract was not mutually abandoned, plaintiff can recover, on the special contract, for her services in boarding decedent up to the time she moved, as the three-year statute of limitations does not bar her cause of action, which did not accrue until decedent's death. McCurry v. Purgason (N. Car.) 1918A-907. (Annotated.)
- 23. Continuing Contract. A contract binding one to rear and maintain another's child until the child's maturity is a continuing one, and the compensation under it becomes due and payable at the termination of the child's minority within the statute of limitations. Myers v. Saltry (Ky.) 1916E-1134.
- 24. In an action against an estate to recover for services to decedent, where the services extended over a period of more than five years preceding the filing of the claim, but were continuous up to within a year of the commencement of the action, the services rendered more than five years before filing of the claim are not barred by the statute of limitations, since under such circumstances the statute did not begin to run. Estate of Oldfield (Iowa) 1917D-1067.

### (6) Action to Enforce Trust.

25. Running of Limitations Against Trustee—Termination of Trust. Where an executor resigned in 1899, his letters being revoked and the estate transferred to his successors, the surrogate court awarding him excessive costs, allowances, and fees, which he retained without actual fraudulent intention, the owner of the residuary estate being aware of the termination of the trust, her cause of action against the executor on the ground

that he was a constructive trustee for her as to the excessive fees retained by him was barred in 1909, whether the six or the ten year statute of limitations applied, since, where a trust ends, and the trustee yields the trust to a successor, the statute of limitations begins to run in his favor, though, where a trustee subsists and has not been renounced, the statute does not run. Spallholz v. Sheldon (N. Y.) 1917C-1017. (Annotated.)

26. The six years' limitation prescribed by Minn. Laws 1905, § 4076, for actions to enforce a trust, does not begin to run against a suit by a monastic brotherhood to enforce its equitable ownership under the constitution of the Order in the gains and acquisitions of a member until the latter's death, where there is no repudiation of the trust during his lifetime. Order of St. Benedict v. Steinhauser (U. S.) 1917A-463.

## (7) Action for Libel or Slander.

#### Note.

Running of statute of limitations against action for libel or slander. 1917C-64.

- (8) Action for Breach of Agreement to Devise.
- 27. Breach of Agreement to Devise. Where services are to be performed for another in consideration of an oral agreement by the terms of which the person is to be compensated by a devise in the will of the person for whom the services have been or are to be performed, the cause of action does not accrue until the death of the promisor and his failure to make the devise according to the terms of the contract. Gordon v. Spellman (Ga.) 1918A-852.
- 28. Agreement to Compensate by Will. Where plaintiff, in return for decedent's agreement to leave her realty, agreed to board him, and thereafter left her home and moved to another, the contract being mutually abandoned by the parties, any cause of action in the nature of a quantum meruit accrues to plaintiff at the time of the abandonment, and her action for services rendered will be barred in three years therefrom. McCurry v. Purgason (N. Car.) 1918A-907. (Annotated.)

#### (9) Stockholder's Action.

29. Action by Stockholder for Dividends. The obligation of a corporation to pay a declared dividend to a stockholder is not subject to limitations until there has been a demand on the corporation and a refusal to pay. Yeaman v. Galveston City Co. (Tex.) 1917E-191.

- (10) Action to Recover Usurious Interest.
- 30. Recovery of Usurious Interest—When Right of Action Accrues. The mere assignment of a usurious obligation does not set the statute of limitations running against an action to recover back payment of usurious interest because it is the same usurious obligation, and no transaction occurred sufficient to make a novation which could be deemed a payment of the obligation. Taulbee v. Hargis (Ky.) 1918A-762.
- 31. Recovery of Usurious Payments / When Cause of Action Arises. The cause of action for the reclamation of usurious interest arises when it has been paid. Taulbee v. Hargis (Ky.) 1918A-762.

### (11) Action on Judgment.

32. When Statute of Limitation Begins to Run. Utah Comp. Laws 1907, § 2874, requiring an action on a judgment to be commenced within eight years, means eight years from the time the cause of action has arisen. Sweetser v. Fox (Utah) 1916C-620. (Annotated.)

#### Notes.

When statute of limitations begins to run against action on judgment. 1916C-625.

Running of statute of limitations against action for services performed in consideration of oral agreement to compensate by will. 1918A-912.

- b. Suspension or Interruption of Operation of Statute.
  - (1) Absence from State.
- 33. Absence from Jurisdiction. Under N. Y. Code Civ. Proc. § 401, providing that, if when a cause of action accrues against a person he is without the state, the action may be commenced within the time limited therefor after his return to the state, with certain exceptions as to designations by foreign corporations, there is no distinction between a limitation prescribed by statute and one prescribed by contract. Comey v. United Surety Co. (N. Y.) 1917E-424.
- 34. Pa. Act May 22, 1895 (P. L. 112), providing that defendant, becoming a non-resident after the cause of action has arisen, shall not have the benefit of any statute for the limitation of actions during the period of such residence without the state, contemplates that, where a resident of the state incurs an indebtedness and becomes a nonresident so that he cannot be served with process, limitations do not run in his favor. Hunter v. Bremer (Pa.) 1918A-152.

- 35. Absence as Question of Fact. In an action on notes, whether defendant at the time the cause of action arose had been a resident in this state under Pa. Act May 22, 1895 (P. L. 112), and whether he subsequently abandoned it, and, if so, for how long, are questions for the jury. Hunter v. Bremer (Pa.) 1918A-152.
- 36. Absence of Creditor. N. Car. Revisal 1905, § 366, referring to the absence of the debtor from the state beyond the jurisdiction of the court and its process, has no application to the absence of a creditor, since he may go into the territory of the debtor's residence and sue in the courts whenever he may desire. Ewbank v. Lyman (N. Car.) 1917A-272.

### (2) Nonresidence of Party.

37. Words and Phrases—"Residence." In action on notes, an instruction as to right of a nonresident defendant to the benefit of the statute of limitations, to the effect that residence did not necessarily involve the idea of an intention of remaining at the place of his residence, is construed, with reference to its context, to mean and to have been understood as if the word "permanently" had been used therein before the word "remaining" and as so construed is held to be correct. Hunter v. Bremer (Pa.) 1918A-152.

(Annotated.)

#### (3) Commencement of Action.

- 38. Amendment of Pleading. In an action for the death of an employee incinerated when defendant's premises burned, a count in the original declaration averred that defendant negligently obstructed the passageway to the only fire Other allegations were made in combination with such averments. It is held that the count defectively stated a cause of action under the Ill. Factory Act, § 14, requiring adequate fire escapes to be furnished in mills, mercantile establishments, etc., and so an additional count, correctly stating a cause of action under the act, was not subject to plea of limitation. Lichtenstein v. L. Fish Furniture Co. (III.) 1918A-1087.
- 39. Action for Slander Effect of Amendment Introducing New Cause of Action. In action for slander, an order sustaining demurrer to the complaint substantially found that the words were not actionable per se. After demurrer to the amended complaint was sustained, plaintiff again amended, charging specific words actionable per se, but such amendment was filed eighteen months after the alleged slander. It was held that the action was barred by limitations. Irvine v. Barrett (Va.) 1917C-62.
- 40. Where an action for wrongful death was instituted against a railroad com-

- pany within the one-year limitation period prescribed by 20 Del. Laws, c. 594, by filing a praccipe, and the declaration filed against that deceased was an employee of the defendant company, the cause of action stated by an amended declaration, filed after the expiration, of the year, alleging that he was an employee of the Pullman Company, and charging the defendant company with the duties owed to a stranger, was not barred by such statute; an action at law being commenced in this state, so as to stop the running of limitations, by praccipe, and not by the plaintiff's declaration, as in many states. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227. (Annotated.)
- 41. In an action against a newspaper for libel, an amendment to the complaint setting up a republication of the libelous article by other newspapers, and charging that they were induced or caused by defendant, states a different cause of action, and hence, being filed more than a year after the publication, is expressly barred by Ala. Code 1907, § 4840. Age-Herald Publishing Co. v. Waterman (Ala.) 1916E-900.
- 42. Tolling Statute of Limitations—Effect of Subsequent Slander. Words to the effect that plaintiff stole \$1,500 are so dissociated from those that defendant's business was short \$1,500 for which he could not account, when not alleged to have been spoken at the same time or to the same person, as to constitute a new cause of action and do not toll the statute of limitations as to the original cause of action. Irvine v. Barrett (Va.) 1917C-62.

  (Annotated.)

#### 5. REVIVAL OF CAUSES OF ACTION.

- a. Acknowledgment or New Promise.
- 43. Listing of Debt by Executor. An affidavit for probate made by an executor, containing a list of the debts of the testator is not such an acknowledgment of a claim included therein as will remove the bar of the statute of limitations. Lloyd v. Coote & Ball (Eng.) 1916E-434.

#### b. Part Payment.

- 44. Tolling Statute Payment by One of Several Makers. A payment of interest on a past due note by one of two makers without the knowledge or consent of the other will start the statute of limitations running anew as to the latter. Macaulay v. Schurmann (Hawaii) 1916E—1206. (Annotated.)
- 45. Payments made on a note either of interest or principal before the note is barred by limitations tolls the statute as to the party making the payment and starts the statute afresh from the date of payment. Nicholas v. Porter (Ind.) 1916D-326.

46. Payment by Principal — Effect on Liability of Surety — Consent by Surety. Payment of interest by the principal debtor with the knowledge and consent of the surety tolls the statute of limitations as to the surety. Nicholas v. Porter (Ind.) 1916D-326. (Annotated.)

#### Note.

Part payment by principal with consent of surety as suspending statute of limitations as to surety. 1916D-327.

#### 6. ACTIONS.

### a. Pleadings of Plaintiff.

- 47. Continuing Publication. Under Rem. & Bal. Wash. Code, § 160, providing that an action for libel must be commenced within two years after the cause of action accrues, a complaint charging continued publication up to the time of the commencement of the action is not vulnerable to a demurrer raising the bar of the statute; each publication constituting a separate libel. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638.
- 48. Effect of Amendment Raising Question by Demurrer. Demurrer to a plea of limitations to a count as amended presents the question of law whether the cause of action set up by the amended count was other and different than that set up by the original count. Wende v. Chicago City R. Co. (III.) 1918A-222.

### b. Pleadings of Defendant.

- 49. Where, in an action for injuries under a provision of the Canadian Code, defendant pleads generally that the action is barred by the laws of the province of Quebec requiring that the action be brought within a year, on which plaintiff joins issue, he cannot thereafter object that the plea was insufficient because it did not set out verbatim the statute relied on, though, if a demurrer had been filed to the plea, it would probably have been sustained. Osborne v. Grand Trunk R. Co. (Vt.) 1916C-74.
- 50. Overruling demurrer to a plea of limitations to an amended count of the declaration is a holding that the amended count set up another and different cause of action than that in the original count. Wende v. Chicago City R. Co. (III.) 1918A-222.
- 51. Necessity of Pleading Statute. Defendant has a right to waive the statute of limitations if he desires to do so, and if he would avail himself of lapse of time as a peremptory bar to an action against him, he must interpose the statute by plea. Taulbee v. Hargis (Ky.) 1918A-762.

### 7. WHO MAY PLEAD STATUTE.

52. Action by Administrator. Since an administrator succeeds to the rights of

his intestate, derives his title from him, and in an action endeavors to enforce a right which belonged to the intestate, the bar of limitations, if available against the intestate, is ordinarily available against the administrator. Causey v. Seaboard Air Line B. Co. (N. Car.) 1916C-707.

### LIMITATION OF LIABILITY.

Under Employers' Liability Act, see Master and Servant, 73.

#### LIMITING LIABILITY.

See Carriers, 18; Carriers of Goods, 11-14; Carriers of Livestock, 3; Master and Servant, 38, 39.

### LIQUIDATED DAMAGES.

See Contracts, 63-73, 75.

#### LIQUORS.

See Intoxicating Liquors.

#### LIS PENDENS.

- 1. Scope of Lis Pendens Statute. Such statute does not apply to a case where a person sells, leases, or encumbers realty not his own and which he never had owned. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 2. Effect of Suit in Federal Court. Ky. St. § 2358a, providing that no action in which the title or possession of realty is involved, nor any order or judgment therein, or sale thereunder, shall affect the right or title of any subsequent purchaser for value and without notice thereof, except from the time there shall be filed in the office of the clerk of the county court in which the realty lies a memorandum stating the style and number of the action, the court in which it is pending, the name of the person whose interest is involved, and a description of the realty, must be followed in order that the action, sale, or judgment may affect the title or interest of a subsequent purchaser, etc., of realty situated in the state involved in Tennis Coal a suit in the federal court. Co. v. Sackett (Ky.) 1917E-629.

#### LIVESTOCK.

See Animals: Carriers of Livestock.

### LOAN ASSOCIATIONS.

See Building and Loan Associations.

#### LOAN BROKERS.

See Brokers, 14; Pawnbrokers.

See Banks and Banking, 57-60; Building and Loan Association, 3, 4; Pawn Brokers; Pledges.

Obtaining loan, see False Pretenses, 5. To infant, validity, see Infants, 6.

### LOATHSOME DISEASE.

As defense to action, see Breach of Promise of Marriage, 1, 5-8.

LOCAL AND TRANSITORY ACTIONS. Jurisdiction, see Courts, 5-7.

### LOCAL ASSESSMENT.

Special assessments for improvements, see Taxation, 116-145.

#### LOCAL OPTION.

- 1. Election—Presumption of Regularity. Where an election adopting prohibition in a county was not contested within the statutory time, the court must conclusively presume, on a trial for violating the prohibition law, that all the steps taken to enact prohibition in the county were legal. Longmire v. State (Tex.) 1917A-726.
- 2. Local Option Election—Proof of Result—Record Book. Under Ill. Anti-Saloon Territory Act (Laws 1907, p. 297), 7, providing that the clerk shall record in a well-bound book, to be kept in his office by himself and his successor, the result of the vote on the proposition of the political subdivision becoming antisaloon territory, and such result may be proved by such record or by the official certificate of the clerk, and, where it shows that a majority of the votes were "yes," it shall be prima facie evidence that the political subdivision has become anti-saloon territory, it is not necessary to make such record proof that it be shown that it was in the exclusive possession of the clerk. People v. Elliott (Ill.) 1918B-391.
- 3. Effect of Vote Village Included Within Town. Under the local option statutes, if a town votes upon the license question and a village located within the town and not separated therefrom for all purposes has not voted thereon as an independent municipality, the vote of the town determines the question for all the territory of the town, including that within the village; but if the village itself as an independent municipality upon the question, the vote of the village determines such question for the territory within the village regardless of the vote of the town. State-White (Minn.) 1917C-(Annotated.) 510.

Territory affected by adoption of local option law. 1917C-512.

#### LODGING-HOUSES.

See Innkeepers; Licenses.

LOGGER'S LIEN.

See Liens, 6-8.

#### LOGGING.

See Trees and Timber, 22-25.

#### LOGS AND LUMBER.

See Trees and Timber.

#### LOOKOUT LAW.

See Railroads, 52, 53.

#### LOSS OF ARM.

What constitutes, see Master and Servant, 205.

#### LOSS OF EYE.

What constitutes, see Master and Servant, 204.

#### LOSS OF FINGER.

What constitutes, see Master and Servant, 203.

### LOSS OF HAND.

Includes, loss by amputation, see Accident Insurance, 19.

#### LOSS OF SERVICES.

Parent's action for child's services, see Parent and Child, 3.

### LOST INSTRUMENTS.

Parol proof, see Evidence, 126-128. Sufficiency of proof, see Evidence, 154. Parol proof of lost memorandum, see Frauds, Statute of, 24.

- 1. Actions—Loss of note. When it is proven that a note declared on has subsequently been lost, secondary evidence of its contents is admissible. Austin v. Calloway (W. Va.) 1916E-112.
- 2. Loss of a note, occurring after it has been declared on, does not abate the suit or require amendment of pleadings. Austin v. Calloway (W. Va.) 1916E-112.
- 3. A court of law has jurisdiction of an action to recover upon a lost note, when it is clearly established that plaintiff had title to such note and that its loss occurred after it became payable. Austin v. Calloway (W. Va.) 1916E-112.

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- 4. Actions—Effect of Discovery of Instrument. If after diligent and unavailing search therefor plaintiff sues, when allowable, in equity, upon a lost bond, its discovery and production thereafter is immaterial upon his right to relief in a suit then pending. Clark v. Nickell (W. Va.) 1917A-1286.
- 5. Jurisdiction of Action on Lost Instrument. Equity has jurisdiction to enforce the liability of the obligors on the lost bond of a defaulting bank cashier. Clark v. Nickell (W. Va.) 1917A-1286.

(Annotated.)

Jurisdiction of action on lost instrument, 1917A-1289.

#### LOST PROPERTY.

- 1. Rights of Finder of Mislaid Property. Plaintiff, who rented a safe deposit box, while using the customer's private room, discovered an envelope lying on the corner of the desk containing bills to the amount of \$180, and delivered it to the officers of the company, and after diligent effort by them and failure to find the rightful owner, brought suit for its return. It is held that the money, when discovered by plaintiff, was in the possession of the deposit company, which owed a duty towards it, and which, as against plaintiff, was entitled to its possession and custody subject to the rights of the real owner. Foster v. Fidelity Safe Deposit Co. (Mo.) 1917D-798.

  (Annotated.)
- 2. Rights of Finder of Lost Property. The finder of lost property is entitled to possession against every one but the true owner. Foster v. Fidelity Safe Deposit Co. (Mo.) 1917D-798.
- 3. Distinction Between Lost and Mislaid Property. Property to be "lost" \*must have been unintentionally or involuntarily parted with, and money discovered in the highway or on the ground or the floor will be considered as having been casually and unknowingly dropped, and thus lost; but where it is intentionally put down, as in a drawer or on a table, and the owner forgets where he left it and cannot find it, it is not in a legal sense lost! Foster v. Fidelity Safe Deposit Co. (Mo.) 1917D-798.

  (Annotated.)
- 4. Rights of Parties as to Mislaid Property. Where a person goes into another's public place of business to transact business with him and places his money on a table or desk and comes away, forgetting that he has done so, it is left in the possession of the owner, or within the protection of the house or place, and in the legal sense is not lost. Foster v. Fidelity Safe Deposit Co. (Mo.) 1917D-798.
- 5. Mo. Rev. St. 1909, \$ 8268 et seq., defining the duty of persons finding lost prop-

erty, relates only to the duties of a finder of lost property who does not know the true owner, and provides a method for the acquisition of title, and is inapplicable to a safety deposit company obtaining constructive possession of money placed by a customer on a desk provided by the company for the use of its customers, and it is the lawful custodian of the money for the true owner, and must exercise due care to discover him and deliver the property to him. Foster v. Fidelity Safe Deposit Co. (Mo.) 1917D-798.

(Annotated.)

Rights of parties with respect to mislaid property as distinguished from lost property. 1917D-803.

LOTTERY.

Defined, see Gaming, 2.

LUMBER.

See Trees and Timber.

LUNATICS.

See Insanity.

LYING IN WAIT.

Meaning, see Homicide, 60.

#### MACHINIST.

As within Federal Employers' Liability Act, see Master and Servant, 52.

#### MACHINIST'S HELPER.

As within Employers' Liability Act, see Master and Servant, 64.

MAILABLE MATTER.

See Postoffice, 1, 2.

MAIL CARRIER.

Status, see Public Officers, 7.

MAILS.

See Postoffice.

MAINTENANCE.

See Champerty and Maintenance.

### MAJORITY.

Power to bind firm, see Partnership, 18-20.

### MALICE.

Charging malice, see Indictments and Informations, 12, 13.

In civil action for libel, see Libel and Slander, 8-12, 103, 109, 114, 116, 119, 121, 122, 133, 134, 136, 138, 140, 147.

Malice essential for liability, see Malicious Prosecution, 7.

Giving redelivery bond as evidence, see Replevin, 11.

As essential to assault, see Trespass, 4.

### MALICE AFORETHOUGHT.

Defined, see Robbery, 1.

### MALICIOUS ACT.

Defined, see Torts, 2.

#### MALICIOUS INTERFERENCE WITH CONTRACT.

Procuring discharge of servant, see Torts,

#### MALICIOUS MISCHIEF.

Charging malice, see Indictments and Informations, 12, 13,

### MALICIOUS MOTIVE.

As affecting liability, see Torts, 4.

#### MALICIOUS PROSECUTION.

- 1. Nature and Grounds of Liability, 541.
  - a. In General, 541.
  - b. Termination of Prosecution, 541.
  - c. Malice, 541.
  - d. Probable Cause, 542.
    - In General, 542.
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- 2. Actions, 542.

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  - e. Instructions, 543.
  - f. Damages, 543. g. Verdict, 544.

  - h. Defenses, 544.

Excessiveness of verdict, see Damages, 54,

#### 1. NATURE AND GROUNDS OF LIA-BILITY.

#### a. In General.

- 1. Nature of Prosecution-Proceeding to Abate Nuisance. An action for malicious prosecution will not lie for the malicious filing of a complaint under the Eng. Public Health Act against the occupier of premises to compel the cleaning and disinfecting thereof. Wiffen v. Bailey (Eng.) 1916E-489. (Annotated.)
- 2. Elements of Tort. The elements necessary to support an action for malicious prosecution are the institution of proceedings without probable cause, with malice, that they have terminated in plaintiff's favor, and that she suffered damage therefrom. McIntosh v. Wales (Wyo.) 1916C-273.

- 3. Writs-Damages on Dissolution. Damages will not be allowed on the dissolution of ordinary conservatory writs, in the absence of statutory authority therefor. Harvey v. Gartner (La.) 1916D-900.
- 4. What Constitutes Bankruptcy Proceeding. A petition in bankruptcy filed by bona fide creditors, without malice, without libelous and slanderous charges, with reasonable grounds for believing the allegations contained in the petition, with probable cause, and upon legal advice, although not successfully prosecuted, will not sustain an action for damages in the courts of the state. Harvey v. Gartner (La.) 1916D-900. (Annotated.)

### Notes.

Liability as for malicious prosecution of one advising or procuring third person to institute proceeding. 1918A-485.

Liability as for malicious prosecution of one who states facts to magistrate, public prosecutor or executive officer. 1918A-

Instituting bankruptcy or insolvency proceeding as ground for action for malicious prosecution. 1916D-909.

Institution of proceeding to abate nui-sance as ground for action for malicious prosecution. 1916E-493.

### b. Termination of Prosecution.

- 5. Dismissal. Where defendants nished information under oath, on which a justice of the peace issued a warrant charging plaintiff with cattle theft, the fact that the prosecuting attorney thereafter caused the proceedings to be dismissed without submitting any evidence does not render such dismissal any the less a termination of the proceedings in plaintiff's favor. McIntosh v. Wales (Wyo.) 1916C-
- 6. Plaintiff, by showing the dismissal of the prosecution, establishes a prima facie case of want of probable cause, but, if such case is overcome by proof of probable cause, the issue of malice becomes immaterial, as proof of probable cause is a complete defense. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.

#### c. Malice.

7. Distinction Between Malice and Want of Probable Cause. Probable cause, to justify a criminal prosecution, may exist, though the prosecuting witness acts ma-liciously, if the charge is true, and, even if not true, if the witness acts honestly and in good faith, basing his charge on facts which he in good faith believes to be true, and which afterward turn out to be false; "probable cause" not depending on the guilt or innocence of accused in fact, but on the honest and reasonable belief of the party commencing the prosecution. McIntosh v. Wales (Wyo.) 1916C-273.

#### d. Probable Cause.

### (1) In General.

- 8. Probable Cause Question for Court. What facts, and whether particular facts, constitute probable cause, is for the court. Williams v. Pullman Co. (Minn.) 1916E-374.
- 9. Necessity of Affirmative Proof. The want of probable cause cannot be inferred from the existence of malice, but must be expressly shown, so that evidence of malice is inadmissible to show the want of probable cause. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.
- 10. Probable Cause as Question of Law or Fact. The existence of the facts necessary to establish probable cause is a question for the jury, but the facts necessary to establish probable cause are for the court; and if the existence of facts sufficient to establish probable cause is not disputed or is sufficiently shown, there is no question for the jury, and the court should hold, as a matter of law, that there is probable cause and dismiss the action. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.

#### Note.

Advice of magistrate or layman as defense to action for malicious prosecution. 1918A-498.

### (2) Advice of Counsel.

- 11. Defendant, who was sued for malicious prosecution, cannot testify that he was not actuated by malice, where he did not consult an attorney before instituting the prosecution, but merely submitted the facts to a magistrate's clerk, who was an attorney at law, and the representations to the clerk were not shown, for there was no foundation for the testimony. Morin v. Moreau (Me.) 1918A-497.
- 12. Advice of Magistrate. Where a complainant consults an attorney at law, making a full, fair, and truthful disclosure, and solicits his deliberate opinion, and the advice obtained is favorable to a prosecution, such advice will go far, in the absence of other facts, to show probable cause and to negative malice in an action for malicious prosecution, but it does not negative malice or show probable cause that the defendant consulted a magistrate or a magistrate's clerk, who was an attorney at law, before beginning a prosecution. (Morin v. Moreau (Me.) 1918A-497.

(Annotated.)

13. Details of Statement to Counsel. Where defendant, in an action for malicious prosecution, desires to show that he acted upon the advice of counsel to nega-

tive malice and show probable cause, the details of the statement he made to his counsel before instituting the prosecution are admissible. Morin v. Moreau (Me.) 1918A-497.

#### 2. ACTIONS.

### a. Pleading.

14. Joinder of Causes of Action. Two causes of action, each for malicious prosecution, held to arise out of transactions connected with the subject of action, and each to affect all the parties to the action, and therefore to be properly united in one complaint. Price v. Minnesota, etc. R. Co. (Minn.) 1916C-267.

### b. Admissibility of Evidence.

- 15. Reputation of Plaintiff. In such suits, the bad reputation of the now plaintiff is a circumstance bearing on the state of mind of the defendant going to show that the prosecutor had reasonable grounds and acted in good faith. Calhoun v. Bell (La.) 1916D-1165. (Annotated.)
- 16. Evidence of Damages—Injury to Credit. Where, in an action for malicious prosecution, plaintiff claimed that her credit was injured at a bank by her arrest, such injury can be proved by plaintiff as well as by the bank officials. McIntosh v. Wales (Wyo.) 1916C-273.
- 17. Defendant's Wealth. Where, in an action for malicious prosecution, plaintiff claims that defendant, J., had instituted the prosecution in order that he might get plaintiff and her husband out of the country, and so have freer access to a range for his cattle, and plaintiff prays to recover punitive damages, evidence of J.'s financial condition and the extent of his land holdings, etc., is admissible. McIntosh v. Wales (Wyo.) 1916C-273.
- 18. Evidence Hearsay. In an action for malicious prosecution, testimony of the prosecuting attorney as to what had been hold him by the officers of the bank and others concerning transactions between the bank's manager and the plaintiff, and that, in his opinion, the plaintiff was guilty of grand larceny, is not within the hearsay law, but is admissible on the issues of good faith and probable cause. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489.

#### Note.

Admissibility of evidence of plaintiff's character in action for malicious prosecution. 1916D-1167.

#### c. Sufficiency of Evidence.

19. Proof of Want of Probable Cause—Acquittal. In an action to recover damages for malicious criminal prosecution, proof of an acquittal upon a trial for the crime charged is not prima facie evidence

- of want of probable cause for the institution of the prosecution. Williams v. Pullman Co. (Minn.) 1916E-374. (Annotated.)
- 20. Evidence Insufficient. The facts in this case upon plaintiff's own testimony do not prove want of probable cause for his arrest and prosecution upon the charge of drunk and disorderly. Williams v. Pullman Co. (Minn.) 1916E-374.
- 21. Want of Probable Cause—Termination of Original Prosecution as Evidence. Dismissal of a criminal prosecution against plaintiff at the instance of the prosecuting attorney without submitting any evidence, while admissible to show a termination of the proceedings in plaintiff's favor, is not evidence of malice or want of probable cause. McIntosh v. Wales (Wyo.) 1916C-273.
- 22. Evidence Sufficient. The determination of the trial court and jury that there was no probable cause is held correct. Price v. Minnesota, etc. R. Co. (Minn.) 1916C-267.
- 23. Proof of Want of Probable Cause Insufficient. Where, in an action for malicious prosecution, one of defendants was plaintiff's uncle, and had known her in the community from childhood, and there was other proof that plaintiff's reputation for honesty and integrity was good, and she testified that she never had stolen any calves from defendants or either of them, as alleged, the proof is sufficient to raise a prima facie case of want of probable cause. McIntosh v. Wales (Wyo.) 1916C—273.
- 24. Inference of Malice. Malice may be inferred from a showing of want of probable cause, but want of probable cause will not be inferred from proof of malice alone. McIntosh v. Wales (Wyo.) 1916C-273.
- 25. Persons Liable—Instigating Prosecution by Third Person. That defendant in a malicious prosecution suit, not only countenanced and approved, but in fact instigated, the prosecution, and caused the arrest of plaintiff, his tenant, for taking away a cotten crop, when there had been no settlement, and in fact there was no rent due him, and there was enough cotton on the place to pay any balance claimed by him, warrants a verdict for plaintiff. Gordon v. McLearn (Ark.) 1918A-482.

  (Annotated.)

#### Note.

Acquittal in criminal prosecution as evidence, in action for malicious prosecution, of want of probable cause. 1916E-376.

### d. Questions for Jury.

26. The defense of advice of counsel was properly for the jury to determine, and the evidence sustains the verdict on this issue. Price v. Minnesota, etc. R. Co. (Minn.) 19160-267.

### e. Instructions.

- 27. Probable Cause—Question of Law or Fact. The existence of facts tending to show probable cause for the institution of a criminal prosecution is for the jury, but their legal effect is for the court, and instructions advising the jury with respect thereto should be given. Carroll v. Parry (D. C.) 1916E-971.
- 28. Trial—Instructions Approved. There was no prejudicial error in the rulings on evidence, in the charge or in the refusal to give requested instructions. Price v. Minnesota, etc. R. Co. (Minn.) 1916C-267.

#### f. Damages.

- 29. Elements of Damage Recoverable. The circumstances of aggravation, bodily pain, mental anguish, and injury to reputation, and expenses of litigation less taxable costs, are proper elements of damages for malicious prosecution. Seidler v. Burns (Conn.) 1916C-266.
- 30. Excessiveness of Damages. Where plaintiff suing for malicious prosecution shows that he was arrested about 5 o'clock in the afternoon and taken through the public streets to the police station, where he was kept in a cell until the next morning, that his case was then adjourned until the following day when he was acquitted, and there is evidence that the acts of defendant were wanton and malicious, a verdict of \$500 will not be disturbed as excessive. Seidler v. Burns (Conn.) 1916C-266. (Annotated.)
- 31. The damages are not excessive within the rule guiding this court in cases of this kind. Price v. Minnesota, etc. R. Co. (Minn.) 1916C-267. (Annotated.)
- 32. Punitive Damages. Where there is evidence of actual malice in an action for malicious prosecution, plaintiff may recover punitive damages. McIntosh v. Wales (Wyo.) 1916C-273.
- 33. Recovery of Attorney's Fee. In a prosecution for malicious prosecution, plaintiff may recover a reasonable attorney's fee for services rendered in procuring her release from the prosecution. McIntosh v. Wales (Wyo.) 1916C-273.
- 34. Compensatory or Punitive Damages. Where the jury finds that defendant in a malicious prosecution suit has acted willfully, in a wanton and oppressive manner, and in conscious disregard of his civil obligations and of plaintiff's rights, it may properly assess punitive damages. Gordon v. McLearn (Ark.) 1918A-482.
- 35. No punitive damages in a malicious prosecution suit may be assessed, unless compensatory damages are also assessed, although punitive damages may largely exceed the compensatory damages. Gordon v. McLearn (Ark.) 1918A-482.

### g. Verdict.

36. The finding of the jury that there was malice is sustained by the evidence. Price v. Minnesota, etc. R. Co. (Minn.) 1916C-267.

37. Judgment Against One Defendant Only. In an action for malicious prosecution against two defendants, alleging that they conspired to cause the arrest of the plaintiff on a false charge, the individual liability of a single defendant does not depend upon the proof of the existence of a conspiracy, and a verdict for one defendant does not discharge the other from liability. Gordon v. McLearn (Ark.) 1918A-482.

#### Note.

What is excessive or inadequate verdict in action for malicious prosecution. 1916C-250.

#### h. Defenses.

- 38. Original Proceeding Jurisdiction and Process. In suits for damages for malicious prosecutions and false arrest, it is not material that the plaintiff was prosecuted on an insufficient process, or before a court without jurisdiction. Calhoun v. Bell (La.) 1916D-1165.
- 39. Insufficiency of Original Complaint. Where plaintiff was actually arrested and held under a warrant issued on a sworn complaint, the fact that such complaint did not in fact state a criminal offense is no defense to an action for malicious pros-McIntosh v. Wales (Wyo.) ecution. 1916C-273.
- 40. Persons Liable—Statement of Facts to Public Prosecutor. That defendant in an action for malicious prosecution made to the prosecuting attorney a full and true statement of all the facts concerning the crime within his knowledge, and acted upon the attorney's advice that a prosecution be instituted, or made the disclosure. and the prosecuting officer himself instituted the prosecution, constitutes a good defense. Hightower v. Union Savings, etc. Co. (Wash.) 1918A-489. (Annotated.)

#### MALPRACTICE.

See Physicians and Surgeons, 19-45.

#### MANAGER.

Authority of bank manager, see Banks and Banking, 11, 12.

#### MANDAMUS.

- 1. Nature and Grounds of Relief, 544.
- 2. Nature of Acts Compellable, 544.
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  - b. Acts of Judicial Officers, 545.
    - In General, 545.
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    - (3) Ministerial or Arbitrary Acts,

- c. Right to Office, 545.
- d. Acts of Private Corporation, 545.
- e. Issuance to Private Person, 546.
- f. Ministerial Acts, 546.
- g. Duty Imposed by Law, 546. h. Useless Act, 546.
- 3. Procedure, 546.
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  - e. Pleading, 547. f. Fiat for Writ, 547.

  - g. Peremptory Writ, 547.h. Appeal and Error, 547.

To compel refund of taxes erroneously collected, see Taxation, 108.

#### 1. NATURE AND GROUNDS OF RE-LIEF.

- 1. Effect of Existence of Statutory Remedy. The remedy given by section 39, chapter 39, W. Va. Code 1899, against a sheriff, for failure to pay county orders drawn on him, that remedy not being as competent to afford relief on the very subject-matter, and one equally as convenient, beneficial, and effective, is not exclusive of the remedy by mandamus; it is cumulative only of that common-law remedy. Eureka Pipe Line Co. v. Riggs (W. Va.) 1918A-995.
- 2. S. Dak. Laws 1911, c. 239, provides that when a judge of the supreme court, not legally resident at the state capital, shall have changed his actual residence thereto, there shall be paid to such judge, for his increased expenses, the fixed sum of \$50 a month, payable on the certified vouchers of such judge. The state auditor refused to issue warrants to the members of the supreme court covering the amounts claimed by them to be due under the statute for a certain month and the presiding judge of such court sought mandamus therein to compel issuance to him. An action at law by the judge against the state, under Code Civ. Proc. § 25, could not have been prosecuted to final judgment prior to a date when the appropriation for the payment would have lapsed. It is held that the relief by ordinary suit at law was not plain, adequate, and speedy, since such remedy, to prevent mandamus, must be equally convenient and beneficial, and as effective as mandamus, placing the relator in the same position he would have occupied had the duty sought to be coerced been performed. (McCoy v. Handlin (S. Dak.) 1917A-1046.
- 2. NATURE OF ACTS COMPELLABLE.
  - u. Exercise of Discretionary Powers.
- 3. Subjects of Relief-Denial of Liquor License. Mandamus will not lie to control or restrict the discretion given to a city council in respect to the issuance of a liquor license, but in the present case it

sufficiently appears that the license was refused solely because its issuance had been prohibited by an ordinance adopted under the initiative provisions of the city charter, and not in the exercise of the discretion reposed in the council. State v. Duluth (Minn.) 1918A-683.

(Annotated.)

Note.

Mandamus to control issuance of liquor license. 1918A-687.

### b. Acts of Judicial Officers.

#### (1) In General.

- 4. Where an applicant for registration as a trained nurse appealed from the decision of the state board of nurse examiners to the state association of graduated nurses as authorized by Mont. Laws 1913, c. 50, \$ 11, she cannot thereafter ask mandamus against the board, even though the association acted capriciously and without the full hearing required in denying relief to her, since the board cannot be held responsible for the failure of the association to do its duty. State v. District Court (Mont.) 1917C-164.
- 5. Right to Remedy—Controlling Action of Licensing Board. Under Mont. Laws 1913, c. 50, providing for the registration of nurses, the state board of examiners for nurses is a public board and cannot be compelled by mandamus to certify an applicant to the governor for registration, since the determination of the qualifications of applicants is a quasi-judicial function, which, if honestly exercised, cannot be subject to judicial review, though the honest performance of such duty can be commanded. State v. District Court (Mont.) 1917C-164.

### (2) Compelling Action.

- 6. Where a judge is incompetent, on statutory or common-law grounds, to try a cause pending before him, mandamus is the proper remedy to compel him to certify his incompetency as a preliminary to the selection of a qualified judge in his stead. McConnell v. Goodwin (Ala.) 1917A-839.
- 7. The fact that a relator, who alleged that her application for registration as a nurse was rejected by the board arbitrarily and not in the exercise of its honest judgment, asked for mandamus to compel the board to certify her name to the governor, does not prevent the court from issuing mandamus to compel the board to pass upon her qualifications according to its honest judgment. State v. District Court (Mont.) 1917C-164.

#### (3) Ministerial or Arbitrary Acts.

8. To Court — Exceeding Jurisdiction. Mandamus is the proper remedy where a federal district court has exceeded its

power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the conviction. Ex parte United States (U. S.) 1917B-355.

9. Grounds for Relief—To Compel Dismissal of Action. Where, under the statutes, defendant is entitled to dismissal of plaintiff's action for want of prosecution, mandamus to compel the lower court to order dismissal will not be denied on the ground that the writ is discretionary, and will not be issued where it will cause injustice. Larkin v. Superior Court (Cal.) 1917D-670.

### c. Right to Office.

- 10. Enforcement of Preferential Right to Appointment. Mandamus is not the proper remedy to enforce the appointment by the governor of an honorably discharged soldier to a position on the board of public health and medical examiners, under S. Dak. Pol. Code, § 3242, providing that in every public department and upon all public works, honorably discharged Union soldiers shall be preferred for appointment, since u disregard of such statute does not violate the legal rights of any particular person so as to enable him to maintain civil proceedings in his own behalf. Phelps v. Byrne (S. D.) 1918B-996.
- 11. Restoration to Office. A petition for mandamus is appropriate to compel the restoration to office of a rightful incumbent who has been wrongfully removed. Chace v. City Council (R. I.) 1916C-1257.
- 12. Subjects of Relief—Reinstatement of Teacher. In such case, mandamus is available as a remedy, for reinstatement. Richards v. District School Board (Ore.) 1917D—266.
- 13. Preventing Removal from Office. Mandamus is an appropriate remedy to compel the mayor of a city to refrain from attempting to remove the commissioner of public safety from his office without authority, as the commissioner's tenure and removal so intimately affect the public service and municipal interest that the writ may be invoked to secure the proper execution of the laws. Cunningham v. Mayor (Mass.) 1917C-1100.

## d. Acts of Private Corporation.

- 14. Corporations—Election of Officers—Mandamus to Test Validity. Mandamus affords the appropriate relief to test the validity of an election to offices in a Massachusetts business corporation, though it is not the purpose of the court to extend the writ into new fields. Longyear v. Hardman (Mass.) 1916D-1200.
- 15. Contractual Duty to Municipality. A city, by ordinance, leases land owned by

it to a private corporation for a wharfage business, and therein reserves the right, within a period specified, to purchase all buildings and appliances constructed and used by the lessee in the business, the price thereof to be fixed by appraisers, two chosen by each of the contracting parties and the fifth by those thus selected. The city, within the time limited, elects to purchase, and, after due notice, appoints two appraisers to act on its behalf; but the lessee declines to make any selection of appraisers or to consummate the purchase.

Held, mandamus is not the proper remedy to compel compliance by the lessee with the provisions of the ordinance and contract relating to such purchase by the city. Huntington v. Huntington Wharf, etc. Co. (W. Va.) 1918A-913.

(Annotated.)

#### e. Issuance to Private Person.

16. Duties Enforceable—Contract Obligation. Mandamus does not lie to enforce purely contractual obligations. Huntington v. Huntington Wharf, etc. Co. (W. Va.) 1918A-913.

#### Note.

Mandamus as remedy in behalf of municipality to compel performance of contractual obligation. 1918A-915.

#### f. Ministerial Acts.

- 17. Mandamus to Compel Return. The duty of the county canvassing board, independently of the Wis. Law of 1911, is purely ministerial; it is required to obtain possession of the district returns within the time specified; it may have a remedy by mandamus to enable it to do so, if necessary, and may be compelled by mandamus, if necessary, to complete its work within the required time. State v. Board of State Canvassers (Wis.) 1916D-159.
- 18. Enforcing Payment of Allowance to Judge. S. Dak. Laws 1911, c. 239, provides that where a supreme court judge, not a legal resident of the state capital shall remove thereto he shall be paid \$50 monthly in consideration of increased expenses incident to the removal. The state auditor refused to issue warrants to the members of the supreme court for the amount for a certain month, and the presiding judge of the court sought mandamus therein to compel the issuance of such a warrant to him under Code Civ. Proc. § 764. providing that the writ of mandamus may be issued by the supreme court to any inferior tribunal, board, or person to compel the performance of an act specially enjoined as a duty resulting from an office, trust, or station. The auditor contended that the plaintiff's remedy was by action at law against the state in the supreme court, as Code Civ. Proc. § 25 et seq., pro-

vide that any person aggrieved by the refusal of the state auditor to allow any just claim may sue the state in the supreme court. It is held that since there was no dispute as to the amount to be paid, if anything, the payment was a ministerial duty, imposed by statute, involving no discretion, and the writ of mandamus was the proper remedy as the procedure under section 25 et seq., was to determine the amount of claims disputed as to amount, not a means to compel payment of those as to which the state does not dispute the amount. McCoy v. Handlin (S. Dak.) 1917A-1046.

### g. Duty Imposed by Law.

19. A mandamus will lie to compel a railroad company to make the necessary repairs to its road running through the streets of a city or town, so as to keep the same free for the use of the public, and clear of all obstructions. La. Rev. St. § 691, as amended by Acts No. 204 of 1902, p. 395, and No. 157 of 1910, p. 236; Act No. 193 of 1912, p. 381. State v. Louisiana, etc. R. Co. (La.) 1916C-1170.

(Annotated.)

20. Under Iowa Code, § 4341, providing for writ of mandamus to compel an inferior body or tribunal to execute a duty imposed by law, a writ of mandamus is the proper remedy to compel the board of supervisors to perform a duty imposed by law. Commercial Nat. Bank v. Board of Supervisors (Iowa) 1916C-227.

### h. Useless Act.

21. To Compel Canvass of Votes. Mandamus will not issue to compel a city council to canvass votes at a city election, where the ballots were void for uncertainty; since the writ will not issue to compel the performance of an act which can accomplish no useful purpose. Wilson v. Blake (Cal.) 1916D-205.

### 3. PROCEDURE.

### a. Jurisdiction.

22. Issuance in Vacation. The writ of mandamus and incidental prohibition, being peremptory in character, is void when issued in vacation, and was properly quashed, and the fiat under which the writ was issued by the clerk was void for the same reason. McConnell v. Goodwin (Ala.) 1917A-839.

### b. Who May Obtain Writ.

23. Persons Entitled to Apply for Writ-Enactment of Statute. One having a special interest in the publication of a legislative act may institute mandamus against the secretary of state to compelits publication among the acts of the legislature. Arkansas State Fair Assoc. v. Hodges (Ark.) 1917C-829.

#### c. Parties Defendant.

24. A rule to show cause why mandamus should not issue where a federal district court has exceeded its power by ordering that the execution of a sentence to im-prisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the legality of the conviction is properly directed to the judge, to compel the vacation of the order of suspension, rather than to the clerk of the court, to compel him to issue a commitment. Ex parte United States (U.S.) 1917B-355.

#### d. Abatement.

25. Against Officer-Effect of Expiration of Term. A suit in mandamus against a sheriff by the holder of such order of ex-oneration, to compel the former to repay him excess of taxes collected, does not abate by the officer's death, resignation, or expiration of his term, if it be shown that, by the fault of the county court, or otherwise, he has failed to pay such order, and at the expiration of his term he has paid over to his successor the money which he should have paid to relator, and such sum has gone into the treasury to the credit of the county fund, the district fund, and to the boards of education. In such case the suit may be revived, and the incumbent in office cited into court and required to respond to the writ, as upon original process. Eureka Pipe Line Co. v. Riggs (W. Va.) 1918A-995. (Annotated.)

26. The facts in this case call for the proper application of the rule of practice just stated. Eureka Pipe Line Co. v. Riggs (W. Va.) 1918A-995. (Annotated.)

#### Note.

Abatement of mandamus by termination of respondent's office. 1918A-1000.

### e. Pleading.

27. Application for Writ — Allegations on Information and Belief. Where it is obvious that the reason for the action of the council is not within the personal knowledge of the relator, he may allege such reason upon information and belief. State v. Duluth (Minn.) 1918A-683.

### f. Fiat for Writ.

28. Definiteness. A fiat to the circuit clerk of a county, directing him to issue mandamus "or other remedial writ" requiring the judge of probate to certify his disqualification, is bad, in that it leaves the selection of the appropriate writ to the discretion of the clerk, a judicial authority which cannot be thus delegated. McConnell v. Goodwin (Ala.) 1917A-839.

### g. Peremptory Writ.

29. Right to Peremptory Writ-Alternative Writ Erroneous in Part. The rule that where an alternative writ is awarded for a purpose, partly proper and partly improper, the court will not grant peremptory mandamus, is not an iron-bound one, but is to be applied with principles of justice. Larkin v. Superior Court (Cal.) 1917D-670.

30. Where one of several defendants defaulted, and the others were entitled to dismissal for want of prosecution, and the defendants who answered moved for a dismissal as to them, their application for a writ of mandamus to compel the trial court to order dismissal will not be denied under the rule that a petitioner for mandamus is concluded by the terms of the alternative writ, and, as the alternative writ prayed a dismissal of "the action," it was not wholly authorized. Larkin v. Superior Court (Cal.) 1917D-670.

### h. Appeal and Error.

31. Findings of Fact. The supreme court is not bound by the findings of fact made by its commissioner in mandamus, and will examine the facts when challenged, whether formal exceptions are filed or not. State v. Jost (Mo.) 1917D-1102.

### MANDATORY AND PERMISSIVE STATUTES.

See Statutes, 18-20.

MANDATORY INJUNCTION. See Injunctions.

MANTA.

Defined, see Wills, 59.

MANN ACT.

See Prostitution, 14, 15, 21.

### MAN OF STRAW.

Liability for deficiency judgment, see Mortgages, 28.

#### MANSLAUGHTER.

See Automobiles, 63; Homicide.

#### MANUFACTURER.

Liability for injuries, see Automobiles. 58-62

Liability for explosion of gasoline lighting system, see Negligence, 90, 99.

#### MAPS.

As evidence, see Evidence, 91, 92. Parol proof to explain, see Evidence, 121.

#### MARINE INSURANCE.

See Insurance: Ships and Shipping.

- 1. Action Joinder of Underwriters. Where a number of underwriters insure a vessel by a contract expressly declaring that they bound themselves severally, and not jointly, for its performance, the insured cannot maintain a single action against all the insurers to recover an aggregate amount of the policy. Fish v. Vanderlip (N. Y.) 1916E-150.
- 2. Constructive Total Loss-Frustration of Voyage. A vessel which is, at the breaking out of war, bound to a port of one of the belligerents and is warned that capture is inevitable if an attempt is made to reach that port, may put into a friendly port, and the owners may there abandon the ship and cargo to the underwriters and claim a constructive total loss, if the policy insures against capture or "restraint of princes." British, etc. Marine Ins. Co. v. Sanday (Eng.) 1916D-(Annotated.)

#### Note.

Frustration of voyage because of existence of war as constructive total loss within marine insurance policy. 1916D-

### MARITIME EMPLOYEES.

As within Workmen's Compensation Act, see Master and Servant, 243-247, 262.

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### MARRIAGE.

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See Adultery; Alimony and Suit Money; Bigamy; Breach of Promise of Marriage; Divorce; Husband and Wife; Incest; Polygamy.

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Effect of bigamy on first marriage, see Bigamy, 1.

How proved, see Husband and Wife, 71-

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marriage, see Incest, 2.

As affecting widow's compensation under Workmen's Compensation Act. see Master and Servant, 278.

Ground for removal of teacher, Schools, 32.

As revocation of will, see Wills, 106-110. Testamentary provisions in restraint, see Wills, 229-236.

### 1. NATURE AND VALIDITY.

### a. Statutory Regulation.

1. "Father"-Meaning of Term - Stepfather not Included. Under N. Car. Revisal 1905, § 2088, providing that, where either party to a proposed marriage is under 18 and resides with the father, mother, uncle, etc., the register of deeds shall not issue a license for such marriage until the consent in writing of the relation with whom the infant resides shall be delivered to him, while the consent of the persons named, and in the order named, must be obtained, and where the infant is living with the father and mother the written consent of the father is necessary, where the infant is living with her mother and stepfather, the mother's consent is sufficient, and the stepfather's consent is not required, since the words "father" and "stepfather" are in general use and well understood, the difference in the relationship and the marked distinction between their duties and liabilities are well known, and the word "father" does not include a "stepfather," defined as the husband of one's mother, who is not one's father. Owens v. Munden (N. Car. 1917B-1117. (Annotated.)

- b. Rights and Obligations of Parties.
- 2. Intent not to Perform Marital Obli-The statement of a man at the time of his marriage that he would not live with the woman does not render the Wimbrough v. Wimmarriage void. brough (Md.) 1916E-920. (Annotated.)

### c. Validity.

- (1) Prohibited Degrees of Relationship.
- 3. Persons Related Within Prohibited Degree-Validity. S. Car. Civ. Code 1912, § 3743, declares that no man shall marry his sister's daughter, and that no woman shall marry her mother's brother. Section 3752 provides that either party to a marriage, the validity of which is doubted, may institute a suit to determine the

validity. Section 3753 provides that the court of common pleas may determine any issue affecting the validity of contracts of marriage. Defendant in 1882 married the daughter of his half-sister. It is held that the statute included relatives of the half blood; that the marriage was not void, but voidable, the distinction being that a "void marriage" is one not good for any legal purpose, the invalidity of which may be maintained in any proceeding be-tween any parties, while a "voidable marriage" is one where there is an imperfection which can be inquired into only during the lives of both of the parties in a proceeding to obtain a sentence declaring it void, so that until set aside it is practically valid, and when set aside is rendered void from the beginning. State v. Smith (S. Car.) 1917C-149. (Annotated.)

### Note.

Whether marriages within prohibited degrees of relationship voidable or void. 1917C-151,

(2) Prior Existing Marriage.

4. Validity — Within Proscribed Time After Divorce. Where a man and woman, within six months after his divorce, left Washington for Canada only to have a marriage performed, immediately returning, having had no intention to change their domicil, the marriage ceremony is void in law, and its issue illegitimate. Peerless Pacific Co. v. Burckhard (Wash.) 1918B-247.

### (3) Common-law Marriage.

- 5. N. Y. Laws 1907, c. 742, repealing Laws 1901, c. 339, § 6, declaring invalid marriages contracted otherwise than as therein provided, renders common-law marriages valid again, although Laws 1901, c. 339, § 2, requiring solemnization by certain persons, was not repealed. Ziegler v. P. Cassidy's Sons (N. Y.) 1917E-248. (Annotated.)
- 6. Prior to 1901 common-law marriages were valid in New York. Ziegler v. P. Cassidy's Sons (N. Y.) 1917E-248.
- (Annotated.)
  7. N. Y. Laws 1901, c. 339, § 2, providing that marriages must be solemnized by certain persons, and section 6, providing that no marriages contracted otherwise than as provided shall be valid, rendered commonlaw marriages invalid, although section 2 alone would have been insufficient for that purpose. Ziegler v. P. Cassidy's Sons (N. Y.) 1917E-248. (Annotated.)
- 8. Statutory provisions, requiring written contracts of marriage to be acknowledged a certain way; that the marriage statutes shall not invalidate marriages among Quakers, etc., nor should failure to procure a license invalidate them, do not, by necessary implication, render common-

law marriages void. Ziegler v. P. Cassidy's Sons (N. Y.) 1917E-248. (Annotated.)

9. The fact that the marriage law provision, recognizing marriages contracted in the manner theretofore used, was stricken out when common-law marriages were prohibited and not reinserted when the common-law marriage prohibition was repealed, does not indicate a legislative intent to continue the prohibition of common-law marriages. Ziegler v. P. Cassidy's Sons (N. Y.) 1917E-248.

(Annotated.)

10. A statute will not be construed to prohibit common-law marriages where the interpretation is doubtful. Ziegler v. P. Cassidy's Sons (N. Y.) 1917E-248.

(Annotated.)

#### 2. SUFFICIENCY OF EVIDENCE.

11. Evidence Insufficient. In a habeas corpus proceeding to obtain the release of a juvenile delinquent from the custody of the superintendent of the state industrial school, evidence held insufficient to establish any legal marriage between the delinquent and plaintiff. Stoker v. Gowans (Utah) 1916E-1025.

#### 3. ANNULMENT.

#### a. Grounds.

12. Duress—Marriage to Escape Prosecution. Where a man marries to escape arrest or imprisonment for seduction or bastardy he cannot avoid the marriage on the ground of duress, nor is a marriage induced by threats of lawful prosecution, arrest, or imprisonment, to redress or punish a wrong, open to impeachment on that ground. Wimbrough v. Wimbrough (Md.) 1916E-920.

#### b. Jurisdiction.

13. Annulment — Power of Though Md. Code Pub. Civ. Laws, art. 62, § 14, provides that circuit courts and the superior court of Baltimore city upon petition, and the circuit courts and the criminal court of Baltimore on indictment, may inquire into the validity of any marriage and declare any marriage contrary to that article, or any second marriage, the first subsisting, null and void, the authority of courts of equity to determine the validity of a marriage charged to have been procured by abduction, terror, fraud, or duress, rests upon their general jurisdiction to set aside contracts affected by Wimbrough v. Wimbrough fraud, etc. (Md.) 1916E-920.

#### c. Evidence.

14. The jurisdiction of equity to set aside a marriage for fraud, duress, etc., should be exercised with extreme caution, and only on clear, distinct, and satisfactory evidence. Wimbrough v. Wimbrough (Md.) 1916E-920.

DIGEST. 1916C-1918B.

15. Evidence of Duress Insufficient. Tn a husband's action to annul a marriage, evidence held insufficient to show duress on the part of the wife's father, justifying the annulment of the marriage. Wimbrough v. Wimbrough (Md.) 1916E-

#### MARRIED WOMEN.

Liability for husband's negligence, see Automobiles, 24, 32.

Liability for injury caused by herself, see Automobiles, 25, 49.

Renewal of note after disability removed, effect, see Bills and Notes. 38.

Contracts of, see Husband and Wife, 1-13. Conveyance by of life estate, see Life Estates, 5.

### MARSHALING ASSETS.

See Equity, 6.

On foreclosure of mortgage, see Mortgages and Deeds of Trust, 29, 31.

#### MARTIAL LAW.

See Militia.

1. Power to Declare-Scope of Military Power - Suppression of Newspaper. virtue of the authority vested in the governor by the constitution and laws of the state, he has authority as commander in chief of the military forces, pending the existence of martial law covering any portion of the state's territory, to cause to be arrested and imprisoned, until peace is restored, any person whom he has good reason to believe is aiding or encouraging disorder and rioting; and he may also temporarily suppress any newspaper published in the state, having a circulation in the martial zone, and containing articles which he has reason to believe will encourage a continuation of the disorder therein. Hatfield v. Graham (W. Va.) 1917C-1.

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#### 1. CONTRACT OF EMPLOYMENT.

### a. Duration of Hiring.

- 1. Renewal of Contract-Continuing in Service. As plaintiff after his original employment for the year 1910 continued in the service of defendant without further contract and received one increase of salary, whether he was employed by the month or by the year in 1914, when he left plaintiff's service, is held to be for the jury. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171. (Annotated.)
- 2. The fact of plaintiff's subsequent employment implies some sort of a contract, from the continuance in service, depending upon the intention of the parties, and there is a rebuttable presumption that he was again employed for a like term. Conrad v. Ellison-Harvey Co. (Va.) 1918B-(Annotated.) 1171.

Note.

Term of employment and rate of compensation of one continuing in service after termination of contract. 1918B-1176.

### b. Discharge.

### (1) Question of Law or Fact.

3. Question for Jury. In a discharged bookkeeper's action on the common counts in assumpsit for salary, the question whether the plaintiff was discharged or quit the service of defendant of his own accord is held to be for the jury. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171.

### (2) Admissibility of Evidence.

- 4. Plaintiff is entitled to show the circumstances and negotiations under which he began his original term of service, to be considered with the original contract itself in determining the probable intention of the parties to continue in the relation after the first year expired. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171. (Annotated.)
- 5. Action for Discharge Contract for Previous Term. The original written contract of employment for one year is admissible to show the terms of the original hiring. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171.

#### c. Compensation.

- 6, Seaman's Wages—"Loss of the Ship"
  -Detention by Enemy. The seizure and detention of a vessel in the enemy's port at the outbreak of war is not a "loss of the ship" within the Eng. Merchant Shipping Act of 1894 which will terminate a seaman's right to wages. Horlock v. Beal (Eng.) 1916D-670. (Annotated.)
- 7. On the ground of impossibility of performance of the contract, the seaman's right to wages terminate by the seizure of the ship. Horlock v. Beal (Eng.) 1916D-670. (Annotated.)

Notes. What constitutes "loss" within meaning of statute terminating seamen's wages upon loss of vessel. 1916D-688.

Tips as part of earnings or wages. 1918B-1122.

### d. Credentials.

- 8. Duty to Furnish Certificate of Character. In the absence of statute, there is no legal duty on the part of an employer to furnish a servant discharged or leaving his service with any certificate of character. Dick v. Northern Pacific R. Co. (Wash.) 1917A-638.
- LIABILITY OF MASTER FOR IN-JURY TO SERVANT.
- a. Duty to Furnish Safe Place to Work. (1) In General.
- 9. It has always been the law that it is the master's duty to furnish his servant

a safe place to work, and if for any reason the place was unsafe the master is liable for resultant injuries. Kimbol v. Industrial Accident Commission (Cal.) 1917E-312.

10. Duty as Qualified or Absolute. Except where the law absolutely enjoins the doing of a thing as a duty, it is the masters duty to exercise reasonable care to furnish his servant a reasonably safe place to work and reasonably safe appliances; but, when the statute enjoins the doing of things absolutely, his duty is imperative. Correll v. Williams, etc. Co. (Iowa) 1918A-117.

### (2) Railroad Cars and Premises.

- 11. Negligence of Railroad Company—Dangerous Obstruction Near Track. A railroad company is guilty of actionable negligence to its employees in operating a train upon its own track or one belonging to another road past an obstruction located dangerously near the track, if it knew, or by the exercise of ordinary care could have known, of the dangerous obstruction. Devine v. Delano (Ill.) 1918A-689.
- 12. Such rule applies where the dangerous obstruction is alongside the track on the premises of a manufacturing plant. Devine v. Delano (III.) 1918A-689.
- 13. Unnecessary Dangers. Where no necessity exists for the operation of a railroad under dangerous conditions, and where it only requires care and skill to make such conditions safe, the road's employee may not be subjected to such dangers, wholly unnecessary to the proper operation of the road's business, because railroad work is inherently dangerous. Devine v. Delano (III.) 1918A-689.
- 14. Negligence of Railroad Company—Post Near Track. A railroad daily operating trains along a switch track, running into a manufacturing plant dangerously near which a post stood, which had been in the same position for a year and a half before it injured a switchman, was chargeable with knowledge of the post's dangerous proximity to the track. Devine v. Delano (III.) 1918A-689.
- 15. A railroad was liable for the death of its switchman, killed by being struck, when riding on a train, by a post standing, to the road's knowledge, in dangerous proximity to a switch track. Devine v. Delano (Ill.) 1918A-689.
- 16. A railroad, which operated trains on a switch track past a post dangerously near thereto, was guilty of negligence in so doing, if it knew, or should have known, the dangerous proximity, that its switchman was not informed of the fact, and it failed to inform him. Devine v. Delano (Ill.) 1918A-689.

17. Liability for Injury — Diversion from Employment — Going for Drink. Where deceased, employed by one railroad as a switching fireman, is killed by an engine of the defendant railroad while he is away from his engine, though in the yards, he is not a trespasser or licensee, but is at the time engaged in his employment, so that the defendant owes him the duty of active care, although he has gone across the yards to get some milk, and is returning to his engine when struck. Ingram's Admx. v. Rutland R. Co. (Vt.) 1918A-1191. (Annotated.)

### Notes.

Effect on relation of employee as such of his stopping work temporarily for his own purposes. 1918A-1194.

Location of mail crane near railroad track as actionable negligence. 1916E-717

b. Duty to Furnish Safe Appliances and Machinery.

### (1) In General.

18. Negligence—Safe Appliances—Maritime Employee. Where a stevedore returning to work in the hold of a ship was required to pass down the ladder from a hatchway so located that he had to take hold either of the hatch coaming, or of a rope just above it, which rope was apparently firmly fixed to stanchions, and on his taking hold of such rope one of the stanchions pulled loose, it cannot be said as a matter of law that the master was free from negligence in having the rope less secure than it appeared to be. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655.

### (2) Guarding Machinery.

19. Duty to Guard Dangerous Machinery—Statute — Effect of Noncompliance. Under Iowa Code Supp. 1913, § 4999a2, requiring every owner, agent, superintendent, etc., in charge of any place where machinery is used to furnish belt shifters, and, wherever possible, loose pulleys, and requiring that all saws, machinery, etc., shall be properly guarded, it is the master's affirmative duty to provide such protection, and his failure to do so is actionable negligence. Correll v. Williams, etc. Co. (Iowa) 1918A-117.

### (3) Work Animals.

20. Where an animal is used by an employer to carry on work under his direction, he is bound to use reasonable diligence to provide a safe animal, and is bound by what he knew or with reasonable diligence might have known as to the docility of the animal. Marks v. Columbia County Lumber Co. (Ore.) 1917A-306. (Annotated.)

#### Note.

Duty and nability of master to servant with respect to animal furnished by him to servant. 1917A-309.

## c. Duty to Warn and Instruct Servant.

21. Though ordinarily it is a miner's duty to look after the safety of the roof of the room in which he works and the employer is only required to furnish props necessary for propping the roof, where its foreman undertakes to make an inspection as to the safety or soundness of the roof, it is the employer's duty to exercise ordinary care to ascertain the true condition of the roof and inform the miner of the facts that an ordinarily careful inspection would have revealed. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C—375.

## d. Promulgation of Rules.

22. Habitual Disregard of Rule. Habitual violation of a rule of a railroad company with its knowledge and acquiescence abrogates it, regardless whether the servants charged with its enforcement consented or acquiesced. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.

23. Duty to Inform Servant. It is the duty of the master to make known its rules to the employee, and there is no affirmative duty upon the employee to ascertain their existence. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.

## e. Violation of Statute.

24. Delegation of Statutory Duty. A master delegating the discharge of his statutory duties to his servants cannot thereby escape liability for a failure of the agent to perform such duty, nor by his discharge of such duty in a negligent or careless manner. Correll v. Williams, etc. Co. (Iowa) 1918A-117.

#### f. Acts of Fellow Servants.

## (1) Who Are.

25. Engineer and Track Repairer. Except as modified by statute, an engineer and a track repairer, though in different departments of the railroad company, are fellow servants engaged in the same common work or enterprise, and where such track repairer, while riding on the engine in charge of such engineer to the place where such track repairer has to work, received injuries by reason of the negligence of such engineer in operating the engine, there can be no recovery by the track repairer against the railroad company, the engineer not sustaining a representative relation. such as vice principal, to the defendant company. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971.

## (2) Nature of Liability.

26. At the common law where the master himself has performed his duty, he is not liable to one of his servants for personal injuries received by such servant in the course of his employment, through the negligence of a fellow servant or employee of such servant, when engaged in the same undertaking or common-work or enterprise, unless such fellow servant or coemployee sustains a representative relation, such as vice-principal, to the master. This com-mon-law principle is in force in this state, except as modified by sections 3148, 3149, 3150, of the Fla. General Statutes of 1906, and chapter 6521 of the Acts of 1913. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971. (Annotated.)

## (3) Effect of Statutes.

27. Abrogation of Fellow-servant Doctrine—Railroads. A corporation or company engaged in the operation of a sawmill, and as an incident to such business operates a steam railroad about six or seven miles long, commonly known as a log road, is not "a railroad company" within the term and meaning of sections 3148, 3149 and 3150 of the Fla. General Statutes of 1906. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971.

28. What Constitutes "Superintendence." Ala. Code 1907, § 3910, subd. 2, makes employers liable for injuries to employees caused by the negligence of any person in the employer's service who has any superintendence intrusted to him while in the exercise of such superintendence. In a railway employee's action for injuries the evidence showed that B., a mechanic, was sent to F. to repair a locomotive; that plaintiff was sent by his foreman to help B. work on the engine; that his duties did not include work of this character, but required his service about a coal shute and in the transfer of baggage; and that B. directed plaintiff to do certain things connected with the repair of the engine. It is held that the evidence did not make a prima facie case of B.'s superintendence, as "superintendence," within the statute, is the creature of power or authority conferred by the master, and, though there are positions in a master's service naturally importing a character of superintendence reposed in the employee serving in that position, B.'s service or station was not of that type. Louisville, etc. R. Co. v. Carter (Ala.) 1917E-292.

## g. Assumption of Risk.

#### (1) Violation of Statute.

29. Breach of Statutory Duty of Master. 'Under Iowa Code Supp. 1913, § 4999a2, requiring owners, etc., of places where ma-

chinery is used to guard all saws, machinery, etc., and section 4999a3 providing that where the master's machinery or appliances are defective, and where it is his duty to furnish reasonably safe machinery place for work, the servant by continuing the work shall not assume the risk growing out of such defects of which he may have had knowledge when the master also knows of such defect, except when it is the servant's duty to remedy defects, and that under such conditions the servant shall not be deemed to have waived the negligence, if any, unless the danger is so imminent that a reasonably prudent man would not have continued in the work, and that the statute shall not be construed to include risks incident to the employment, the conditions referred to are those created by the master's negligence, and which it is the duty of the servant in the ordinary course of his employment to remedy, so that when the master fails in his duty, the servant does not assume the risk by continuing in the work, except when it is his duty to remedy the defects, and even then he does not assume the risk, unless the danger is so imminent that a reasonably prudent person would not continue therein. Correll v. Williams, etc. Co. (Iowa) 1918A-117.

(Annotated.)

## (2) Promise to Repair.

30. Liability of Automobile Owner to Chauffeur. Where, in a chauffeur's action for injuries sustained while replacing a punctured automobile tire, in consequence of a defect in the iron retaining ring, which blew out while the tire was being pumped, the evidence was conflicting as to whether the defendant owner had notice of the defect and promised to correct it, the question of assumption of risk is for the jury. Richardson v. Flower (Pa.) 1916E-1088. (Annotated.)

## (3) Assumption by Contract.

31. Validity of Contract. A clause of a switchman's contract of employment, whereby he assumed the risk of the great danger of his duty, was contrary to public policy, so far as purporting to charge the switchman with assuming any risk or danger caused by the road's negligence. Devine v. Delano (III.) 1918A-689.

## h. Contributory Negligence.

# (1) In General.

32. Contributory Negligence of Miner. Where the danger of the roof of a mine falling is not so obvious and glaring that a reasonably prudent man would not have continued to work there, a miner is not negligent as a matter of law in continuing work in reliance upon his foreman's assurance that the roof is safe. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.

# (2) Violation of Rules.

33. Using Hand Car at Night. Plaintiff's evidence showed that his intestate, a section foreman, was negligently killed at night by defendant's engine running without lights, which struck the intestate while riding on his hand car returning from a neighboring town where he had been on business. There was nothing in plaintiff's evidence to show that such use of the hand car was improper, but defendant's evidence showed that it was in violation of a rule of the company against the use of hand cars at night. It is held that a nonsuit on the ground of contributory negligence was improperly granted, since such judgment can be entered only where contributory negligence clearly appears from plaintiff's evidence. Horne v. Atlantic Coast Line R. Co. (N. Car.) 1918A-1171.

## (3) Questions of Law and Fact.

34. Question for Jury. Where deceased, employed as a fireman by one railroad, was at the station to get a drink, and hearing a call from his engine started to run across the unlighted yard to it, and was struck by the car of the defendant railroad, it is a fair inference that he saw the approaching car, but judged its speed erroneously owing to darkness and the fact that the car bore no lights, and, as an error of judgment does not necessarily show lack of care, the question of his care is for the jury. Ingram's Admx. v. Rutland R. Co. (Vt.) 1918A-1191.

35. Engine Without Headlight. Conceding that the intestate was negligent in using the hand car in violation of such rule, the case should be submitted to the jury on the question of proximate cause, since though he was wrongfully on the track, defendant owed the intestate the duty to have a headlight on the engine whereby he might have seen it approaching in time to avoid injury. Horne v. Atlantic Coast Line R. Co. (N. Car.) 1918A—1171. (Annotated.)

36. Contributory Negligence. The question whether plaintiff's contributory negligence was proven by defendant's evidence is held to have been exclusively for the jury. Horne v. Atlantic Coast Line R. Co. (N. Car.) 1918A-1171.

37. In such case, it could not be said as a matter of law that the servant was guilty of contributory negligence in using the rope for support. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655.

# i. Limiting Liability by Contract.

38. A contract between an employer and an employee, which nullifies or lessens any legal duty that the employer owes to the employee relative to safeguarding the life, limb, safety, health or welfare of the lat-

ter, is contrary to public policy, and, therefore, null and void. Such void contract between employer and employee is not validated by any subsequent assignment, whereby the assignee is relieved or acquitted from liability for any or all negligent acts causing death or any personal injury to said employee, though with full knowledge of all the facts to all the parties. Pittsburgh, etc. R. Co. v. Kinney (Ohio) 1918B-286. (Annotated.)

39. Mary Kinney, a car cleaner, entered into a contract of employment in writing with the Pullman Company, in which contract it was provided, among other things, that Mary Kinney, in consideration of her employment and wages therefor by the Pullman Company, would assume all risks of accident or casualty incident to such employment and would release the Pullman Company from all liability therefor. contract further recited that the Pullman Company had a contract of carriage with the railway company, whereby the Pullman Company had promised and agreed to protect the defendant railway company from any and all liability arising out of the negligence of the defendant railway company, or its employees, in causing death or injuries to any of the employees of the Pullman Company. Said contract between Mary Kinney and the Pullman Company recited the substantial terms of such release in the contract between the railway company and the Pullman Company, and further contained the provision that the Pullman Company might assign its release on the part of Mary Kinney to any rail-road company carrying the Pullman Company's cars. Held: Said contract between Mary Kinney and the Pullman Company, so far as it undertook to release the latter, or any railroad company, from negligent acts causing death or injury to said Mary Kinney, was invalid because contrary to public policy. Pittsburgh, etc. R. Co. v. Kinney (Ohio) 1918B-286.

(Annotated.)

Liability of master to domestic servant. 1917D-499.

## j. Employers' Liability Acts.

#### (1) Nature and Scope.

- 40. Scope of Act. Ore. Employers' Liability Act 1910 is not limited to construction work but applies also to factories and mills, including failure of owners to protect dangerous machinery. Cameron v. Pacific Line, etc. Co. (Ore.) 1916E-769.
- 41. Application to Railroad. Ore. Employers' Liability Act March 2, 1911 (Laws 1911, c. 88), which by section 1 is made to apply to employers of five or more persons engaged in business, trade, or commerce, applies to railroads; "business" being that which occupies the time, attention, or labor of man for the purpose of profit, or im-

provement as their principal concern, while "commerce" is traffic, including the means and vehicles by which traffic is accomplished, and also intercourse, or transportation, though there was already in force a statute fixing the liability of railroads to their employees. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258.

42. Statutes Repealed. Ore. Employers' Liability Law of 1910 (Laws 1911, p. 16) does not in terms repeal the factory inspection act (Laws 1907, p. 302), but only so much thereof as is inconsistent with the employers' liability law, the primary purpose of the factory inspection act being to safeguard dangerous machinery, the liability provided in section 8 thereof being based on the neglect of the employer to safeguard any machinery or the use of it after receipt of notice to guard it, but when the injury is the proximate result of an omission to guard, and there is a liability concerning matters in conflict with the Employers' Liability Act, the latter controls, and the limitation of liability contained in the factory inspection act has no application. Cameron v. Pacific Lime, etc. Co. (Ore.) 1916E-769. (Annotated.)

#### Note.

What statutes are impliedly repealed by State Employers' Liability or Workmen's Compensation Act. 1916E-773.

#### (2) Constitutionality.

- 43. Employers' Liability Act. Whether Ind. Employers' Liability Act March 2, 1911 (Laws 1911, c. 88) § 7, providing that all questions of assumption of risk, negligence, or contributory negligence shall be for the jury, unless the case is tried without a jury, when they shall be questions of fact for the court, is invalid as depriving courts of judicial functions, would not be determined, where under the first paragraph of the complaint the evidence made a question for the jury as to negligence, while under the second paragraph there was no question of defendant's liability. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258. (Annotated.)
- 44. The statute creates no liability on the part of an employer where there is no negligence, and hence does not deprive employers of liberty or property without due process of law. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258,
- 45. Ind. Employers' Liability Act March 2, 1911 (Laws 1911, c. 88), is not invalid as denying the equal protection of the laws because it applies only to employers of five or more persons, since there is some basis in reason for distinguishing between an employer of a large number of employees and one employing but a few employees, and it cannot be said that it was unreasonable to separate employers into those employing five or more persons and those employing five or more persons and those employing five or more persons and those

ploying less than five. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258.

(Annotated.)

- (3) Injuries Arising "Out of" and "In Course of" Employment.
- 46. The Federal Employers' Liability Act (Fed. St. Ann. 1909 Supp. p. 584) does not permit recovery upon a mere showing that the employee was injured while engaged in interstate commerce, regardless of whether it was in the course of his employment or not, but the usual rules for such recovery apply. Byram v. Illinois Central R. Co. (Iowa) 1918A-1067. (Annotated.)
- 47. Liability to Injured Servant—Acts Outside Course of Employment. The evidence is held to show that the acts in doing which the plaintiff servant was injured were not within the course of his employment, so that the master was not liable. Byram v. Illinois Central R. Co. (Iowa) 1918A-1067.
- 48. An accident arises out of the employment of an injured servant, where it is something the risk of which might have been contemplated by a reasonable person when entering the employment as incident to it. Byram v. Illinois Central R. Co. (Iowa) 1918A-1067.
- 49. An engine hostler has by virtue of his position no implied authority to call assistance in the absence of an emergency, so that a fireman who responded to such a call could not recover for injuries received while rendering the assistance asked. Byram v. Illinois Central R. Co. (Iowa) 1918A-1067.
- 50. If a servant voluntarily undertakes the performance of a duty for which he was not employed, he acts at his own peril, and cannot recover for injuries. Byram v. Illinois Central R. Co. (Iowa) 1918A-1067.

## Note.

Necessity that servant be acting in course of employment when injured in order to recover under Employers' Liability Act. 1918A-1070.

- (4) Employees Within Federal Employers' Liability Act.
- 51. Car Repairer. An injury received by a car repairer, while raising a fallen drawhead to standard height during the temporary stoppage of the car for that purpose while in interstate transit, falls within the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]), regulating the liability of interstate carriers to employees, Lorick v. Seaboard Air Line Ry. (S. Car.) 1917D-920.
- 52. Machinist in Repair Shop. Under the Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Fed. St. Ann.

- 1909 Supp. p. 584), making every common carrier by railroad engaged in interstate commerce liable in damages to any person injured while he is employed by such carrier in such commerce from the negligence of the carrier's officers, agents, or employees, or from any defect in its appliances and equipments, an employee of a railroad which was engaged in interstate and intrastate commerce working as a mechanic principally in running a machine where he shaped parts to be used in the repair of locomotives in immediate need of repair, and generally, but not exclusively, in the repair of locomotives used in interstate commerce, while engaged on Sunday in moving the countershaft, which supplied power to the shaping machine, and whose hand, while over the rail on a girder which he was drilling, was cut off by the wheels of a traveling crane moving on the girders, is not employed in interstate commerce, and cannot recover. Shanks v. Delaware, etc. R. Co. (N. Y.) 1916E-467.
- 53. Carpenter Extending Repair Shop. Where the partition between the extension of railroad repair shops and the old part of the shops had been torn out and tracks laid in the extension, machinery installed, and several engines used in interstate commerce run into it and there stored temporarily, the extension was being used as an instrumentality of interstate commerce, though yet incomplete; and hence a carpenter injured while working in aid of interstate commerce. Thompson v. ('incinnati, etc. Co. (Ky.) 1917A-1266.
- 54. Engine Mover. Moving an engine used in interstate commerce preparatory to attaching it to cars is an act in interstate commerce, so that negligence of fellow servants in so moving the engine will entitle the injured servant to recover under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. L. 65 [Fed. St. Ann. 1909 Supp. p. 584]). Byram v. Illinois Central R. Co. (Iowa) 1918A-1067.
- 55. Night Watchman. A night watchman in the employ of a railway company, injured while in the performance of his duty to guard tools and materials intended to be used in the construction of a new railway station and new tracks, is not then engaged in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (Fed. St. Ann. 1909 Supp. p. 584), § 8657, although such station and tracks were designed for use, when finished, in interstate commerce. New York Central R. Co. v. White (U. S.) 1917D-629.
- 56. Effect of Suing on State Statute. As the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584, 1912 Supp. p. 335]) supersedes a state enactment in the same field and governs exclusively all cases fall-

ing within its scope, and as an employee injured under circumstances subjecting his claim for damages to the federal statute cannot properly recover therefor under counts declaring on the state statute, a defendant is entitled to general affirmative instructions in its favor with respect to such counts if the evidence shows that the employee was engaged in interstate commerce at the time of the injury, although such defendant requested the general affirmative charge as to a count based on the federal statute on the ground that plaintiff, when injured, was not engaged in interstate commerce. Louisville, etc. R. Co. v. Carter (Ala.) 1917E-292. (Annotated.)

- 57. Employee Repairing Locomotive. A railroad employee injured while assisting in repairing a locomotive which was being used or to be used wholly within state of Alabama in drawing a work train engaged in repairing the railroad company's interstate track is not within the Federal Employers' Liability Act, and was entitled to sue under the state statute, since the federal act is only applicable to those in the employment of interstate carriers who at the time of the injury are engaged in work immediately related and directly contributory to interstate commerce, and, while such relation exists when his service is in or about the maintenance or repair of agencies already devoted to or immediately capable of facilitating some essential feature of interstate commerce, the engine in question was not ar instrumentality of such commerce nor an immediately or directly applied means to the maintenance or repair of any indispensable feature of interstate transportation, but was only brought into a secondary relation to an interstate instrumentality. Louisville, etc. R. Co. v. Carter (Ala.) 1917E-292.
- 58. The purpose to devote in future an agency capable of use in interstate commerce to that service will not bring it within the operation of the Federal Employers' Liability Act, though the physical preparation of the agency for immediate use in such commerce may suffice. Louisville, etc. R. Co. v. Carter (Ala.) 1917E-292.
- 59. Maritime Employees. Congress did not establish a rule of liability with respect to injuries received by an employee on an ocean-going ship plying between ports of different states, owned and operated by a corporation which is also an instate railway carrier, by enacting the provisions of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), giving a right of recovery against interstate carriers by railroad for the death or injury of employees while engaged in interstate commerce, caused by the negligence of the carriers' officers, agents, or employees, or by any defect or insufficiency, due to its

- negligence, in its "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The word "boats" in the statute refers to vessels which may be properly regarded as in substance part of a railroad's extension or equipment, as understood and applied in common practice. Southern Pacific Co. v. Jensen (U. S.) 1917E-900.
- 60. Employee of Interstate Railroad. The operation of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), governing the liability of interstate railway carriers for the death or injury of their employees while employed in interstate commerce, cannot be interfered with by a state either by putting the carriers and their employees to an election between the provisions of that statute and a state workmen's compensation act, as is attempted by N. J. Laws 1911, c. 95, or by imputing such an election to them by a presumption. Erie R. Co. v. statutory Winfield (U.S.) 1918B-662. (Annotated.)
- 61. Engineer of Switch Engine. An employee of an interstate railway carrier in charge of a switch engine who is killed while leaving the yards after his day's work, which includes employment in both interstate and intrastate commerce is employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), governing the liability of such carriers for the death or injury of their employees when employed in interstate commerce. Erie R. Co. v. Winfield (U. S.) 1918B-662.
- 62. Existence of Relation. The Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]) has no application to an employee who incurs an injury while not engaged in interstate commerce, or an injury incurred by a person who is not an employee of the railroad at the time. Chesapeake, etc. R. Co. v. Harmon's Adm'r. (Ky.) 1918B-41. (Annotated.)
- 63. Student Fireman. A "student" fireman, who receives no wages or other return, except information, for his services, performed by virtue of a permit authorizing him to ride on the engine only of defendant's trains at his pleasure, although an employee and entitled to a reasonably safe place to work in places where he must necesssarily be while performing the duties contemplated by the arrangement, is not an "employee" within the Federal Employers' Liability Act, when killed in a rearend collision while in the caboose after having abandoned his duties temporarily. Chesapeake, etc. R. Co. v. Harmon's Adm'r. (Ky.) 1918B-41. (Annotated.)
- 64. Machinist in Roundhouse. A machinist's helper, engaged, while making repairs in the roundhouse, upon an engine

1916C-1918B.

which had been used in hauling over the railway company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident, is not then employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149 [Fed. St. Ann. 1909 Supp. p. 584]), governing the liability of an interstate carrier for injuries to its employees when employed in interstate commerce. Minneapolis, etc. R. Co. v. Winters (U. S.) 1918B-54. (Annotated.)

65. Clearing Wreckage from Track. An employee of an interstate railway carrier assisting in clearing up a wreck which was blocking the movement of cars in interstate commerce, who, while carrying blocks on his shoulder which were to be used in jacking up a wrecked car and re-placing it upon the track, stumbled over some large clinkers which were on the roadway near the track, and in stumbling struck his foot on some old cross ties, overgrown with grass, as a result of which he was seriously injured, is employed in interstate commerce within the meaning of the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), as amended by the Act of April 5, 1910 (36 Stat. L. 291, c. 143, Fed. St. Ann 1912 Supp. p. 335), giving a right of recovery against the carrier for injury to an employee while so rier for injury to an employee while so employed, although his primary object may have been the rescue of a fellow employee, pinned beneath the car. Southern R. Co. v. Puckett (U. S.) 1918B-69.

(Annotated.)

## Notes.

Employees entitled to protection under Federal Employers' Liability Act. 1916E-472.

Employees entitled to protection under Federal Employers' Liability Act. 1918B-55.

Existence of relation of employer and employee under Federal Employers' Liability Act. 1918B-46.

Maritime employees as within purview of Workmen's Compensation Act. 1918B-661.

## (5) Employers Within Act.

66. Ind. Employers' Liability Act March 2, 1911 (Laws 1911, c. 88) § 3, which by section 1 is made to apply only to employers of five or more persons, providing that an employee shall not be held to have assumed the risk of any defect in the place of work or in the tool, implement, or appliance furnished him by the employer, where such defect prior to the injury was, or by ordinary care might have been, known to the employer in time to have repaired it, or discontinued its use, does not

require employers of five or more persons to exercise a higher diligence than those of less than five, since at common law it is the employer's duty to furnish or exercise ordinary care to see that tools, implements, or places of work are reasonably safe, and that rule still obtains as to all employers. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258. (Annotated.)

## (6) Contributory Negligence.

- 67. Contributory Negligence. In an action for injuries to a servant under Ore. Employers' Liability Act 1910, contributory negligence is not a defense, but may be considered in fixing damages. Cameron v. Pacific Lime, etc. Co. (Ore.) 1916E-769.
- 68. Contributory Negligence as Defense Under Federal Act. Under the Federal Employers' Liability Act (Fed. St. Ann. 1909 Supp. p. 584), which adopts the comparative negligence doctrine, plaintiff's contributory negligence does not defeat nis action. Byram v. Illinois Central R. Co. (Iowa) 1918A-1067.

## (7) Negligence of Fellow Servant.

69. Assumption of Risk—Negligence of Another Servant. A servant does not assume the risk arising out of the negligence of another employee; for against such risk he cannot guard, nor can he anticipate it. Byram v. Illinois Central R. Co. (Iowa) 1918A-1067.

## (8) Assumption of Risk.

- 70. The Oregon Employers' Liability Act abrogates the doctrine of assumption of risk in actions coming within its scope. Marks v. Columbia County Lumber Co. (Ore.) 1917-306.
- 71. Whether a car repairer who continued at work after complaining of the lack of a certain tool, on the master's promise to supply it, assumed the risk of working without it so as to bar an action under the Federal Employers' Liability Act (Fed. St. Ann. 1909 Supp. p. 584) is held to be for the jury. Lorick v. Seaboard Air Line Ry. (S. Car.) 1917D-920.

(Annotated.)

72. Construction — Changes in Existing Law. Ind. Employers' Liability Act March 2, 1911 (Laws 1911, c. 88) § 1, makes employers of more than five persons liable for injuries to, or the death of, an employee due to its negligence, or the negligence of its agents, servants, etc. Section 2 places the burden of proving that the injured employee did not use due care and diligence on the employer, and provides that no such employee shall be held negligent by reason of the assumption of the risk, where the violation of any ordinance, statute, or rule, regulation, or

direction of any public officer, bureau, or commission was the cause of the injury or death; that it shall not be a defense that the dangers inherent or apparent in the employment contributed to the injury; that the employee shall not be held negligent where the injury results from his obedience to any order of the employer, or of any employee whose orders he was bound to obey, although such order was a deviation from other rules or orders previously made. Section 3 contains similar provisions as to assumption of risk, and provides that the employee shall not be held to have assumed the risk of any defect in the place of work, or in the tool, etc., furnished him, where the defect was prior to the injury known to the employer, or by ordinary care might have been known to him, in time to have repaired it or discontinued its use, and that the burden of proving that he did not know of such defect or was not chargeable with knowledge thereof shall be on the employer. Held, that the statute did not change the law as it formerly existed, as to when an employee assomes the risk, or is negligent, or as to the burden of proof as to negligence, but did destroy the fellow-servant rule, and change the rule as to burden of proof as to knowledge, or constructive knowledge of the defect in the place, tool, or appliance. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258.

## (9) Limitation of Recovery.

73. Liability for Death by Wrongful Act—Limit on Recovery Removed. Ore. Employers' Liability Act 1910 (Laws 1911, p. 17) § 4, removes the limitation of recovery in an action for death of a servant, brought under such act, prescribed in cases of wrongful death by L. O. L. § 380. Cameron v. Pacific Lime, etc. Co. (Ore.) 1916E—769.

#### (10) Persons Entitled to Sue.

74. Federal Employers' Liability Act—Who is "Dependent." Under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]) giving a right of action for wrongful death for the benefit of the dependent next of kin, an elder sister of a deceased employee, suing as his administratrix who is married and in comfortable circumstances, and who boarded deceased, in return for which he made monthly contributions for about two years prior to his death, was not "dependent" upon deceased, and cannot recover. Southern R. Co. v. Vessell (Ala.) 1917D-892. (Annotated.)

75. Illegitimacy—Persons Entitled to Recover for Death of Illegitimate Child. Under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, § 9, 35 Stat. 65, amended by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 [Fed. St. Ann. 1912 Supp. p. 335]), giving a right of action for the

death of an employee for the benefit of the surviving widow, husband, children, or parents, and, if none, then of the next of kin dependent upon such employee, the next of kin are to be determined by the law of the state in which the action is brought, and under Revisal 1905, § 137, and section 1556, rule 10, providing that illegitimate children of the same mother shall be considered legitimate as between themselves and their representatives, and that their personal estates shall be distributed as if they had been born in lawful wedlock, and that, in case of the death of any such child without issue, his estate shall be distributed among his mother and such persons as would be his next of kin, if all such children had been born in lawful wedlock, a suit can be maintained for the death of an illegitimate child, whose mother is dead, for the benefit of his mother's legitimate children, who are dependent upon him. Kenney v. Seaboard Air Line R. Co. (N. Car.) 1916E-450. (Annotated.)

### (11) What Law Governs.

76. Election Between Federal Act and State Law. Where the petition in a railroad employee's action for injuries, while working on an extension of a repair shop, alleged a cause of action under the state law and also under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]), the court should require plaintiff to elect under which law he will prosecute his action. Thompson v. Cincinnati, etc. Co. (Ky.) 1917A-1266. (Annotated.)

77. Effect of Federal Act—Superseding State Statutes. The Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]) in the cases to which it applies is necessarily supreme. Howard v. Nashville, etc. R. Co. (Tenn.) 1917A-844.

78. Applicability of Federal Act. Where a railroad repair shop was used for engines engaged in interstate commerce, an extension thereof designed to make it more effective for such use was in aid of interstate commerce; and hence a carpenter injured while working on the extension is injured while engaged in aid of interstate commerce, regardless of whether the extension was itself being used as an instrumentality of interstate commerce. Thompson v. Cincinnati, etc. Co. (Ky.) 1917A-1266.

79. Where plaintiff in such action elects to proceed under the Federal Employers' Liability Act, the court should dismiss the action as against two individual defendants who were plaintiff's coemployees; no provision being made by the Federal Employers' Liability Act, expressly or by implication, for recovery by one employee against his coemployee. Thompson v. Cincinnati, etc. Co. (Ky.) 1917A-1266.

80. Federal Act as Exclusive. Congress intended the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), regulating the liability of an interstate railway carrier in case of the injury or death of an employee when employed in interstate commerce, to be as comprehensive of those instances in which it excludes liability, i. e., where there is no causal negligence for which the carrier is responsible, as of those in which liability is imposed, and in both classes such act is paramount to, and exclusive of, state regulation. Erie R. Co. v. Winfield (U. S.) 1918B-662.

## Note.

Necessity of election between Federal Employers' Liability Act and state statute or common law. 1917A-1270.

## (12) Pleading.

- 81. Pleading Damage. In such action there should be pleadings averring the pecuniary losses which plaintiffs expect to Nashville, etc. Ry. v. Anderson prove. (Tenn.) 1917D-902.
- 82. Necessity of Pleading Federal Act. A complaint against a railroad company for injury to its fireman sufficiently states a case within the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, Fed. St. Ann. 1909 Supp. p. 584), as amended April 5, 1910 (Act April 5, 1910, c. 143, 36 Stat. 291, Fed. St. Ann. 1912 Supp. p. 335), though that act is not specifically referred to, where it states that plaintiff was a resident of Wisconsin; and that, when injured, he was employed by the defendant as a fireman on a passenger train running from Chicago to Milwaukee. Rowlands v. Chicago, etc. R. Co. (Wis.) 1916E-714.

## (13) Evidence.

- 83. Necessity of Proving Damage. In such action there must be evidence of pecuniary damage to his beneficiaries before such damage can be allowed. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902.
- 84. Subsequent Installation of Safety Device. Where, in an action for injuries to a servant by his foot and leg becoming caught in an unguarded conveyor in a gypsum mill, the complaint alleged that the conveyor could and should have been covered, without interfering with its efficiency, and would have secured protection to plainwhich allegation was specifically denied in the answer, and the jury during the trial visited the premises, at which time the conveyor was covered, evidence that it was covered after the accident was admissible. Cameron v. Pacific Lime, etc. Co. (Ore.) 1916E-769.
- 85. Indemnity Insurance—Proof on Personal Injury Trial-Prejudice. Where, in an action for injuries to a servant, plain-

- tiff's counsel intentionally pursuad a witness on recross-examination until he obtained an answer disclosing that defendant carried employers' liability insurance covering the accident, the admission of such evidence over objection is error. Cameron v. Pacific Lime, etc. Co. (Ore.) 1916E-769. (Annotated.)
- 86. Burden of Proof. In an action against a railroad company under Pa. Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Fed. St. Ann. 1909 Supp. p. 584), and Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (6 Fed St. Ann. p. 752), for death of plaintiff's husband, the burden is on plaintiff to prove violation of the federal statutes, and that decedent was engaged in interstate commerce, or with its instrumentalities, at the time of the accident. Hench v. Pennsylvania R. Co. (Pa.) 1916D-230.
- 87. In an action for injuries resulting in the death of a brakeman, evidence merely that from time to time cars containing both intrastate and interstate commerce were received, stored, shifted, and reloaded in the yard in which the accident occurred creates no presumption that the cars being shifted at the time of the accident were intended for use in interstate commerce. Hench v. Pennsylvania R. Co. (Pa.) 1916D-230.

(Annotated.)

(Annotated.)

- 88. In an action against a railroad company under federal statutes for death of plaintiff's husband, who was fatally injured while coupling cars, failure of defendant to produce records showing what particular cars were being moved in the freight yard on the night of the accident creates no presumption that the cars therein were being used in interstate commerce, where defendant's clerk, who kept certain records of cars, testifies that he has no such records. Hench v. Pennsylvania R. Co. (Pa.) 1916D-230. (Annotated.)
- 89. The relation of master and servant must be based upon a contract, either express or implied, and the terms and conditions of the contract must, in a large measure, be looked to, to determine the duties which each owes to the other, so that it may be ascertained what acts of the employer may or may not constitute negligence, as applied to the employee. Chesapeake, etc. R. Co. v. Harmon's Adm'r. (Ky.) 1918B-41. (Annotated.)

## (14) Instructions.

90. Elements of Damages-Testimony to Support. In an action under the Federal Employers' Liability Act of April 22, 1908 (Fed. St. Ann. 1909 Supp. p. 584), for death of a railroad employee, where there was no proof as to what portion of dece-dent's earnings his widow and child might have reasonably expected to receive, charge telling the jury that they might find as damages a sum equal to the entire amount of the probable earnings of decedent is erroneous. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902.

91. Where there is no proof as to the value of decedent's customary contributions to the support of his widow and minor child, and nothing to indicate what they might reasonably have expected from him for support, there being no evidence as to proof of his personal qualities and the interest he took in his family, the submission to the jury of such matters as a basis of damages is improper. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902.

92. Action for Injuries-Instruction not Misleading. In a railway brakeman's action for injuries, in which the first paragraph of the complaint charged negligence of the engineer in backing against the car on which he was riding in the course of his duty, and the second paragraph alleged a cause of action under Ind. Employers' Liability Act (Laws 1911, c. 88), and under the evidence his place of work became unsafe either through the engineer's negligence, or through the giving of a negligent order requiring him to be at that place, an instruction that as defendant was a corporation and could not discharge in person the obligation of furnishing its employees a reasonably safe place to work, and appliances with which to work, but must provide some agent to take its place, the agent to whom it delegated this duty stood in its place and stead, is not misleading, where the charge is otherwise proper, though there is no allegation of a failure to furnish a reasonably safe place or appliances with which to work, since it was negligence, and not the place of work, which produced the injury. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258.

# (15) Damages.

93. Proof of Damage—Loss of Support—Amount. Where there is proof of the earning capacity of decedent and his expectancy of life, but nothing to show what his beneficiaries, his widow and minor child, might reasonably have expected to receive from him for their support, only a recovery for nominal damages can stand. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D—902.

94. Computation of Damage—Life Expectancy of Beneficiary. In such action damages to the widow should be calculated on the basis of her expectancy of life as well as her husband's. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D—902.

## (16) Verdict.

95. In such action, where there is no proof as to what portion of decedent's earnings his widow and child might reasonably have expected to receive, it is error

to instruct that the jury may find damages to be the net value of his earnings after payment of his personal expenses. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902.

96. Res Judicata—Action Under Federal Employers' Liability Act—Effect on Other Remedy. The decision on appeal that decedent's administrator had no right of action for decedent's death under the Federal Employers' Liability Act does not preclude his seeking remedy under state law if he has any. Chesapeake, etc. R. Co. v. Harmon's Adm'r. (Ky.) 1918B-41.

97. Majority Verdict — Action Under Federal Statute. The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, i. e., by a unanimous verdict, does not control the state courts, even when enforcing rights under a federal statute like the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict. Minneapolis, etc. R. Co. v. Bombolis (U. S.) 1916E-505.

(Annotated.)

#### (17) Review.

98. Federal Employers' Liability Act—Applicability—Saving Question for Review. Error, if any, in basing a recovery in a personal injury action upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149 [Fed. St. Ann. 1909 Supp. p. 584]), does not entitle the defendant to have the judgment reversed, where such defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident, or to object to the application of the federal statute, but, on the contrary, invoked and relied, without qualification, upon that statute and the rights that, because of that statute, it supposed itself to possess. Minneapolis, etc. R. Co. V. Winters (U. S.) 1918B-54.

99. Action Under Federal Act—Review—Scope of Decision—Rights at Common Law. Where the only question before the court on an appeal from an action under the Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Fed. St. Ann. 1909 Supp. p. 584), was whether an employee was engaged in interstate commerce when killed, which was decided adversely, it is not necessary to decide whether a common-law right of action existed. Chesapeake, etc. R. Co. v. Harmon's Adm'r. (Ky.) 1918B-41.

100. Review by Federal Court of State Decision—Negligence—Clinkers on Right of Way. The federal supreme court will not disturb the concurrent conclusion of two state courts in an action brought under the Employers' Liability Act of April

22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), as amended by the Act of April 5, 1910 (36 Stat. L. 291, c. 143, Fed. St. Ann. 1912 Supp. p. 335), that there was sufficient ground for attributing negligence to the railway carrier because of the presence of large clinkers in the path along which an employee was called upon to pass in the course of his duty, and over which he stumbled while carrying some blocks to be used in jacking up a wrecked car. Southern R. Co. v. Puckett (U. S.) 1918B-69.

# k. Workmen's Compensation Acts.

## (1) Nature and Purpose.

101. Theory of Liability. In a case arising under the N. Y. Workmen's Compensation Act (Consol. Laws, c. 67) the doctrine of respondeat superior has no application, nor do the rules of employers' liability for negligence control, but compensation is awarded workmen injured in certain enumerated occupations. Dale v. Saunders (N. Y.) 1918B-703.

102. Commission Substituted for Employer. Wash. Laws 1911, c. 74, is neither an employer's liability nor a workmen's compensation act, but an industrial insurance law, withdrawing from private controversy all phases of injury to workmen; and compensation flows from the commission, which must be sued rather than the employer, if it rejects a claim. Stertz v. Industrial Ins. Commission (Wash.) 1918B-

103. Scope of Act. A carpenter hired in the state of Rhode Island, and while engaged in the master's work in the state of Connecticut, was injured. He sought re-covery under R. I. Workmen's Compensation Act (Pub. Laws 1911-12, c. 831). Article 2, § 21, declares that an employee shall, after injury, at reasonable times during the continuance of his disability, if requested by his employer, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, and declares that, if the employee refuses to submit to such examination, his right of compensation shall be suspended, and compensation during the period of suspension shall be forfeited. Article 2, § 1, in broad terms gives employees compensation for personal injuries by accident arising out of and in the due course of employment, while article 3, § 16, declares that proceedings shall be brought either in the county where the employer or employee lives or has his usual place of business, and that changes of venue may be granted. Pub. Laws 1915, c. 1268, provides for a report of injuries. It is held that, as the act was obviously intended to furnish a comprehensive scheme for the compensation of injured employees, it governed injuries received by the employee, hired in the state, while at work for the master without the state. Grinnell v. Wilkinson (R. I.) 1918B-618. (Annotated.)

104. The general purpose of the Ill. Workmen's Compensation Act of 1913 is to provide a method by which injuries received by employees in certain classes of occupations may be quickly adjusted so that something shall be received according to fixed rules for determining compensation in said cases. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

105. The Workmen's Compensation Act is applicable only to those relations of employer and employee which are in the legislative control of the state, untrammeled by the laws of the United States. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655.

106. Purpose of Act. The N. Y. Employers' Liability Act was intended to protect and safeguard the interests of employees. Whiley v. Solvay Process Co. (N. Y.) 1917A-314.

107. Basis of Liability—Negligence and Contributory Negligence. Under Acts Md. 1914, c. 800, regulating workmen's compensation, compensation for anjuries or death is not dependent on negligence of the employer nor denied by reason of contributory negligence. American Ice Co. v. Fitzhugh (Md.) 1917D-33.

108. Compulsory Nature of Statute. While a compensation statute might be unduly compulsory, though professing to be wholly voluntary, and might attach such penalties to nonacceptance as to compel acceptance by undue means, a statute which attaches no penalties for failure to accept its provisions, save taking away what may arbitrarily be taken, constitutionally is not exercising undue compulsion. What the legislature may take at its will, it may allow retention of upon condition. If it may eliminate a defense at will, it does not violate the constitution to take it upon refusal to accept an arbitration statute. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

(Annotated.)

109. The act does, in essence, go beyond obtaining an agreement by acceptance of its provisions that an arbitration shall determine summarily and speedily that compensation shall be made by applying a statute schedule, and that recovery for injury shall be neither greater nor smaller than provided in said schedules. And it has never been seriously questioned that the legislature could require, or parties agree upon arbitration and upon a limit of recovery for injury or death. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

## (2) Constitutionality.

110. Validity of Act. If the Mich. Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) be held to apply

to occupational diseases, such provisions are invalid, not being within the scope of the title as required by Const. art. 5, \$ 21, providing that no law shall embrace more than one subject, which shall be expressed in its title. Adams v. Acme White Lead, etc. Works (Mich.) 1916D-689.

(Annotated.)

111. Said law does not violate the due process of law clause of the constitution by compelling compensation of workmen for injuries due to acts of third persons, against whose acts the employer should have every inducement to guard. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

112. It would not be a violation of the due process of law clause of the constitution to make the master the insurer of the workman while on the premises. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

113. Nor is the act special legislation within the meaning of Ky. Const. § 59, since "special legislation" applies to particular places or persons as distinguished from classes of places or persons. Greene v. Caldwell (Ky.) 1918B-604.

(Annotated.)

114. Nor is such act unconstitutional as class legislation in violation of Ky. Const. § 59, providing that the general assembly shall not pass local or special acts concerning a number of subjects therein mentioned, since the classification made is reasonable. Greene v. Caldwell (Ky.) 1918B-604. (Annotated.)

115. The title to such act does not violate Ky. Const. § 51, requiring the subject of a law to be expressed in the title. Greene v. Caldwell (Ky.) 1918B-604.

(Annotated.)

116. Nor is it unconstitutional because not allowing a jury trial, since the parties accepting it thereby agree to trial without jury. Greene v. Caldwell (Ky.) 1918B-604. (Annotated.)

117. Such act does not violate Ky. Const. § 135, forbidding establishment of courts not provided for in the constitution, since the compensation board is not a "court" within the constitution, and the act provides in section 52 for appeal from its decision, so that its members are arbitrators within Const. § 250, providing that arbitrators shall be chosen by the parties, the acceptance of the act by employer and employee constituting a consent that the board act as "arbitrators." Greene v. Caldwell (Ky.) 1918B-604. (Annotated.)

118. The constitutionality of the act as a whole is not affected by the validity or invalidity of section 22 thereof, as to compensation to alien widows, children, and relatives, since this section is separa-

ble from the remainder of the act. Greene v. Caldwell (Ky.) 1918B-604.

(Annotated.)

119. Nor is the act invalid as making, by section 11 thereof, radical changes in the law of parent and child, since there is no constitutional restraint on such action by the legislature. Greene v. Caldwell (Ky.) 1918B-604. (Annotated.)

120. Such act is not unconstitutional as a depriving of property without due process of law, contrary to Const. U. S. Amend. 14 (9 Fed. St. Ann. 416) because taking from a nonaccepting employer certain defenses, since the employer has no vested rights in these defenses, and the legislature could take them away without giving any election at all. Greene v. Caldwell (Ky.) 1918B-604. (Annotated.)

121. Nor is the act unconstitutional under Ky. Const. § 196, forbidding a common carrier to contract for relief from its common-law liability. Greene v. Caldwell (Ky.) 1918B-604. (Annotated.)

122. The Workmen's Compensation Act of 1916 (Laws Ky. 1916, c. 33), is not unconstitutional, under Const. § 54, forbidding limitation of amount of recovery for injuries, as being compulsory on employees, since by section 74 it provides for their election to accept the provisions of the act, notwithstanding section 76b, providing that as to nonaccepting employee, the employer may use the defenses of contributory negligence, fellow servant, and assumed risk. Greene v. Caldwell (Ky.) 1918B-604. (Annotated.)

123. Such act so construed is not unconstitutional as being, in effect, compulsory by giving an unreasonably short time—from June 28th to July 1st—for election by employers whether or not to come under the act. Victor Chemical Works v. Industrial Board (III.) 1918B—627.

124. The compulsory compensation scheme of the New York Workmen's Com-pensation Act (N. Y. Laws 1913, c. 816; Laws 1914, cc. 41 and 316), which, in lieu of the common-law liability confined to cases of negligence, imposes a liability upon employers to make compensation for disabling, or fatal accidental personal injuries received by, employees in the course of their employment in certain gainful occupations denominated "hazardous employments," without regard to fault as a cause, except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty, graduating the compensa-tion for disability according to a prescribed scale based upon loss of earning power, having regard to the previous wage and the character and duration of

the disability, and measuring the death benefits according to the dependency of the surviving wife, husband, or infant children,—does not contravene U. S. Const. 14th Amend. as taking property without due process of law, or unwarrantably limiting freedom of contract, whether considered from the standpoint of employer or employee, but is a valid exercise of the police power of the state. New York Central R. Co. v. White (U. S.) 1917D-629. (Annotated.)

125. The exclusion of farm laborers and domestic servants from the compulsory compensation scheme of the New York Workmen's Compensation Act (N. Y. Laws 1913, c. 816; Laws 1914, cc. 41 and 316) is not such an arbitrary classification as to contravene the equal protection of the laws clause of U. S. Const. 14th Amend., since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. New York Central R. Co. v. White (U. S.) 1917D-629. (Annotated.)

126. The requirement of the New York Workmen's Compensation Act (N. Y. Laws 1913, c. 816; Laws 1914, cc. 41 and 316), \$50, that the employer shall secure payment of the compulsory compensation prescribed by that act either by (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by furnishing satisfactory proof of his financial ability to pay the compensation, and depositing securities for that purpose, cannot be said to contravene U. S. Const. 14th Amend., since self-insurance under the third method presumably is open to all solvent employers on reasonable terms. New York Central R. Co. v. White (U. S.) 1917D-629.

(Annotated.)

127. Employers are not denied the equal protection of the laws, contrary to U. S. Const. 14th Amend. by the provisions of the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. c. 147), § 5, that where both employer and employee reject the act, the liability of the employer shall be the same as though the employee had not rejected it, thus leaving a rejecting employer liable, whether the employee on his part accepts or rejects the act, for personal injuries sustained by an employee arising out of and in the usual course of the employment, with no right to avail himself of the fellow-servant rule or the defenses of contributory negligence or assumption of risk, while by § 3b, if the employee rejects the act and the employer accepts it, the latter may avail himself of such common-law rules and defenses. Hawkins v. Bleakly (U. S.) (Annotated.)

128. There is nothing repugnant to U. S. Const. 14th Amend. in the provision of the Iowa Workmen's Compensation Act

(Iowa Laws 35th Gen. Assem. c. 147) that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and that if it be found that the employer or his agent made such request or suggestion, the employee shall be conclusively presumed to have been unduly influenced and his rejection of the act shall be void. Hawkins v. Bleakly (U. S.) 1917D-637. (Annotated.)

129. The scheme adopted by the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. c. 147), for the adjustment of compensation when the employer accepts its provisions, is not in contravention of U.S. Const. 14th Amend. as clothing an administrative body with an arbitrary discretion inconsistent with due process of law, where the act provides the measure of compensation, the circumstances under which it is to be made, establishes administrative machinery for applying the statutory measure to the facts of each particular case, and provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental jurisdictional questions. Hawkins v. Bleakly (U. S.) 1917D-637. (Annotated.)

.130. The right to trial by jury, guaranteed by U. S. Const. 7th Amend., cannot be said to be infringed by the Washington Workmen's Compensation Act (Wash. Laws 1911, c. 74), on the theory that if such act be valid, it must be followed in the federal courts in cases that are within its provisions, where there is nothing in such act that excludes trial by jury in any private rights of action which are preserved, and, as between employer and employee, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by a jury. Mountain Timber Co. v. Washington (U. S.) 1917D-642. (Annotated.)

131. A state may consistently with U. S. Const. 14th Amend. substitute a system of compulsory compensation for disabling or fatal accidental personal injuries received by employees in the course of their employment in certain so-called hazardous employments without regard to fault of the employer, in lieu of the existing right to maintain actions for damages in cases of the employers' negligence, in which the latter may assert immunity for the negligence of a fellow servant and the defenses of contributory negligence and assumed risk. Mountain Timber Co. v. Washington (U. S.) 1917D-642. (Annotated.)

132. The exaction, under the Washington Workmen's Compensation Act (Wash. Laws 1911, c. 74), from employers in certain industries denominated "extrahazardous," without regard to any wrongful act on their part, or to whether injuries have

befallen their own employees or not, of periodical contributions based upon percentages of pay rolls to a state fund from which compensation shall be made for disabling or fatal injuries received by employees in the course of their employment in such industries, is not inconsistent with the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., but such exaction is a valid exercise of the state's police power, there being no claim that the scale of compensation is unduly large, and the schedule of contribution evidencing an intent to proportion the various percentages according to the hazard of each of the groups into which the industries are divided, and to limit the burden to the requirements of each industry. Mountain Timber Co. v. Washington (U. S.) 1917D-642.

(Annotated.) 133. The evident purpose of the Washington Workmen's Compensation (Wash. Laws 1911, c. 74), to classify the various occupations according to the respective hazard of each, is a sufficient answer (there being no particular showing of erroneous classification) to the objection, founded on U.S. Const. 14th Amend. that the statute goes too far in classifying as hazardous large numbers of occupations that are not hazardous in their nature. Mountain Timber Washington Co. ٧. (U. S). 1917D-642. (Annotated.)

134. The federal supreme court will not assume, in the absence of an actual decision of the state court, that the provision of the Washington Workmen's Compensation Act (Wash. Laws 1911, c. 74), making it unlawful for the employer to deduct any part of his compulsory contribution to the state fund created by that act from the wages or earnings of his workmen, will be so broadly construed as to bring it in conflict with the federal constitution. Timber Co. Mountain Washington (U.S.) 1917D-642. (Annotated.)

135. There is no denial of due process of law in the provisions of the Iowa elective Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. c. 147), that an employer rejecting the compensation features of that act shall not escape liability for personal injury sustained by an em-ployee arising out of, or in the usual course of, the employment, because the employee assumed the risk of the employment, or because of the employee's negligence, unless this was wilful and with the intent to cause the injury, or was the result of intoxication, or because the injury was caused by the negligence of a coemployee, and that in an action against such rejecting employer it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut such presumption. Hawkins v. Bleakly (U. S.) 1917D-637. (Annotated.)

136. Rights of employees under U. S. Const. 14th Amend. are not invaded by abolition, under the Washington Workmen's Compensation Act (Wash. Laws 1911, c. 74), of private rights of action for damages in case of disabling or fatal accidental personal injuries received employees in certain employments denominated "extrahazardous" (and in any other industry, at the option of employer and employees), and the substitution of a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazards of each class of occupation.

Mountain Timber Co. v. Washington (U. S.) 1917D-642. (Annotated.)

137. Workmen's Compensation Act, giving employer and employee an option to accept or reject it, is not unconstitutional as denying to parties who have accepted it the right of trial by jury, as under Iowa Code, § 3650, providing that the right exists only if it be not waived, the right to jury trial can be waived. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

Annotated.)

138. The Iowa Workmen's Compensation Act, § 26, provides that an agreement between an employer and an employee as to compensation, filed with the commissioner, is not to be approved unless its terms conform to the provisions of the act, and section 1, last paragraph, provides that where the parties have not given notice of an election to reject, every contract of hire shall be construed as an implied agreement to accept compensation as provided by the act. It is held that the statute was not unduly coercive. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

139. Iowa Const. art. 5, § 1, provides that the judicial power shall be vested in the supreme court, district court, and such inferior courts as the general assembly may establish. Iowa Workmen's Compensation Act, §§ 25-35, provide for the determination of the amount of compensation to be awarded an injured workman by a committee of arbitration, and that there shall be no appeal on questions of fact from the decree of the district court approving  $_{
m the}$ committee's award course. It is held that the act was not unconstitutional under the rule that contracts by which the parties undertake to deprive themselves in toto of the right to resort to the courts to settle controversies between them are invalid. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-(Annotated.)

140. Cal. Const. art. 6, § 1, provides that the judicial power of the state shall be vested in the senate, certain named courts, and such inferior courts as the legislature

establish. Const. art. 20, § 21, adopted in 1911, authorizes the legislature to create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by them in the course of their employment and to provide for the settlement of any disputes arising under the legislation by arbitration or by an industrial accident board, by the courts or by either or any or all of these agencies. Cal. Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 279), §§ 22, 23, 24a, 25, 26, 73a, 78, 84 and 64a size 11 and 12 and 13 and 14 and 15 and 78, 84, and 84c, give the industrial accident commission power to hear applications by employees or their dependents, after notice is served on the other party, to issue subpoenas, take testimony, punish for contempt, make findings which are conclusive and "full power, authority, and jurisdiction to try and finally determine all proceedings for the recovery of compensation," subject only to a limited right of review by certiorari. It is held that the act confers on the commission judicial power, which is the power to decide and make binding orders between persons who bring cases for decision, and therefore violates article 6, § 1, of the constitution unless within the authority of article 20, § 21. Western Metal Supply Co. v. Pills-(Annotated.) bury (Cal.) 1917E-390.

141. Cal. Const. art. 20, § 21, authorizing the legislature to create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment and to provide for the settlement of disputes arising thereunder by arbitration, by an industrial accident board or by the courts, when construed in the light of its purpose to substitute a system of compensation for all injuries for the common-law liability of the master for negligence, and in the light of the uniform scope of previous workmen's compensation acts, authorizes the legislature to provide for the compensation of those dependent on a workman killed in the course of his employment as well as to an injured employee himself, since "compensation to employees" may be fairly held to mean, not merely money payments to them, but also providing medical and surgical treatment and support for those who ordinarily look to the employee for support. Western Metal Supply Co. v. Pillsbury (Cal.) 1917E-390. (Annotated.)

142. The fact that the dependents of a workman, killed in the course of his employment, may be nonresidents of the state and nation, does not show that no public purpose is to be served by requiring such compensation to be made so as to deprive that provision of the act of its validity as an exercise of the police power. Western Metal Supply Co. v. Pillsbury (Cal.) 1917E-390. (Annotated.)

143. Workmen's Compensation Act, taking from the employer who rejects the act the defense that the servant's own negligence contributed to his injury, is not unconstitutional therefor, since the act has in fact added to the defense of contributory negligence, as under Iowa Code of 1915, Supplemental Supp. § 3953a, all contributory negligence would be available in mitigation only, there being, under the compensation statute, the right to plead contributory negligence in mitigation, plus the right to plead certain contributory negligence, such as intoxication of the servant, in bar. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

144. Workmen's Compensation Act, providing that the burden of proof shall rest upon the employer who rejects the act to rebut the presumption that the injury to his servant was the result of his negligence, is not unconstitutional, since rules as to presumptions and burden of proof have been established by the decisions of the court and can be changed or abrogated by the legislature. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

(Annotated.)

145. Workmen's Compensation Act, abolishing, as against an employer who rejects it, the defense that the injury to his servant was due to the negligence of a fellow servant, is not unconstitutional thereby as an illegal classification or for any other reason, since the defense, having been evolved by the courts, may properly be abrogated by the legislature, as no one has a vested interest in commonlaw rules. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

146. Workmen's Compensation Act, abolishing, as against an employer rejecting it, various defenses resting on risks assured by the employee, is not unconstitutional therefor, since as such defenses of assumption of risk have been evolved by the courts, they may be properly abrogated by the legislature, as no one has a vested interest in common-law rules. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

147. Workmen's Compensation Act, abolishing the defenses of assumption of risk, contributory negligence, etc., is not unconstitutional as denying, without a repeal of Iowa Code, § 3650, providing that issues of fact in an ordinary action must be tried by jury unless the same is waived, the right, to an employer who has rejected the act, of trial by jury of issues of fact in his servant's action against him for injuries. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

(Annotated.)

148. The Workmen's Compensation Act, if it imposes a tax, imposes it for a public purpose sustained by the police power.

Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

149. There is nothing in the provision of the act with reference to insurance to be effected by the employer which unlawfully abridges the right to contract. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

150. Though the insurance provisions of the act are treated as a compulsory tax, such taxation is an authorized exercise of the police power. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

(Annotated.)

151. If it is true that the insurance provisions of the statute have induced and enabled insurance associations to combine for the exaction of unduly high premiums, that will not render the statute unconstitutional. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

152. Iowa Workmen's Compensation Act, §§ 25-35, provide generally for a committee of arbitration; that if a claim for review is filed, the commissioner shall revise the decision of the committee, or refer the matter back for further findings of fact; that any party in interest may present a certified copy of the order of the commissioner or decision of the committee or a memorandum of agreement approved to the district court, which shall render decree in accordance therewith. It is held that the specified sections do not work an improper delegation of judicial power. Hunter v. Co. Consolidated Coal Colfax (Iowa) 1917E-803. (Annotated.)

153. Provisions in effect providing for arbitration, for decree upon the award, and for a limited review of this decree upon appeal, are not necessarily a delegation of judicial power, and are at least as much a delegation of legislative as of judicial power, and may be upheld on that ground. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

154. Provisions for such arbitration and review are authorized by the police power, though they may, in a sense, clothe an administrative body with quasi-judicial functions in some respects, as to amount to a delegation of some judicial power, and though in some cases this operates to deny the right of trial by jury. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

155. Even if acceptance of the act constitute a contract to oust the courts of all jurisdiction, it would not invalidate the statute, since, while such contracts are condemned, it is on grounds of public policy, and a contract which is expressly sanctioned by or effectuated through a statute cannot be against public policy, as the legislature is the supreme judge of what constitutes public policy. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

156. Iowa Workmen's Compensation Act, § 42, provides that every employer subject to its provisions shall insure his liability under the act in some organization approved by the state department of insurance, while other provisions afford methods by which the insurance can be carried by mutual arrangement between the employer and employee, or under which the employer may carry his own risk, while there are various provisions as to carrying insurance, etc. It is held that the insurance scheme was not invalid as an unauthorized use of the taxing power. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

157. While the consequences of rejection of the Workmen's Compensation Act by the employer and by the employee, respectively, are not identical, they are sufficiently so as that, especially in view of the difference in situation, the difference created is not arbitrary classification. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

158. Iowa Workmen's Compensation Act, § 5, provides that where both employer and employee reject the act the liability of the employer shall be the same as though the employee had not rejected. Section 3, par. "b," provides that, if the employee rejects, the employer may plead all defenses, including those at common law, and contributory negligence, assumption of risk, and fellow servant. Section 10 provides that compensation under the act is to be awarded only if both employer and employee have accepted the act. It is held that the act was not unconstitutional as containing an improper classification and arbitrary differentiation. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

159. The Iowa Workmen's Compensation Act is not within the rule of cases in which statutes impairing the right freely to contract as to hours of labor, and statutes forbidding discharge because an employee is a member of a labor union, and the like, were held unconstitutional, because it leaves both parties at liberty to accept or reject the provisions of the act, and because it is a proper exercise of the police power in so far as it regulates agreement between employer and employee. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

160. Workmen's Compensation Act, excepting from its operation household or domestic servants, farm or other laborers engaged in agricultural pursuits, and casual employees, is not unconstitutional as class legislation, as the power to classify is primarily in the legislature, and courts accord to it the widest latitude in performing this function, so that a classification adopted by it will be sustained, unless it is so palpably arbitrary as that there is no room for doubt this discretion

has been abused; and excepting from the act household or domestic servants, farm laborers engaged in agricultural pursuits, and those in an employment of a casual nature, is no arbitrary classification, to say nothing of being palpably arbitrary. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

161. Parties other than such employees cannot urge against the validity of a workmen's compensation act that it interferes with exclusive jurisdiction of federal courts of actions for injury of employees of railroads; and, in any event, the act guards against this very interference with federal law. Mere academic possibilities will not avail to make a statute unconstitutional. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

162. The Iowa Workmen's Compensation Act, § 51, provides that part 1 of the act shall take effect from and after July 1, 1914, and parts 2 and 3 from and after July 4, 1913, and that if either employer or employee serves notice to reject not less than thirty days before July 1, 1914, when part 1 takes effect, such notice shall have the same force and effect as though part 1 had taken effect July 4, 1913. Acts 35th Gen. Assem. c. 148, provides that the Workmen's Compensation Act shall not apply to injuries sustained prior to the times when the compensation act takes effect in all its parts. It is held that the act was not unconstitutional as impairing the obligation of existing contracts, as a statute which provides expressly that existing contracts are not to be affected is not open to the objection that it impairs the right of contract. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

163. Iowa Workmen's Compensation Act, §§ 8, 13, 18, are constitutional, since the sections cited are mere guards against contracts to reduce the employer's liability for negligence, and statute provisions prohibiling the making of contracts intended to evade obligations created by the statute are not an impairment of the right to contract, but a method of preventing evasions of contract obligations. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

164. Iowa Workmen's Compensation Act, § 3, provides that if any request be made by an employer that an employee shall exercise his right to reject the act, there shall arise a conclusive presumption that the employee was unduly influenced. Séction 19 provides that any agreement made by any employer with any employee or other beneficiary as to any claim under the act made within twelve days after injury, shall be presumed fraudulent. It is held that the act was constitutional. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

165. Iowa Workmen's Compensation Act, §§ 3, 8, 13, 18, 19, leave both the employer and the employee the liberty to accept or reject its provisions, while its requirements in case of acceptance constitute such an exercise of the state's police power as will sustain compulsory acceptance, as the legislature in an honest exercise of the police power may validly impair the obligations of contracts. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

166. Iowa Workmen's Compensation Act, providing for the assessment of an injured workman's compensation by an executive board, is not unconstitutional, in that the statute violated the guaranties of the federal constitution of due process of law, and equal protection of laws, and effected a wrongful abridgment of the privileges and immunities of citizenship. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

167. The Ill. Workmen's Compensation Act of 1911 (Laws 1911, p. 315) is constitutional. Devine v. Delano (Ill.) 1918A-689.

#### Notes.

Workmen's Compensation Act as applicable to injury received in another jurisdiction. 1918B-625.

Constitutionality of Workmen's Compensation Act. 1918B-611.

### (3) Construction Generally.

168. Construction. Mich. Employers' Liability and Workmen's Compensation Act (Pub. Acts, Extra Sess. 1912, No. 10), providing compensation for injuries to and death of workmen while engaged in their employment, independent of the question of negligence, is in derogation of the common law, and should be strictly construed, though the act provides a remedy against a person who would not otherwise be liable. Andrejwski v. Wolverine Coal Co. (Mich.) 1916D-724.

169. Construction of 'Act — Depriving Court of Jurisdiction. The legislature, in adopting Wash. Laws 1911, c. 74, as to workmen's compensation, having said positively that jurisdiction of courts in controversies over injuries to employees is ended, the courts must liberally construe such provision as well as other portions of the law. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

170. Although it employs the word "accident" in administrative portions of the act, it does not thereby limit the words "fortuitous event" used in the clause granting compensation, since general intent will not control positive definitions. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

171. Effect—Dispensing With Judicial Controversy. The Wash, Workmen's Com-

pensation Act (Laws 1911, c. 74), by omitting the words "accident" and "arising out of and in the course of employment," and substituting therefor "fortuitous event" and "injured in extrahazardous work," departs from prevailing systems and awards compensation without judicial controversies. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

172. Workmen's Compensation Act as Retroactive. Where the amending statute materially changes the statute amended, making desirable a postponement of its operation to permit an adjustment to changed provisions, the argument that the limitation was intended to be retrospective is less cogent; and when such limitation, if retrospective, is radical and harsh, and the changes in the substantive provisions of the statute furnish an adequate reason for a postponement, such postponement should not be held to show an intent to make the statute retrospective. And it is held that chapter 209, Laws Minn. 1915, approved April 21, 1915, and effective July 1, 1915, amending the Workmen's Compensation Act of 1913 (Laws 1913, c. 467), and providing a limitation of one year after injury in which a workman may commence his action, the effect being, if the act is retrospective, to require accrued causes of action to be brought within seventy days after the passage of the statute, was not retrospective. State v. General Accident, etc. Assurance Corp. (Minn.) 1918B-615. (Annotated.)

173. Definition of Terms—Elevator as "Vehicle." An elevator is not a "vehicle" within the classification of group 41 of N. Y. Workmen's Compensation Law (Consol. Laws, c. 67), which embraces the operation of therwise than on tracks, of cars, trucks, wagons, and other vehicles," etc. Wilson v. Dorflinger (N. Y.) 1917D-38.

174. Plant—Definition of Term—As Used Employers' Liability Act. Under the N. Y. Employers' Liability Act (Consol. Laws, c. 31, § 200, as amended by Laws 1910, c. 352), making an employer liable for personal injury to an employee in the exercise of due care, by any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer, and arising from, or not discovered and remedied owing to, the negligence of the employer or any one intrusted by him with seeing that the ways, etc., are in proper condition, the word "plant," used in connection with and relating to a business, includes everything, other than supplies and stock in trade, requisite to the carrying on of the business; whatever apparatus is used by a business man for carrying on his businessnot his stock in trade which he buys or makes for sale-but all goods and tools, fixed or movable, which he keeps for permanent employment in his business; anything regularly used in the conduct of an

employer's business, without which it could not be carried on in the usual manner; and there is a "defect" when any part of the plant is not in a proper condition for the purpose for which it was intended, or when it is so incomplete that the use of the plant is dangerous by reason of the failure to furnish reasonably necessary parts for the purpose for which it is used. Whiley v. Solvay Process Co. (N. Y.) 1917A-314. (Annotated.)

175. Abolition of Defenses—Assumption of Risk. The common-law rule that an employee continuing in the work of his employer with full knowledge of the dangers incident thereto assumes such risks has not been changed by the N. Y. Employers' Liability Act (Consol. Laws, c. 31, §§ 200-204), defining the employers' liability, unless notice is given as provided by that act, and the employee is entitled to recover under its terms. Wiley v. Solvay Process Co. (N. Y.) 1917A-314.

176. Assumption of Risk-Abolition of Defense-Effect. Though some authorities hold that the defense of assumption of inherent risks presents the claim that the employer is wholly free from blame, many more authorities define this defense of assumption otherwise. Since, therefore, the legislature is not obliged to hold that defending with assumption of inherent risk is necessarily defending with total freedom from blame, and since the one is neither necessarily nor universally held to be the equivalent of the other, the taking away of the defense of assumption is not necessarily an elimination of the defense of total want of fault, especially where the act expressly provides carefully worked out methods for litigating whether the master was shown to be wholly blameless. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

177. When at a time at which a statute is passed the authorities are greatly at variance as to what is presented by the defense that the employec assumed the risks inherent in the employment, and the statute enacted contains a well-considered provision, putting the burden of proof upon the employer that he was wholly free from fault, the statute should not be construed into taking away the defense that the employer is wholly blameless, merely because the statute eliminates such assumption of risk as a defense. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

178. Absolute Liability. Because of the presumption that the legislature has in mind the state of the law on the subject of a statute when it enacts the same, and because at the time this statute was enacted there was at least room for reasonable difference of opinion on whether a statute making the employer respond, when wholly free from blame, is valid, and because of the rule that courts will not so construe a statute as to render it uncon-

stitutional, or as to raise serious doubts as to its validity, if any other construction is within the bounds of reason possible, the statute under consideration is held not to create such absolute liability. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

#### Notes.

Meaning of phrase "average weekly earnings" in Workmen's Compensation or similar act, 1918B-640.

Workmen's Compensation Act as retroactive in operation. 1918B-617.

## (4) Operation Without State.

179. Injury Outside State Where Contract of Employment was Made. The only actions to secure workmen's compensation under a foreign statute which the courts of Connecticut cannot enforce are those where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. Douthwright v. Champlin (Conn.) 1917E-512. (Annotated.)

180. Pub. Acts Conn. 1913, c. 138, as to workmen's compensation, provides compensation for nonresidents as well as residents, and under all contracts of employment wherever and by whomsoever made. Douthwright v. Champlin (Conn.) 1917E-512. (Annotated.)

181. Where the act is rejected the courts are in no sense deprived of jurisdiction, although the procedure before them is changed, and certain defenses are eliminated. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803. (Annotated.)

182. If the act is accepted, there is thus a contract which takes some powers from the court, but still is not an agreement to cust them of all jurisdiction. Their inherent powers are left quite largely untouched, even where the statute is accepted. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

(Annotated.)

183. Where master and servant lived in Massachusetts, where the master's principal place of business was, and there made a contract for employment, and the servant was injured while working for the master in Connecticut, both having accepted Pub. Acts 1913, c. 138, pt. B, as to workmen's compensation, the courts of Connecticut can enforce compensation, since the Massachusetts act has no extraterritorial effect, and the Workmen's Compensation Act of Connecticut must be read into the contract. Douthwright v. Champlin (Conn.) 1917E-512. (Annotated.)

## (5) Election Under Optional Act.

184. Time for Election. Ill. Workmen's Compensation Act approved June 28, 1913, and going into effect July 1, 1913 (Laws

1913, p. 337), providing that every employer enumerated in section 3, par. 6, shall be conclusively presumed to have filed notice of election to come under the act unless and until notice to the contrary is filed with the industrial board, and that every employer who has elected to come under the act shall be bound by it until January of the next succeeding year, but may elect to withdraw from the operation of the act after the end of such year by filing notice with the board at least sixty days prior to the end of the year, is held to have given employers not affirmatively filing notice to come under the act at least until November, 1913, to withdraw from the same by giving notice. Victor Chemical Works v. Industrial Board (III.) ical Works 1918B-627.

185. Necessity -- Nonhazardous Employment. Ill. Workmen's Compensation Act, § 1 (Hurd's Rev. St. 1913, c. 48, § 126), gives to all employers in the state the right to elect to pay compensation to their employees according to the provisions of the act. Section 3 (section 128) provides that in certain enumerated extrahazardous occupations, it shall be presumed that the employer has elected to come under the act, and if he elects not to do so, he is denied the defenses of assumption of risk, contributory negligence, and negligence of fellow servants in actions by his employees for injuries. It is held that the voluntary election under section I applies to all em-ployees in any branch of the employer's business, but the presumed election under section 3 applies only to those employees engaged in an extrahazardous occupation, so that a farm hand employed on the farm of a corporation which had made no election under the act and which operated a warehouse and office in the city cannot recover compensation for injuries received while doing ordinary farm work, though the corporation's employees in the city might be within the terms of the act. Vaughan's Seed Store v. Simonini (Ill.) 1918B-713. (Annotated.)

186. Right of Election. Neither the master nor the servant has any right of election whether he will come under the Ill. Workmen's Compensation Act (Laws 1911, p. 345 [Rem. Code 1914, §§ 6604—1 to 6604—32]), if engaged in the kind of work which falls thereunder, and neither can exempt himself from the burdens imposed, nor waive the benefits. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655.

187. Effect of Failure to Accept—Defenses Abolished. The Ill. Workmen's Compensation Act (Acts 35th Gen. Asseme. 147) provides that the rejecting employer, in suit against him by a servant for personal injuries, may not avail himself of the defenses of assumption of risk, or that the employer used reasonable care in employing reasonably competent em-

ployees, or that the injury was caused by the negligence of a fellow servant. An employer which had rejected the act and was sued for personal injuries was not permitted to present to the jury the defense that the injury was due to the employee's negligence. It is held that the provision of the act establishing the presumption that the injury was the result of the employer's negligence did not abolish the defense of contributory negligence; it merely forcing the employer to show affirmatively that he is blameless. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

188. Election to Reject-Authority of Receiver. Where the United States court for the eastern district of Missouri, by the order appointing receivers for a railroad, authorized them "to run, manage, maintain, and operate said railroads and property wheresoever situated or found, whether in this state, judicial circuit, or elsewhere, and to use, manage, and conduct such business in such manner as in their judgment will produce the best results, and to this end exercise the authority and franchise of said railroad company and discharge all the public duties obligatory upon it, and manage and operate said railroads and property according to the requirements of the valid laws of the various states in which the same are situated, and in the same manner that the defendant railroad company would be bound to do if in possession," the receivers had authority to reject the Workmen's Compensation Act in the southern district of Illinois without obtaining a special order of court for that purpose, since a court in a principal railroad receivership action has general authority over the entire system, even as to parts not within the district in which the court sits, while the authority of the receivers under the order was ample. Devine v. Delano (Ill.) 1918A-689.

(Annotated.)

189. Right to Compensation of Minor Employee—Effect on Rights of Parent. The Ill. Workmen's Compensation Act (St. 1911, c. 751), while intended to take away from injured employees, who shall become subject to its provisions, all common-law rights of action, does not affect the right of action of the parent of a minor servant, who was injured, for the injury not only gives rise to one cause of action in favor of the minor, but to another in favor of his parents, and the parent's action is in no way consequential on that of the minor, being based on loss of services during minority and expenses necessitated by the injury. King v. Viscoloid Company (Mass.) 1916D-1170. (Annotated.)

## (6) Exclusiveness of Remedy.

190. The provision of the Ill. Workmen's Compensation Act (St. 1911, c. 751) that the right of action of an injured employee shall be waived, unless he gives notice that he claims his common-law rights,

shows that the employee cannot, if he be a minor, waive his parent's right of action for the same injuries. King v. Viscoloid Company (Mass.) 1916D-1171.

(Annotated.)

191. The right of action of a parent of an injured minor servant is not barred by an allowance to the servant under the Mass. Workmen's Compensation Act (St. 1911, c. 751), on the theory that the compensation is really a payment of wages to which the parent is entitled, for part 2, § 11, clearly shows that the allowance, though based on salary, is also for permanent injuries. King v. Viscoloid Company (Mass.) 1916D-1170. (Annotated.)

192. The provision in the Mass. Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 5) that the insurer shall pay part of the medical expenses incurred does not, where there is no issue of estoppel, affect the right of action of the parent of an injured minor servant against the master, although the parent could not recover for expenses paid by another. King v. Viscoloid Company (Mass.) 1916D-1170.

(Annotated.)

## Notes.

Award to minor under Workmen's Compensation Act as affecting right of action by parent. 1916D-1172.

Right to and effect of election with respect to acceptance of provisions of Workmen's Compensation Act. 1918B-715.

## (7) "Accident" and "Personal Injury."

193. Disease as Accident—Typhoid from Impure Drinking Water. Under Wis. Workmen's Compensation Act (St. 1913, §§ 2384—1-2394—31), § 2394—3, declaring that liability for the compensation provided for in lieu of other liability shall exist against an employer for any personal injury accidentally suffered by an employee, where an employee is performing a service growing out of and incidental to his employment, the right to compensation for the death of an employee resulting from typhoid fever caused by the furnishing of polluted drinking water falls within the act; the disease being incurred as an incident to the employment. Vennen v. New Dells Lumber Co. (Wis.) 1918B-293. (Annotated.)

194. Where an employee contracts typhoid fever by reason of impure drinking water furnished by the master, his death from the disease is an "accident," within Wis. St. 1913, § 2394—3, making the employer liable for injuries proximately caused by accident; the term "accident" being used in its popular significance, as including injuries produced by negligence. Vennen v. New Dells Lumber Co. (Wis.) 1918B-293. (Annotated.)

1916C-1918B.

195. What Constitutes Accident—Occupational Disease. Mich. Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10), providing for compensation for the accidental injury to, or death of, employees provides, in part 1, § 5, subd. 2, that every person having any one in his service who, prior to the time of the accident to the employee, shall have elected to become subject to the provisions of the act, and shall not have effected a with-drawal, is subject to the act. By Pub. Acts 1911, No. 245, the legislature created a commission to provide for compensation for accidental injuries or death of workmen in their employment, and the Workmen's Compensation Act as prepared by the committee was adopted without change. Held that, as an accident is an unforeseen event occurring without design, the Workmen's Compensation Act does not apply to occupational diseases, which are diseases arising from causes incident to certain occupations and do not occur suddenly, this conclusion being strengthened by the requirements of part 3, § 17, that the employer give notice to the industrial accident board within ten days after the occurrence of accident; for in the case of an occupational disease the employer might not be able to give the notice because not informed that a workman who had left his employ was afflicted with an occupational disease. Adams v. Acme White Lead, etc. Works (Mich.) 1916D-689. (Annotated.)

196. What Constitutes Injury. Section 3 providing that "injury refers only to injury resulting from fortuitous event as distinguished from contraction of disease," all injuries are intended to be compensated for unless wilfully incurred, since only disease is excluded. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

(Annotated.)

197. Disease as Accident. No compensation can be recovered under the Workmen's Compensation Act by the dependents of a workman who, having sustained an accidental injury, became insane from despondency over his slow recovery and committed suicide, there being no direct causal connection between the insanity and the injury. Withers v. London, etc. R. Co. (Eng.) 1918B-341. (Annotated.)

198. Where a hack driver in the employment of defendant stable company, which had elected to become subject to the Workmen's Compensation Act (Pub. Laws R. I. 1912, c. 831), was pitched from his seat by the motion of the hack while driving and while helpless from dizziness or unconsciousness, occasioned by a disease from which he was suffering, he is entitled to compensation for the resulting injuries, since his fall was an "accident arising out of his employment" within the meaning of article I, § 1, of the act. Carroll v. What Cheer Stables Co. (R. I.) 1918B-346. (Annotated.)

199. Accident in Course of Employment—Disobedience of Orders. A workman injured while engaged in performing a duty of his employment is none the less within the Workmen's Compensation Act because in entering on that work he disobeyed an order to perform first another duty. Williams v. Llandudno Coaching, etc. Co. (Eng.) 1918B-682.

200. What Constitutes Accident—Rheumatism. Rheumatism contracted by a workman as the result of an emergency employment wherein he was required to stand for several hours in water, is an accident arising out of and in the course of the employment within the meaning of a workmen's compensation act. Glasgow Coal Co. v. Welsh (Eng.) 1916E-161.

(Annotated.)

201. Proof of Accidental Injury—Sufficiency. Proof that a workman engaged in an employment wherein accidental bruises and abrasions were of frequent occurrence came to work apparently without injury and later in the day he was seen to limp and to complain of a bruised knee which on a subsequent day showed abrasion, is sufficient, after the death of the workman from blood poisoning, to sustain a finding that the injury was received accidentally in the course of the employment. Hayward v. Westleigh Colliery Co. (Eng.) 1917D-877.

202. What Constitutes Accident—Wilful Act of Third Person. That a night watchman was killed while discharging his duties by the wilful act of a third person, does not show that his death was not accidental within the Workmen's Compensation Act. Western Metal Supply Co. v. Pillsbury (Cal.) 1917E—390.

203. What Constitutes Loss of Finger. R. I. Laws 1911-1912, c. 831, art. 2, § 12, subd. "c," provides that for loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, compensation consisting of one-half of the average weekly wages or salary, but not more than \$10, nor less than \$4, for a period of twenty-five weeks, shall be al-lowed; while subdivision "d" authorizes similar compensation for a period of twelve weeks for the loss by severance of at least one phalange of a finger, thumb, or toe. Plaintiff's thumb was injured so that a small piece of the bone was lost from the side and pieces of tendons and flesh were also destroyed. It is held that as the thumb itself was not severed, compensa-tion was properly awarded under subdi-vision "d" instead of subdivision "c." Weber v. American Silk Spinning Company (R. I.) 1917E-153.

204. What Constitutes "Loss" of Eye. Where a servant's right eye is impaired so that he possesses only twenty per cent of the natural vision, but his vision can be improved by the introduction of an arti-

ficial pupil, and the fields of vision are normal, he is not entitled to compensation as for "loss of use of the eye," which is equivalent to a loss of the eye. Boscarino v. Carfagno & Dragonette (N. Y.) 1918A-530. (Annotated.)

205. What Constitutes "Loss" of Arm. Wis. St. 1913, § 2394—9, in the first subdivisions provides generally for compensation to injured employees. Subdivision 5 provides for specific payments for named injuries, which includes the loss of forearm and hand, but does not specifically include the impairment of the arm. It is held that as the statute provided that paralysis of a member shall be equivalent to a loss, it did not include a mere impairment, and an award for an injury impairing the use of the arm could not be made under that subdivision. Northwestern Fuel Co. v. Industrial Commission (Wis.) 1918A-533. (Annotated.)

#### Notes.

What constitutes "loss" of limb or part thereof within Workmen's Compensation Act. 1918A-536.

What is "injury" or "personal injury" within meaning of Workmen's Compensation Act. 1918B-362.

Disease as an accident. 1918B-297.

# (8) Injuries Arising "Out of" and "In Course of" Employment.

206. Evidence Excluding Presumption. Evidence that a helper of the injured servant and two other witnesses were present at the time and place of the alleged injuries to the servant, and that they did not see any accident happen to him, and that they did not see a cake of ice fall upon him, and of physicians who examined decedent that there were no bruises, discolorations, or abrasions on the surface of his body, is sufficient to overcome the statutory presumption of N. Y. Workmen's Compensation Law (Laws 1914, c. 41), § 21, which provides that it shall be presumed, in the absence of substantial evidence to the contrary that the claim comes within the provisions of the law. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.

207. Injury in Course of Employment—Working in Forbidden Manner. A workman whose duty is to walk ahead of a moving car as a lookout is not acting within his employment when instead of so doing he rides on the buffer of the car, and he is not entitled to compensation for an injury received while so engaged. Herbert v. Samuel Fox & Co. (Eng.) 1916D-578.

(Annotated.)

208. Injury by Third Person. Under said law; if the workman is injured on the premises from the act of a third person he has the absolute right of compensation from the fund provided; but, if so injured

off the premises, he must elect whether to sue the third person or claim from the fund. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

209. The law does not, by providing compensation only for workmen injured in hazardous or extrahazardous employments, imply that compensation shall be made only for injuries arising out of the work. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

210. Said law provides compensation to workmen injured on the premises by intervention of third persons, since it covers every fortuitous event regardless of fault. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

211. Injury in Course of Employment—Absence from Plant. Section 5 of said act providing compensation for each workman injured whether on the premises or at the plant or, he being in the course of his employment, away from the plant, the words "in the course of employment" qualify only when away from the plant. Stertz v. Industrial Ins. Commission (Wash.) 1918B—354.

212. Effect of Disease. Whether in such a case the accident arose "out of" the employment within meaning of Laws R. I. 1912, c. 831, art. I, § 1, is to be determined by ascertaining whether the proximate cause of the injuries received was an element of, or arose out of, the employment, as disassociated from the fact that such proximate cause was set in motion or ained by petitioner's diseased condition as the remote cause. Carroll v. What Cheer Stables Co. (R. I.) 1918B-346. (Annotated.)

213. Injury Arising Out of Employment —Watchman. A watchman employed in a planing mill, whose employees would, independent of election, fall within III. Workmen's Compensation Act (Laws 1913, p. 339, § 3b), and be entitled to compensation, if injured while protecting the property at the plant from suspected persons, receives an injury arising out of an employment within such section, and is entitled to compensation. Chicago Dry Kiln Co. v. Industrial Board (III.) 1918B-645.

214. Meddling. A workman was employed to polish small metal articles on a buffing machine, to which was attached an exhaust pipe containing a fan to carry away dust from the work. The exhaust system was entirely separate from the buffing machine and in charge of a special responsible man. The workman disregarded his instructions not to meddle with the exhaust system, and took off a cover on the pipe near the fan and reached down to recover a metal piece he had accidentally dropped into the system below the buffing wheel, and was cut on the hand by the fan. It is held that the accident

was not incidental to the work in which he was employed, and he could not recover compensation. Eugene Dietzen Co. v. Industrial Board (Ill.) 1918B-764.

(Annotated.)

215. An employee is engaged in the course of his employment when injury occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it. Eugene Dietzen Co. v. Industrial Board (Ill.) 1918B-764. (Annotated.)

216. The scope of a servant's duties is determined by what he was employed to do and what he actually did with his employer's knowledge and consent, and an employee injured when performing the services he was in the habit of performing is not a volunteer in performing such duties. Eugene Dietzen Co. v. Industrial Board (III.) 1918B-764. (Annotated.)

217. A master is not liable for injuries to a servant unless the servant was at the time in the performance of some duty for which he was employed; and a "volunteer" is one who introduces himself into matters which do not concern him, and does, or undertakes to do, something which he is not bound to do or which is not in pursuance or protection of any interest of the master, and which is undertaken in the absence of any peril requiring him to act as in an emergency. Eugene Dietzen Co. v. Industrial Board (III.) 1918B-764.

218. Where a servant voluntarily and without direction from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking, and, if injured, must suffer the consequences. Eugene Dietzen Co. v. Industrial Board (III.) 1918B-764. (Annotated.)

219. Where a servant is employed to do a certain service and is injured in the performance of a different service voluntarily undertaken, the master is not liable. Eugene Dietzen Co. v. Industrial Board (Ill.) 1918B-764. (Annotated.)

220. Under Ill. Workmen's Compensation Act, § 1 (Hurd's Rev. St. 1915-16, c. 48, § 126), providing for compensation for accidental injuries "arising out of and in the course of the employment," it is not sufficient that the injury occurs in the course of the employment, but it must also arise out of the employment; that is, it must be an accident resulting from a risk reasonably incidental to the employment. Eugene Dietzen Co. v. Industrial Board (Ill.) 1918B-764. (Annotated.)

221. Fall of Wall on Adjacent Premises. Where a person working in a shed is injured by the fall thereon of a wall on

adjacent premises not belonging to the employer, the accident is one arising out of and in the course of the employment within the Workmen's Compensation Act. Thom v. Sinclair (Eng.) 1917D-188.

(Annotated.)

222. Returning from Work. Where a workman on a vessel leaving at the end of a day's work crosses a private dock which he is permitted to use for that purpose and in so doing falls off the dock and is drowned, the accident is one arising out of and in the course of the employment within the meaning of a workmen's compensation act. John Stewart & Son v.

Longhurst (Eng.) 1917D-196.

(Annotated.)

223. Temporary Interruption of Employment. An accident to a railroad employee does not arise out of and in the course of his employment within the meaning of a workmen's compensation act where, while waiting at a station for a train to take him to his place of work, he goes out to get water for a meal, and, being free to choose his route, attempts to pass under the trucks of a standing train, by a movement of which he is killed. Lancashire, etc. R. Co. v. Highley (Eng.) 1917D-200. (Annotated.)

224. Injury Caused by War. An engineer on a steam trawler injured by the vessel striking a mine laid by the enemy, is entitled to compensation, and his right is not affected by the fact that the skipper took the vessel into an area which he had been warned by the naval authorities to avoid. Risdale v. S. S. Kilmarnock (Eng.) 1917C-757. (Annotated.)

225. Necessity of Causal Connection. Within Cal. Workmen's Compensation Act (St. 1913, p. 283), § 12, an injury arises out of the employment if there is a causal connection between the working conditions and the injury, but not in the absence of such connection, nor if the injury is common to persons regardless of the work. Kimbol v. Industrial Accident Commission (Cal.) 1917E-312. (Annotated.)

226. Dishwasher. A restaurant dishwasher, upon whom, while at work, the ceiling falls, due to overload of stored goods on the upper floor, over which the master has no control, receives an injury "arising out of the employment." Kimbol v. Industrial Accident Commission (Cal.) 1917E-312. (Annotated.)

227. If the employment necessarily accentuates and increases the danger to a higher degree than that to which persons generally are subjected, then it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment, even though unexpected or unusual and in no way actually anticipated. Kimbol v. Industrial Accident Commission (Cal.) 1917E-312. (Annotated.)

228. Under the old law the employer's exemption from liability where he was not negligent existed solely because he was not negligent, and not because the injury did not arise out of the employment, and even under Workmen's Compensation Act the injury, to create liability, must result from a risk reasonably incident to the work. Kimbol v. Industrial Accident Commission (Cal.) 1917E-312. (Annotated.)

229. In determining whether injury arises out of the employment, it is immaterial whether the danger was anticipated, or the employer was free from fault, or the injury resulted from the act of a third party. Kimbol v. Industrial Accident Commission (Cal.) 1917E-312.

(Annotated.)

230. Street Accident. If an employee is sent into the street on his employer's business, an accident there occurring whereby he is injured arises out of and in the course of his employment within the Workmen's Compensation Act, though the risk is one to which all persons using the street are equally subject. Dennis v. A. J. White & Co. (Eng.) 1917E-325. (Annotated.)

#### Notes.

What is accident arising out of and in course of employment within meaning of Workmen's Compensation Act. 1918B-768.

Workmen's Compensation Act as applicable to injury arising from war. 1917C-760.

# (9) Serious and Wilful Misconduct of Employee.

231. Effect of Intoxication of Workman. Where a workman sustains an accidental injury causing his death, while actually engaged in the performance of his duties and from a risk incident to his employment, his dependents are entitled to compensation under the Workmen's Compensation Act though the proximate cause of the accident was the intoxication of the workman. Williams v. Llandudno Coaching, etc. Co. (Eng.) 1918B-682. (Annotated.)

232. Under Md. Workmen's Compensation Act, § 14, providing the circumstances under which if injuries occur compensation shall be made, if the deceased workman died in an accident while in the employ of another, in the course of his employment, and death was not due to self-inflicted injury or wilful misconduct or intoxication, compensation must be made, and it is presumed, in the absence of substantial evidence to the contrary, that death did not occur from wilful intention or solely from intoxication. American Ice Co. v. Fitzhugh (Md.) 1917D-33.

233. Under such statute, the right to compensation is cut off by intoxication only if the intoxication was the sole cause

of the injury. American Ice Co. v. Fitz-hugh (Md.) 1917D-33.

#### Note.

Intoxication of employee as precluding recovery under Workmen's Compensation Act. 1918B-686.

## (10) Notice to Employer.

234. Notice of Claim—Time for Giving. In proceedings for compensation under the 1913 Ill. Workmen's Compensation Act, evidence of formal notice of claim and correspondence in regard to settlement is held to show claim made within six months after accident as required by section 24; the statute being silent as to how such claim shall be made. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

235. Excuse for Failure to Give—Actual Notice. Under Mich. Workmen's Compensation Act, pt. 2, § 18, providing that want of written notice shall not be a bar to proceedings under the act, if it be shown that the employer had notice or knowledge of the injury, where a street employee was injured and informed the superintendent of public works of the city, who had charge of work on the streets, the latter mentioning the matter to the board of public works, so that all city officials had notice of the injury, the employee is not barred from obtaining compensation under the act by his failure to give written notice within three months. Purdy v. Sault Ste. Marie (Mich.) 1917D-881. (Annotated.)

236. Effect of Failure to Give. Evidence in an employer's action to set aside an award in favor of an injured employee is held to sustain a finding that the employer was not prejudiced by the claimant's failure to give the statutory notice of injury. Pellett v. Industrial Commission (Wis.) 1917D-884. (Annotated.)

237. Waiver. Under the express provision of Wis. St. 1915, § 2394—11, notice of injury is waived by the employer's payment within thirty days of the injury of the sum of \$2 for loss of time thereby caused. Pellett v. Industrial Commission (Wis.) 1917D-884. (Annotated.)

238. In an employee's action to set aside an award in favor of an injured employee, evidence that the employee the day after his injury told one of his employers how he fell, and that he was hurt, places upon the employer the burden of showing that he was, in fact, misled by the failure to receive written notice of the injury. Pellett v. Industrial Commission (Wis.) 1917D-884. (Annotated.)

239. Necessity. The Minn. Workmen's Compensation Law is remedial in its nature and must be given a liberal construction to accomplish the purpose intended. Relator's mayor and street commissioner had

actual knowledge of the injury to the respondent immediately after the occurrence thereof. The knowledge of the mayor is the knowledge of the city. Held that where the employer has actual knowledge of the occurrence of the injury, the injured employee is not required to give a written notice thereof. State v. District Court (Minn.) 1917D-866. (Annotated.)

240. Failure to Give—Want of Prejudice—Burden of Proof. Though the burden is on an employee who fails to give timely written notice of an injury as required by the Workmen's Compensation Act, to show that no prejudice resulted to the employer, if it is shown that when the employer learned of the accident he made a full inquiry and there is no evidence sugesting that an earlier inquiry would have been more fruitful, it is sufficient to cast on the employer the burden of showing prejudice, or to sustain a finding of want of prejudice in case of his failure so to do. Hayward v. Westleigh Colliery Co. (Eng.) 1917D-877. (Annotated.)

#### Note.

Notice of injury under Workmen's Compensation Act. 1917D-867.

## (11) Employees Within Act.

241. Who is Workman — Casual Employee. Under such act it is not part of claimant's prima facie case to show he was not within the class of casual employees excepted by section 5, par. 2, thereof; such exception being matter of defense. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

242. Municipal Employee. A fireman of the city of Duluth was killed while in the performance of his duty. His dependents are entitled to recover under the Minn. Workmen's Compensation Act. State v. District Court (Minn.) 1918B-635.

243. Maritime Employees as Within Act. Although Rem. Wash. Code 1915, § 6604—2, includes in the Workmen's Compensation Act as extrahazardous steamboats, tugs, and ferries, such provision does not require that the law be construed to include injuries on ships lying in navigable waters, since there are inland lakes over which the state has sole jurisdiction to which such provision may apply. Shaughnessv v. Northland Steamship Co. (Wash.) 1918B—655. (Annotated.)

244. Minor Illegally Employed. Under Wis. Workmen's Compensation Law (St. 1915, §§ 2394—1 to 2394—31), § 2394—7, subd. 2, declaring that the term "employee" as used in the law shall include every person in the service of another under any contract of hire, including minors who are legally permitted to work under the laws of the state, who for the purposes of section 2394—8, relating to election by em-

ployees, shall be considered the same and have the same power of contracting as adult employees, plaintiff, who was under sixteen years of age/at the time of his employment and injury, and who had not obtained a written permit authorizing his employment under St. 1915, § 1728a, subd. 1, forbidding the employment of children between fourteen and sixteen in any factory, etc., unless there is first obtained from the commissioner of labor, etc., a written permit authorizing the employment of such child, is not an "employee" whose claim for injury is governed by the Workmen's Compensation Law. Stetz v. F. Mayer Boot, etc. Co. (Wis.) 1918B-675.

245. Maritime Employees. Rem. Wash. Code 1915, § 6604-1, withdraws from private controversy all phases of workmen's compensation to the exclusion of every other remedy, proceeding, or compensation, and all civil actions and civil causes of action for personal injuries, and all jurisdiction of the courts of the state thereover is abolished. Section 6604-2 provides that the act shall apply to all inherently hazard-cus work within the jurisdiction of the state, and that the term "extrahazaidous" embraces work about steamboats, tugs, and ferries. Section 6604-27 provides that if any employer shall be adjudicated to be outside the lawful scope of the act, the act shall not apply to him, or to his work-men. It is held that a stevedore injured while working in the hold of a ship in the navigable waters of Puget Sound was not within the act, and that his other rights and remedies remained unimpaired. Shaughnessy.v. Northland Steamship Co. (Wash.) 1917B-655. (Annotated.)

246. Since an employer whose employees are engaged in maritime service is not required to contribute to the accident fund of the state, his employees so engaged cannot lawfully claim compensation from that fund. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655. (Annotated.)

247. Where a servant was injured while working in the hold of a ship lying in the navigable waters of Puget Sound, the question of his compensation is subject to controversy in admiralty in the federal courts, regardless of state law, although he was assisting only in unloading the ship, and not in its navigation. Shaughnessy v. Northland Steamship Co. (Wash.) 1918B-655. (Annotated.)

248. Where an employer hires the services of his team and employee to another to haul sand, the employee is still working for the original employer when he is loading sand in a pit for the purpose of hauling it, and therefore is entitled to compensation from the employer. Dale v. Saunders (N. Y.) 1918B-703. (Annotated.)

249. Who is "Employee" Within Act. The word "employee" as specifically defined in N. Y. Workmen's Compensation

Act, § 3, subd. 4, means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer. Dale v. Saunders (N. Y.) 1918B-703.

(Annotated.)

250. To construe Ill. Workmen's Compensation Act, § 3 (Hurd's Rev. St. 1913, § 128), as applying to all the business of an employer, any part of whose business was extrahazardous, would render the act unconstitutional as discriminating against him in that part of his business not extrahazardous. Vaughan's Seed Store v. Simonini (Ill.) 1918B-713.

251. Existence of Relation of Master and Servant. Plaintiff visited an office of defendant, seeking employment, and was directed by the person in charge thereof to go to defendant's camp near a designated town to begin work. When he reached town to begin work. When he reached the town, he went to defendant's logging train, and was there directed by the engineer to place his baggage on the pilot of the engine and get aboard. He rode on the pilot to the logging camp. Before leaving the immediate vicinity of the train, he was injured. He did not do any work or receive any compensation from defendant prior to the accident. It is held that the relation between the parties was that of passenger and carrier, and not of employee and employer, within the Ore. Workmen's Compensation Act. Susznik v. Alger Logging Co. (Ore.) 1917C-700.

252. Employees of Interstate Railroad. The entire subject of the liability of interstate railway carriers for the death or injury of their employees while employed by them in interstate commerce is so completely covered by the provisions of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), as to prevent any award under the New York Workmen's Compensation Act (N. Y. Laws 1913, c. 816; Laws 1914, cc. 41, 316), where an employee was injured or killed without fault on the railway company's part while he was engaged in interstate commerce, although the federal act gives the right of recovery only when the injury results in whole or in part from negligence attributable to the carrier. New York Central R. Co. v. Winfield (U. S.) 1917D-1139.

(Annotated.)

253. Municipal Corporation. The Mich. Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10) is entitled "An act to promote the welfare of the people of this state, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for accidental injury to or death of employees and methods for the payment of . . . same. establishing an industrial acci-

dent board defining its powers providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided (for) by this act," and provides, in part 6, \$ 5, that it expressly repeals "all acts and parts of acts inconsistent with this act," and "replaced by this act." It is held that the charter provisions of cities with respect to claims which may be made under the compensation act are superseded by its provisions, the title of the act being broad enough to include municipal corporations that are employers. Purdy v. Sault Ste. Marie (Mich.) 1917D-881.

254. Who is Workman—Casual Labor for Municipality. An employee of the city of Northfield was injured while loading gravel used by the city for improving and repairing its streets. Though the employment may have been casual, it was in the usual course of the business of the city, and the Minn. Workmen's Compensation Law applies. State v. District Court (Minn.) 1917D-866.

255. Truck Driver. Md. Acts 1914, c. 800, § 32, enumerating the extrahazardous employments, for death or injury in which the act provides compensation, includes that of driving a horse-drawn truck, though it does not expressly enumerate it, since subsection 43 makes the act applicable to all extrahazardous employments not specifically enumerated, and the words "or other power," as applied to propulsion of vehicles in subsection 41, includes horse power. American Ice Co. v. Fitzhugh (Md.) 1917D-33. (Annotated.)

256. Farmer Erecting Building. The Ill. Workmen's Compensation Act (Hurd's Rev. St. 1913, c. 48, §§ 126-152h); Laws 1913, p. 335, by Section 1, provides that any employer may elect to provide and pay compensation for accidental injuries and thereby relieve himself from all further liability. Section 3, par. "b," declares that the section shall apply only to an employer engaged in the occupations, enterprises, or businesses of building, maintaining, repairing, or demolishing any structure, of construction, of excavation or electrical work, of carriage by land or water and loading and unloading in connection therewith, of warehousing, of mining, of enterprises in which explosives are manufactured or handled, of enterprises wherein molten metal or explosive or injurious gases, etc., are manufactured or used, and of enterprises in which statutory or municipal ordinance regulations shall be imposed for the guarding of machinery, each of which occupations, enterprises, or businesses is declared to be extrahazardous. Section 5 defines an employee as every person in the service of another under any contract of hire, but not including any person whose employment is but casual, or

is not engaged in the usual course of the trade, business, profession, or occupation of his employer. A farmer engaged a carpenter to build a corncrib, and the carpenter was injured by a metal splinter which flew off of his hammer. The carpenter was engaged for no particular time, but it appeared that he was to continue work until the building was fully completed. It is held that as the farmer was not engaged in the business or occupation of building, and as the construction of the corncrib could not be classed as an enterprise which is an undertaking of hazard, nor could it be considered as an extrahazardous business, the statute is not applicable; the farmer not having elected to come within its provisions, which did not include the occupation of farming. Uphoff v. Industrial Board (Ill.) 1917D-1. (Annotated.)

257. Hazardous Employments—Elevator Operator in Store. The business of selling glassware is not "hazardous," and an employee injured operating an elevator in such business cannot recover under the N. Y. Workmen's Compensation Law. Wilson v. Dorflinger (N. Y.) 1917D—38.

(Annotated.)

258. Janitor in Office Building. A janitor in an office building was injured while scrubbing down the walls and floors of the elevator shaft beneath the cage. The elevator was operated by electricity. The Workmen's Compensation Act (3 Rem. & Bal. Wash. Code, § 6604—1 et seq.) provides, in section 2, that the act shall apply to all inherently hazardous employments, including factories, mills, and workshops where machinery is used. Section 3 defines a workshop as a room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise. It is held that though the elevator was operated by electricity, the shaft could not be considered a workshop, and the janitor's rights were not governed by the statute. Remsnider v. Union Savings, etc. Co. (Wash.) 1917D-40. (Annotated.)

259. Where neither the work of a janitor in an office building nor employment about an elevator shaft had been classified as extrahazardous by the Industrial Insurance Department as authorized by Wash. Workmen's Compensation Act, § 2, an injury to a person engaged in such employment is not governed by the statute. Remsnider v. Union Savings, etc. Co. (Wash.) 1917D-40. (Annotated.)

260. Employments Included—Policeman, The Kan. Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216) does not apply to the case of a police officer of a city who is killed in the discharge of his duties. Griswold v. Wichita (Kan.) 1917D-31. (Annotated.)

261. Policeman as "Workman." A police officer of a city of the first class is not a "workman" as defined by the compensation act. Griswold v. Wichita (Kan.) 1917D-31

262. Maritime Employees. The application to an injury sustained by a longshoreman while he was unloading in a New York port an ocean-going steamship owned by a nonresident corporation, and plying between ports of different states, of the provisions of the New York Workmen's Compensation Act (N. Y. Laws 1913, c. 816; Laws 1914, cc. 41, 316), which, in lieu of the common law liability enforceable by suit in cases of negligence, imposes a liability upon employers, enforceable without judicial action, to make compensation for disabling or fatal accidental injuries to employees, without regard to fault as a cause, graduating compensation for disabilities according to a prescribed scale based upon loss of earning power, and measuring death benefits according to the dependency of the surviving wife, husband, or infant children, renders the statute, to that extent, invalid as conflicting with U. S. Const. art. 3, § 2 (9 Fed. St. Ann. 74), extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, U. S. Const. art. 1, § 8 (8 Fed. St. Ann. 674), giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the federal government, and U. S. Judicial Code, §§ 24, 256 (4 Fed. St. Ann. (2d ed.) 838; 5 Id. 921), giving federal district courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it, being also inconsistent with the policy of Congress to encourage investments in ships, manifested by U. S. Rev. Stat. §§ 4283-4285, 4 Fed. St. Ann. 839, Act of June 26, 1884 (23 Stat. at L. 57, c. 121, 4 Fed. St. Ann. 852), § 18, which declare a limitation upon the liability of their owners. Southern Pacific Co. v. Jensen (U. S.) 1917E-900. (Annotated.)

263. Who is Employer—Workman Employed by Several Persons. Where a night watchman is employed by six different firms each acting independently of the others in making its agreement with the watchman, they do not compose a voluntary association employing him within Cal. Workmen's Compensation Act, § 13. Western Metal Supply Co. v. Pillsbury (Cal.) 1917E-390.

264. Under the Cal. Workmen's Compensation Act of 1913, section 13 of which defines an "employer" as every person, firm, voluntary association, and private corporation who has any person in service under any appointment or contract of hire, and section 14 of which defines "employee"

as every person in the service of an employer under any appointment or contract of hire, even if the relation is the same as that of master and servant under Civ. Code, § 2009, defining a "servant" as one who is employed to render personal service to his employer otherwise than in the pursuing of an independent calling and who in such service remains entirely under the control and direction of the latter, a night watchman, who was employed by six different firms each acting independently of the other, is an employee of the one on whose premises he was killed while in the discharge of his duties. Western Metal Supply Co. v. Pillsbury (Cal.) 1917E-390.

#### Notes.

Occupations or employments within purview of Workmen's Compensation Acts. 1917D-4.

Who is "workman" within meaning of Workmen's Compensation Act. 1918B-704.

Railroad employees as within purview of Workmen's Compensation Act. 1918B-664.

Person employed in violation of law as entitled to compensation under Workmen's Compensation Act. 1918B-679.

### (12) Dependents.

265. Beneficiaries - Nonresident Alien. The Ill. Workmen's Compensation Act of 1913, entitled "An act to promote the general welfare of the people of this state by providing compensation" for workmen, and by section 5 defining the term "employee," as used in the act, to include aliens, applies to nonresident alien dependents claiming as beneficiaries thereunder; for the general welfare of the people of the state might well be promoted by providing compensation for accidental injuries or death suffered by aliens, as well as citizens, in the course of employment within the state, since many alien dependents reside in the state, and the people of the state would be interested in not having aliens, as well as citizens, become charges upon the community by reason of injuries suffered in employment. Victor Chemical Works v. Industrial Board (Ill.) 1918B-(Annotated.) 627.

266. Who is Dependent. Mere ability to earn a livelihood will not prevent one from being considered a "dependent" under the Workmen's Compensation Act, even though the person furnishing the support possesses less income than the alleged dependent; the test being whether the alleged dependent relied upon contributions of the employee, wholly or partially, for living expenses necessary and proper to the class and position in life of the claimant. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747. (Annotated.)

267. Under the Conn. Workmen's Compensation Act, a dependent cannot be said to be one who has sufficient means at hand for supplying present necessities according to the class and position in life of the alleged dependent. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747. (Annotated.)

268. A married daughter living with her husband and supporting herself with his aid is not "dependent" upon her father, where she received no contributions from him for six months prior to his death. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747. (Annotated.)

269. Dependency is to be determined in accordance with the fact as the fact may be at the time of the injury. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747.

(Annotated.)

## Notes.

Who is "dependent" within Workmen's Compensation Act. 1918B-749.

Residence of beneficiary as affecting right to compensation under Workmen's Compensation Act. 1918B-635.

## (13) Compensation.

270. Although the employer is required to report whether injury arose out of and in the course of employment of the injured person, that does not restrict compensation to injuries so arising. Stertz v. Industrial Ins. Commission (Wash.) 1918B-354.

271. Average Weekly Earnings—Computation. That a workman had been in the service of an employer but seven weeks when he was injured and that the service in question was in the winter when shorter hours were worked make it proper to compute his "average weekly earnings" on the average earnings of others in the same employment and not on his actual earnings in that employment. Cox v. Trollope (Eng.) 1918B-637. (Annotated.)

272. Effect of Receipt of Other Benefits. The fact that deceased was a member of the Duluth Firemen's Relief Association and that his dependents draw benefits therefrom, does not bar recovery of compensation nor reduce the amount thereof. State v. District Court (Minn.) 1918B-635. (Annotated.)

273. Average Weekly Wages—How Determined. Compensation provided for by Mich. Employers' Liability and Workmen's Compensation Act (Pub. Acts, Extra Sess. 1912, No. 10), being based on the average weekly wages of the injured or deceased employee, 50 per cent of which is to be paid weekly to him or his dependents for various periods of time, according to the nature of the injury or the length of the disability, the average weekly wages of the employee must always be determined by dividing his average earnings by 52.

Andrejwski v. Wolverine Coal Co. (Mich.) 1916D-724. (Annotated.)

274. Mich. Employers' Liability and Workmen's Compensation Act (Pub. Acts, Extra Sess. 1912, No. 10), § 11, pt. 2, provides (1) that the term "average weekly wages," as used in the act, means one fifty-second part of the average annual earnings of the employee; and (2) if he has not worked in the employment in which he was working at the time of the accident during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of 300 times the average daily wage or salary which he has earned in such employment during the days when so employed; and (3) if he has not worked in such employment during substantially the whole of such immediately preceding year, his average earnings shall consist of 300 times the average daily wage or salary which an employee of the same class, working substantially the whole of such immediately preceding year in the same or similar employment in the same or neighboring place, would have earned during the days when so employed; and (4) in cases where the foregoing methods of arriving at the average annual earnings cannot reasonably and fairly be applied, such earnings shall be such sum as, having regard to the previous earnings of the injured employee, and of others of the same or most similar class, etc., shall reasonably represent the annual earning capacity of the injured employee at the time of the accident. It is held, that the term "average annual earnings" means the employee's average annual earnings in the employment in which he was engaged at the time of the injury, and that the first three classes applied to employments wherein operations are carried on for substantially the entire year, and hence where the employment is of such a character that operations are conducted during only a portion of the year, and the employee is compelled to seek other employment during the balance, compensation for his death must be determined under the fourth subdivision. Andrejwski v. Wolverine Coal Co. (Mich.) 1916D-724. (Annotated.)

Liability 275. Mich. Employers' Workmen's Compensation Act (Pub. Acts, Extra Sess. 1912, No. 10), § 11, pt. 2, pro vides (4) that, where the average annual earnings of an employee cannot be arrived at by the methods provided in the three preceding paragraphs, such annual earnings shall be taken as such sum as, having regard to the previous earnings of the injured employee, and all other employees of the same or similar class, working in the same or similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident, in the employment in which

he was working at the time. Decedent, when injured, was working as a coal miner. During the years 1909 to 1912 the average number of days the mines were operated in the district was 211, and from 1904 to 1911 the wages paid to decedent amounted to \$5,175.21. It is held, that the average annual earnings of deceased, taken as a basis for his compensation under (4), was \$575.02, though, during the time he was not engaged in mining, he was otherwise employed. Andrejwski v. Wolverine Coal Co. (Mich.) 1916D-724. (Annotated.)

270. "Average Weekly Earnings"—Casual Laborer. Where an injured employer has been for over three years employed as a casual laborer by the person in whose service he was injured, but has during that time also worked casually for others, his "average weekly earnings" are to be calculated on the average of the earnings of similar laborers in the employment in which he was injured, and not by aggregating his earnings in all employments. Cue v. Port of London Authority (Eng.) 1916C-887. (Annotated.)

277. Average Weekly Earnings—Tips of Railroad Porter. In computing the average weekly earnings of a railroad porter for the purpose of awarding compensation under the Workmen's Compensation Act the tips received by him as an incident of his service are to be included as a part of his earnings. Great Western R. Co. v. Helps (Eng.) 1918B-1120. (Annotated.)

278. Termination of Allowance — Marriage of Beneficiary. Under Md. Workmen's Compensation Law (Acts 1914, c. 800, § 35, fixing compensation for partly dependent persons, and providing for determination of questions of dependency according to the facts existing at the time of the injury resulting in death to the employee, section 42, providing that on marriage of a dependent widow her compensation shall cease, and section 53, giving the commission power to change or modify former findings or orders, the subsequent marriage of a partly dependent sister of a deceased employee does not determine her right to compensation awarded her by the commission and authorize the commission to abate it. Adleman v. Ocean Accident, etc. Corp. (Md.) 1918B-730.

(Annotated.)

279. Rights of Beneficiary — Vesting of Award. An award of compensation from the state insurance fund, under section 35 or the Workmen's Compensation Act (103 O. L. 72), to a wholly dependent person vests in the dependent when the award is made; so that, in case of the death of such dependent, his or her personal representative is entitled to the balance, if any, remaining unpaid. State v. Industrial Commission (Ohio) 1917D-1162.

(Annotated.)

280. Commutation of Award. The word "commute," as employed in Ohio Work-

men's Compensation Act (103 O. L. 88), § 40, providing that the board of awards, under special circumstances, may commute periodical payments to one or more lump payments, means that the board may pay the defendant something less than he otherwise would receive. State v. Industrial Commission (Ohio) 1917D-1162.

281. Total Disability-Effect of Previous Partial Disability. Mich. Pub. Acts, Ex. Sess. 1912, No. 10, pt. 2, § 9, provides that, while the incapacity for work resulting from an injury is total, the employer shall pay a weekly compensation equal to onehalf of the employee's wages, but not to exceed \$10. Section 10 declares that, while the incapacity is partial, the injured employee shall be entitled to compensation equal to one-half the difference between his average weekly wages before the injury and those he is able to earn thereafter, that for the loss of an eye he shall recover as compensation fifty per cent of the average weekly wages during one hundred weeks, and that the loss of both eyes or both legs shall constitute a total and permanent disability. The claimant had in a previous accident lost one eye. Thereafter he lost his remaining eye. It is held that the injury could not be considered as a total disability, and he was entitled only to one-half of his weekly wages for one hundred weeks. Weaver'v. Maxwell Motor Co. (Mich.) 1917E-238. (Annotated.)

282. Average Annual Earnings - Workmen Employed by Several Persons. Under the Cal. Workmen's Compensation Act of 1913, which provides as compensation for the death of a workman a percentage of the average annual earnings of the deceased employee, and section 17 of which prescribes the rules for computing earnings of employees, and in several of its subsections contemplates the payment of awards not based on earnings received from the employer in whose service the employee was injured, the earnings of a night watchman independently employed by six different firms is the amount he received from all of the firms, not the amount he received from the employer in whose service he was killed. Western Metal Supply Co. v. Pillsbury (Cal.) 1917E-390.

283. Right to Compensation—Injury not Impairing Earning Capacity. Under R. I. Workmen's Compensation Act, (art. 2, § 11) an employee is entitled to compensation only when actually incapacitated, and a permanent physical injury does not of itself warrant compensation. Weber v. American Silk Spinning Company (R. I.) 1917E-153. (Annotated.)

Notes.

Total disability under Workmen's Compensation Act. 1917E-240.

Lump sum award under Workmen's Compensation Act. 1918B-694.

Right to compensation under Workmen's Compensation Act, as dependent on loss of earning capacity. 1917E-156.

Award or right to compensation under Workmen's Compensation Act as vesting in beneficiary. 1917D-1169.

Receipt of insurance or other benefit as affecting right to compensation under Workmen's Compensation Act. 1918B-635.

## (14) Proceedings Under Act.

284. Rules of Evidence. Under N. Y. Workmen's Compensation Law, § 68, providing that technical rules of evidence or procedure are not required, but the commission in making an inquiry, or conducting a hearing, shall not be bound by common law or statutory rules of evidence, hearsay testimony is admissible, and the award of the commission cannot be overturned on account of any alleged error in receiving evidence. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.

285. Such statute does not, however, affect the probative force to be given such testimony, but, as further therein provided, the commission must ascertain the substantial rights of the parties, and to sustain an award there must be legally sufficient evidence. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.

286. Declaration of Employee as to Cause of Injury. Hearsay testimony of statements of deceased servant while in nervous condition suffering from delirium tremens in hospital that he was injured when a heavy cake of ice fell upon him is insufficient to overcome positive evidence of witnesses that no ice fell upon him, being in fact no evidence. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.

(Annotated.)

287. Dependency — Sufficiency of Evidence. In proceedings under the Ill. 1913 Workmen's Compensation Act evidence is held to support a finding of the board that deceased left parents, to whose support he had within five years contributed. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

288. Applicability of Rules by Legal Procedure. A proceeding for compensation under the Ill. Workmen's Compensation Act of 1913 is not a proceeding at law, and is not altogether governed by the rules of legal proceedings. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

289. Evidence Admissible — Verdict of Coroner's Jury. In such proceedings the verdict of the coroner's jury impaneled to inquire into the death is proper evidence, since such proceedings take the place of the ordinary action on the case for negligence, in which such evidence was proper. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

290. Medical Referee—Duties. A medical referee sitting as an assessor with the judge hearing a claim under the Workmen's Compensation Act should not be permitted to cross-examine witnesses or otherwise take part in the conduct of the hearing. Earwicker v. London Graving Dock Co. (Eng.) 1918B-665.

291. Medical Examination of Workman. An application by the employer for a medical examination of an injured workman claiming the benefit of the Workmen's Compensation Act is not a nullity because it was not made until the hearing, and while it may be that the trial judge may in his discretion deny an application made at that time, he must rule on it. Accordingly where no note of the proceeding was taken, and no ruling on the application appears, a new trial must be granted. Earwicker v. London Graving Dock Co. (Eng.) 1918B-665. (Annotated.)

292. Absence of Dependents—Award to State. The failure of the court, after finding claimant was not a dependent of a deceased employee, to award the sum of \$750 to the state treasurer can be objected to only by the state, and not by the claimant. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747.

293. Stipulation as to Cause of Injury. Where a molder was injured by a splash of molten iron into his right eye, and after ample opportunity for investigation an agreement as to compensation was entered into between him and a casualty company insuring the employer's liability under the Mich. Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10), in which it was recited that the nature and cause of injury and ground of claim was molten iron splashed into right eye, causing a bad burn in the corner of the eye, such agreement, when approved by the industrial accident board, and an order for compensation entered in accordance therewith, were conclusive as to the cause of the injury, so that in a subsequent proceeding to terminate compensation, it could not be successfully claimed that the defect in the eye at the time of the order was the result of senile cataract. Estate of Beckwith v. Spooner (Mich.) 1916E-(Annotated.)

294. Conclusiveness of Findings. Findings of the industrial accident board that an injured employee's condition was the result of injury and not of senile cataract could not be set aside on petition for review, unless the court could say from the whole record as a conclusion of law that the board must have found from the evidence as a conclusion of fact that the cataract in the eye was senile and not traumatic. Estate of Beckwith v. Spooner (Mich.) 1916E-886. (Annotated.)

295. Where compensation was granted to an injured employee under an agreement

providing that he had sustained an injury to the eye as the result of traumatism, evidence on a petition to terminate the compensation held not to require the industrial accident board as a matter of law to find that the condition was not traumatic, but senile. Estate of Beckwith v. Spooner (Mich.) 1916E-886. (Annotated.)

296. Applicability of Rules of Judicial Procedure. While the Mich. Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No 10) contemplates the prompt adjustment of controversies by summary proceedings under a simplified procedure, unhampered by the technical forms and intervening steps of regular litigation, it indicates clearly an intent that the fundamental principles of a judicial inquiry shall be observed. Reck v. Whittlesberger (Mich.) 1916C-771.

297. Admissibility of Evidence—Declarations of Injured Workman as to Cause of Injury. In a proceeding under the Mich. Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10), hearsay evidence should not be admitted and made the basis of findings of fact and accordingly a self-serving declaration by an injured workman as to the cause of his injury is not admissible. Reck v. Whittlesberger (Mich.) 1916C-771. (Annotated.)

298. Report by Employer to Commission—Effect as Evidence. In a proceeding under the Mich. Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10), a report to the industrial accident board by the employer, made before the death of the employee, and at a time when he had ample opportunity to investigate, and all sources of information were fresh and available, stating that the employee was injured by running a nail into his hand while throwing wood into a furnace, and a second report after the death stating that he was injured by scratching his hand on a nail, constitutes prima facie evidence that the accident and injury occurred as reported, and supports a finding of the board that such injury arose out of, and in the course of, the employment. Reck v. Whittlesberger (Mich.) 1916C-771.

299. Finding as to Dependency. A finding that a claimant for compensation under the Conn. Workmen's Compensation Act (Pub. Acts 1913, c. 138) relied upon sums sent her by a deceased employee "for expenses" is not equivalent to a finding that she relied on them for living expenses necessary and proper for her class and station in life. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747.

300. Motion to Recommit. Upon appeal from award of compensation commissioner, a motion that the finding and award be recommitted with direction should be in writing, where it appears that neither side will produce evidence. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747.

301. Notice of Hearing — Form and Bequisites. Under Wis. St. 1915, § 2394—16, providing that the industrial commission shall cause notice of the hearing embracing a general statement of the claim to be given to each party interested, either a copy of the application for compensation should be attached to the notice, or else it should contain a statement of the time, place, and general nature of the injury claimed to have been received. Pellett v. Industrial Commission (Wis.) 1917D-884.

302. Reopening of Hearing—Procedure—Evidence Previously Taken. Where a proceeding for compensation under the Wis. Workmen's Compensation Act (St. 1915, § 2394—1 et seq.) is opened to allow the employer to cross-examine the claimant and to introduce evidence in chief, no error is committed by not compelling the claimant to put in his evidence anew, as the commission may let such evidence stand and supplement it by that taken on the second hearing, having in such matter of procedure a wide field of discretion. Pellett v. Industrial Commission (Wis.) 1917D-884.

303. Vacation of Award—What Constitutes Fraud—False Testimony by Claimant. Under Wis. St. 1915, § 2394—19, providing that an award of the industrial commission may be set aside on the ground that it was procured by fraud, construed with reference to the report of and the discussions before the committee drafting the Workmen's Compensation Act, false testimony on the part of the claimant and his concealment of facts material to the issue before the commission is no ground for setting aside an award. Pellett v. Industrial Commission (Wis.) 1917D-884.

304. Construction of Finding. In a proceeding by an employee to obtain compensation for personal injuries, the court made a finding that as a result the employee was totally incapacitated for his work up to April 1st, and that on and after that date he had not been and was not, either totally or partially, incapacitated for work, but from that date and at present had been able to perform his work and receive from his employer the same amount of wages as before the injury. It is held that the finding should be construed, not that the employee was capable of performing all sorts of work, but that he was not incapacitated from resuming his former duties. Weber v. American Silk Spinning Company (R. I.) 1917E-153.

305. Duration of Incapacity — Finding Sustained. In a proceeding by an employee to recover compensation for personal injury, the evidence is held to warrant a finding that he had not been incapacitated after the time fixed by the court's finding. Weber v. American Silk Spinning Company (R. I.) 1917E-153.

#### Notes.

Increase, decrease, termination or suspension of allowance under Workmen's Compensation Act. 1916E-889.

Admissibility in proceeding under Workmen's Compensation Act of statement by injured employee respecting cause of injury. 1916C-775.

Increase, decrease, termination or suspension of allowance under Workmen's Compensation Act. 1918B-733.

Provisions in Workmen's Compensation Acts respecting medical examination of workmen. 1918B-670.

## (15) Effect of Settlement.

306. Effect of Settlement—Rights of Workman Against Third Person. A settlement between plaintiff and his employer under the Workmen's Compensation Act, by which the employer was released from all claims on account of the injury to plaintiff, did not operate as a settlement or release of any claim for malpractice which plaintiff might have against the physicians who treated him. Vita v. Fleming (Minn.) 1917E-678. (Annotated.)

### (16) Increase of Award.

307. Allowance for Injury not Originally Claimed for. Under Cal. Workmen's Compensation Act (St. 1913, p. 293), § 25 (d), providing that the industrial accident commission shall have power to "rescind, alter or amend" any order or award, in view of sections 25 (c), 81, 82, the commission, having awarded claimant compensation for an injured leg, cannot more than six months thereafter award such claimant compensation for injuries to a lung suffered in the same accident, which injuries had not been previously reported, since the six months' limitation prescribed by section 16 applies, except where indemnity has been paid or agreed upon as provided by section 16 (c). Ehrhart v. Industrial Accident Commission (Cal.) 1917E-465. (Annotated.)

308. Development of Injury. If a servant is denied compensation for loss of use of an eye on the ground that he can still see and his vision subsequently becomes further impaired, the industrial commission has power to reconsider its award. Boscarino v. Carfogno & Dragonette (N. Y.) 1918A-530.

## (17) Review.

309. Change in Law—Effect on Pending Proceedings. That after appeal is taken from the award of the workmen's compensation commission such commission is superseded by the industrial commission does not affect any of the questions involved. Carroll v. Knickerbocker Ice Co. (N. Y.) 1918B-540.

(Annotated.)

- 310. Lump Sum Award. An appeal from a judgment rendered under the Workmen's Compensation Act, awarding compensation in a lump sum to a dependent upon a workman whose death resulted from personal injuries sustained in a hazardous employment, dismissed for want of merit. McCracken v. Missouri Valley Bridge & Iron Company (Kan.) 1918B-689.
- 311. Findings Conclusive. Where, in an action by the driver for such injuries, the evidence showed that the fall from the hack was partly the result of a positive pitching of the driver from his seat by the motion of the vehicle, and not the mere inert collapse of an unconscious man, the finding of the court below that petitioner "received a personal injury by an accident arising out of . . . said employment," will not be disturbed, since the act provides that findings of fact in the absence of fraud shall be conclusive. Carroll v. What Cheer Stables Co. (R. I.) 1918B-346. (Annotated.)
- 312. Review of Facts. On appeal from a judgment dismissing the petition for compensation under the R. I. Workmen's Compensation Act (Pub. Laws 1911-12, c. 831), where the trial justice made no findings of fact upon the evidence adduced, the supreme court has jurisdiction only to determine the proposition of law on which dismissal was had, and cannot determine the facts. Grinnell v. Wilkinson (R. I.) 1918B-618.
- 313. Certiorari to Review. Whether legal evidence is offered to support the decision of the industrial board as shown by the record of proceedings, where such evidence is agreed upon or reported by stenographer, is a question of law reviewable by certiorari. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.
- 314. Under this section the circuit court by certiorari may review the decision of the industrial board for errors of law. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.
- 315. Objection First Made on Appeal. Such defense cannot be considered for the first time on appeal. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.
- 316. Review of Findings of Industrial Board. The decision of the industrial board that an employee was injured by accident arising out of the employment, if there is competent or legal evidence to support it, cannot be reviewed, as it is not the court's province to pass upon weight or sufficiency of evidence. Chicago Dry Kiln Co. v. Industrial Board (Ill.) 1918B-645. (Annotated.)
- 317. If it is clear upon the facts found by the industrial board that as a legal conclusion an injury was not accidental

- or that it did not arise in the course of the employment, a contrary conclusion awarding compensation will not be allowed to stand. Eugene Dietzen Co. v. Industrial Board (Il.) 1918B-764.
- 318. While the industrial board's findings of fact are conclusive on the supreme court, the legal conclusions of that board, based on their findings, are subject to that court's supervision. Eugene Dietzen Co. v. Industrial Board (III.) 1918B-764.
- 319. On petition to review an order of the industrial accident board denying an application to stop compensation, the essentials leading up to the award or its equivalent are to be taken as res judicata, except the physical condition of the injured employee, which remains open to inquiry. Estate of Beckwith v. Spooner (Mich.) 1916E-886. (Annotated.)
- 320. Under the Mich. Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10) p. 3, § 12, providing that the findings of fact by the industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but that the supreme court may review questions of law, the facts found to be conclusive must be based on competent legal evidence, and not on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence; as to so determine the rights of the parties would be to act outside the authority conferred by the statute, and without jurisdiction. Reck v. Whittlesberger (Mich.) 1916C-771.
- 321. As provided by N. Y. Workmen's Compensation Act, § 20, the decision of the workmen's compensation commission is final as to questions of fact, and the court, on appeal from its ruling, is limited to review of questions of law. Dale v. Saunders (N. Y.) 1918B-703.
- 322. Hearing of Appeal—Right to Open and Close. Under Md. Workmen's Compensation Act (Acts 1914, c. 800), § 55, giving any person aggrieved by a ruling of the industrial accident commission the right to appeal, such appealing party, having the burden of overcoming the decision which is prima facie correct, has the right to open and close the evidence and the arguments. American Ice Co. v. Fitzhugh (Md.) 1917D-33.
- 323. Proceedings to Secure Compensation—Record on Appeal. In a proceeding for workmen's compensation, the findings of the commissioner must contain all facts essential to the case, and on appeal become a part of the record, so that it is not essential that his findings be specifically made a part of the record. Douthwright v. Champlin (Conn.) 1917E-512.
- 324. Conclusiveness of Decision—Want of Jurisdiction. Decision of the industrial toard under the Ill. Workmen's Compensation Act is conclusive only when it is

within its jurisdiction. Uphoff v. Industrial Board (Ill.) 1917D-1.

325. Review of Award. In a proceeding under the Workmen's Compensation Act (Laws R. I. 1911-1912, c. 831), a finding of fact by the superior court, based on evidence, is conclusive on appeal. Weber v. American Silk Spinning Company (R. I.) 1917E-153.

326. Who Entitled to Attack Statute—Person not Aggrieved. On an appeal, contesting the constitutionality of the Workmen's Compensation Act by an employer who has rejected it, he cannot urge a grievance of the employee, since it must appear that contestant was deprived of a constitutional right. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E—803.

327. Review of Facts on Appeal. Under the Workmen's Compensation Act of 1913, § 19, par. "f," providing that the decision of the industrial board, acting within its powers, in the absence of fraud, is conclusive, but that the supreme court shall have power to review questions of law involved therein, the decision of the board upon questions of fact is conclusive, if founded upon competent or legal evidence. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

#### Note.

Review of facts on appeal under Workmen's Compensation Act. 1918B-647.

## 1. Actions for Injuries.

## (1) Pleading.

328. Injury to Minor Illegally Employed—Complaint Sufficient. A complaint for damages for the death of a boy which alleged that deceased was under 14 years of age, that he was struck by one of defendant's tram cars while he was in the discharge of his duties, and that his death was proximately caused by reason of defendant's employing him in violation of Code 1907, § 1035, which prohibits the employment of boys under 14 years of age in mines, states a cause of action under that section of the Code. Cole v. Sloss-Sheffield Steel, etc. Co. (Ala.) 1916E-99.

329. Contributory Negligence of Infant—Plea Insufficient. In an action for damages for the death of a boy under the age of 14 years, a plea which relies upon the boy's contributory negligence in riding upon a tram car in violation of his employer's rules, but which does not aver that he had sufficient capacity to appreciate the danger or risk, is defective. Cole v. Sloss-Sheffield Steel, etc. Co. (Ala.) 1916E-99.

330. Liability for Injury to Domestic Servant. Where the complaint, in an action for injuries to a cook from the explosion of a gas stove, alleged that the explosion was due to defects in the stove, evidence that the burners had been lighted

at least 20 minutes before the explosion did not authorize a recovery by plaintiff; it being incumbent on plaintiff, not only to establish the happening of the accident, but also that it happened on account of the negligence alleged in the complaint. Holmberg v. Jacobs (Ore.) 1917D-496.

(Annotated.)

3301/2. Sufficiency of Averment of Negligence. In an action whereby it is sought to recover damages for personal injuries alleged to have been occasioned by the negligence if a railroad company or corporation, a count in the declaration alleging "that the said track and rails were wet, and the said locomotive engine and tender leaked in such a way the water therefrom fell upon the rails of said track, and the sand box on said locomotive engine was in such a defective condition that sand would not fall therefrom upon the rails of said track by reason whereof the said locomotive engine upon which plaintiff was riding could not be stopped and collided with the said derailed locomotive engine," is not demurrable for failing to allege the acts or omissions of the defendant which caused the plaintiff's injuries. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971.

## (2) Presumptions and Burden of Proof.

331. Injury to Railroad Employee—Presumption of Negligence. The statutory presumption of negligence on the part of a railroad company, under Kirby's Ark. Dig. § 6773, applies to all employees of railroad companies who receive injuries by the running of trains, except those who are engaged in the actual running of the rain which caused the injury. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.

332. Allegations that defendant railroad negligently shoved cars upon the track where plaintiff was repairing a car, striking it and running it over him, with proof that his injuries were so produced, are sufficient, under Kirby's Ark. Dig. § 6773, creating a presumption of negligence on the part of a railroad company, to place the burden of proof upon defendant to show that the injury was not caused through its negligence. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.

333. Presumption as to Competence and Care of Servant. There is no presumption one way or the other as to the skill or want of skill of the driver of 'a vehicle, when all of the facts and circumstances out of which a charge of negligence arose are before the jury, and whether the driver of the vehicle was a reasonably careful and skilful driver, and exercised that degree of care and skill which an ordinarily careful and skilful driver would have exercised under the circumstances, is a matter of proof, and hence, in an action for the death of a person struck by defend-

ant's automobile truck, it is error to charge that the law presumed, in the absence of evidence to the contrary, that the driver of the truck was a reasonably careful and skilful driver, and that if plaintiff had failed to prove that he was not a reasonably careful and skilful driver, defendant was entitled to the presumption that he was reasonably careful and skilful in such work. Devine v. Brunswick-Balke-Collender Co. (III.) 1917B-887.

334. Burden of Proof. An administrator suing a railroad for death of his decedent, a switchman, killed in service, as it was charged, by being struck by a post standing dangerously near the track, had the burden to prove that decedent had not been warned of the dangerous proximity of the post. Devine v. Delano (Ill.) 1918A-689.

## (3) Admissibility of Evidence.

335. Action for Negligence — Rules of Master. In an action for injuries sustained by a car repairer, evidence that when repairs were made on cars outside the repair tracks it was the duty of the foreman to put out a blue flag was admissible in rebuttal of testimony that in such case the blue flag rule required the repairers to put out the flag themselves. St. Louis, etc. R. Co. v. Blaylock (Ark.) 19174-563.

336. Intoxication of Servant. In a servant's action for injury from a blast fired near him, wherein the master contended that the servant was drunk and fell off an embankment into a deep cut and was injured, evidence that the servant was drunk when he left his boarding place to go to work along the way where he was injured is material and admissible. American Bauxite Co. v. Dunn (Ark.) 1917C-625.

337. Changes Made After Accident. Evidence of conditions or changes made after the accident is not admissible to show negligence, or an admission of negligence, at the time of the accident. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637.

338. Where, in an action for a railroad brakeman's death by catching his foot in the unblocked space between main and guard rails, defendant claimed that since the custom of blocking or not blocking such space was not uniform, neither method would have been negligence, evidence was admissible in rebuttal for plaintiff whether the guard rails had been blocked on certain part of defendant's line after the accident, though not admissible as an admission of negligence. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637.

339. Negligence—Evidence—Intention of Injured Servant. In an action against a railroad for death of its switchman in service, where the conductor of the switch-

ing crew has testified that it was not deceased's duty to throw a certain switch, it is competent to show by such conductor that at the last time he saw decedent alive he did not know, as a matter of fact, that decedent was not planning to throw such switch. Devine v. Delano (III.) 1918A-689.

## (4) Sufficiency of Evidence.

340. Evidence that a horse had been in use about the plant for some time, and that the foreman in charge had ample opportunity to observe his conduct when plaintiff was hurt as well as on former occasions, is sufficient to carry to the jury the question whether the master knew, or with reasonable diligence should have known the nature of the horse. Marks v. Columbia County Lumber Co. (Ore.) 1917A—306. (Annotated.)

341. Negligence—Failure to Block Guard Rail. Negligence by an employer cannot be determined, as a matter of law, upon the opinion of experts as to whether a given course of conducting a business is negligence, where the question involves matters as to which common knowledge and observation has evidential weight, such evidence being entitled to the jury's. consideration, along with the other evidence on the question; and hence, in an action against a railroad company for the death of a brakeman by catching his foot in the unblocked space between the guard and main rail, it could not be said that defendant was not negligent in not guarding the space between rails by blocking it, because some qualified railroad men testified that blocking such space did not make it safer and was not done on their roads, while others testified that blocking the space between rails was safer. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637. (Annotated.)

342. Proof of Knowledge of Danger. In determining the question of want of knowledge of a danger by an employee sustaining a personal injury, it is proper to consider all the facts proved, and it is not necessary that proof be made by direct evidence, and it is only where the evidence points neither one way nor the other that plaintiff must fail for want of affirmative proof. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

## (5) Defenses.

343. Affirmative Defenses. Assumption of risk and contributory negligence when available are affirmative defenses. King v. Cooney-Eckstein Co. (Fla.) 1916C-163.

#### (6) Questions for Jury.

344. Ala. Code 1907, § 3910, subd. 3, makes employers liable for injuries to employees caused by the negligence of any

person in the service or employment of the master or employer to whose orders or directions the servant or employee was bound to and did conform, if such injuries resulted from his having so conformed. In an action for injury to a railway employee assisting a mechanic to repair an engine, there was evidence that B. directed plaintiff what to do, that he was cutting a bar of metal with a hammer and chisel; that plaintiff's directed part in the work was to hold the bar still by putting his foot on it and hold a light so that B. could see to do the work; that the cutting of the bar threw off pieces of metal; that one of such pieces struck plaintiff in his right eye; and that he could not hold the light as directed without turning his face towards and into the line of flight of the pieces of metal. It is held that this evidence made a question for the jury as to plaintiff's right to recover. Louisville, etc. R. Co. v. Carter (Ala.) 1917E-292.

Negligence - Safety of Miner's Working Place. In a miner's action for injuries caused by rock falling upon him, where there is evidence that he asked the foreman if he thought any more of the roof would fall, that the foreman took a pick, and, after testing the part of the roof which subsequently fell, assured plaintiff that it was sound and safe, that plaintifl was somewhat inexperienced and not familiar with the character of rock in the roof, and, relying on the foreman's assurance of safety, continued to work there until injured, and that if a proper inspection had been made when the foreman made his inspection it could have been discovered that the rock was loose and liable to fall, it is a question for the jury whether the employer was negligent, though plaintiff's evidence tends to show that ordinarily it was his own duty to look after the safety of the roof of his own room. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.

346. Assumption of Risk—Failure to Give Signals. In an action for injuries to plaintiff when the car which he was repairing was struck by another car, evidence held to justify submission to the jury of the issue of assumption of risk in relying upon foreman to place signals. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.

347. Contributory Negligence. In an action for injuries to plaintiff when the car which he was repairing was struck by another car, evidence held to justify the submission to the jury of the issue of plaintiff's contributory negligence in relying upon the foreman to put out a blue flag. St. Louis, etc. R. Co. v. Blaylock (Ark.) 19174-563.

348. In an action against a railroad company for injury to a fireman who was struck by the arm of a mail crane standing near the track, whether he assumed

the risk or was guilty of contributory negligence is held, under the evidence, a jury question, Rowlands v. Chicago, etc. R. Co. (Wis.) 1916E-714. (Annotated.)

349. Negligence — Switching Unlighted Car Without Warning. Where the defendant railway switched an unlighted car at a speed of ten miles an hour in an unlighted yard, having no guard on the car, nor giving any warning, the question of its negligence as to one rightfully on the track is for the jury. Ingram's Adm'x. v. Rutland R. Co. (Vt.) 1918A-1191.

Negligence—Blasting. On the evidence in a servant's action for injury from a blast fired near him without warning, it is held that whether the master should have reasonably expected the servant, who did not work where the blasting was done, to be within range of the explosion, and should have given warning before the blast was fired, was for the jury. American Bauxite Co. v. Dunn (Ark.) 1917C-625.

351. Whether Servant was Warned. In an administrator's action against a railroad for death of its switchman charged to have been killed in service by being struck by a post in dangerous proximity to the track, whether the conductor of the switching crew warned the switchman of the dangerous condition is held to be for the jury under the evidence. Devine v. Delano (III.) 1918A-689.

352. In an administrator's action against a railroad for death of its switchman charged to have been killed in service by being struck by a post in dangerous proximity to the track, it was a question for the jury whether the road's act in giving a list of nonclearance points on the line to the switchman was a sufficient discharge of the road's duty to warn him of the post. Devine v. Delano (III.) 1918A-689.

353. Contributory Negligence — Railroad Employee—Post Near Track. In an administrator's action against a railroad for death of its switchman in service, question whether the switchman met his death, in striking a post dangerously near the track, by means of the negligence of the road and while he was using due care, is held to be for the jury under the evidence. Devine v. Delano (III.) 1918A-689.

354. Negligence — Failure to Furnish Tool. In an employee's action for injury on the ground that a failure to furnish a punch for making holes through steel hoops was a defect in the condition of the employer's ways, works, machinery, and plant, held on the evidence that whether the plant was defective for that reason was for the jury. Whiley v. Solvay Process Co. (N. Y.) 1917A-314.

355. Whether Servant Assumed Risk. In an action against a railroad for death of its switchman in service, the submission of

an interrogatory as to whether the deceased assumed the risk or danger which resulted in his injury, which the jury answered in the negative, is not prejudicial to defendant, charged in a count of the declaration with having rejected the Workmen's Compensation Act. (Devine v. Delano (III.) 1918A-689. (Annotated.)

## (7) Instructions.

356. Instruction as to Negligence and Contributory Negligence. An instruction that if plaintiff was employed by defendant in its mine and under the control and direction of its foreman, who had authority to direct the work and the manner in which plaintiff was engaged at the time of the injury, and if it was plaintiff's duty to obey his orders and directions, and if while so engaged the foreman negligently directed plaintiff to clean up the rock and other débris in a room, and prior to such command had assured plaintiff when inquired of whether it was safe to work there on account of overhanging rocks, that it was safe, and if plaintiff, relying upon such assurance, went to work there and was injured by a slab of rock falling upon him, he was entitled to recover, is erroneous, where negligence on the part of the foreman in giving such assurance as to the safety of the roof was relied upon as a ground of recovery and not merely as relieving plaintiff from the effect of contributory negligence or assumption of risk, since it undertakes to cover the whole case so far as defendant's actionable negligence is concerned, and does not require a finding that the assurance as to the safety of the roof was negligently given, but makes the employer an insurer as to the correctness of the information furnished plaintiff. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.

357. The error in such instruction is not cured by a further instruction that if the rock which fell upon plaintiff was in a loose and dangerous condition, and if the toreman inspected and sounded it and found it to be in a loose and dangerous condition and liable to fall, or if by the exercise of ordinary care he could have discovered such condition, and if he assured plaintiff that it would not fall and ordered him to work beneath such rock, then such order was negligently made and such assurance negligently given within the meaning of the instructions, since it merely defines "negligent assurance," a term not used in the instruction authorizing a recovery, and, moreover, it was an attempt to supply facts which should have been required to be found by the main instruction and the incorporation of which in a separate instruction would merely confuse the jury. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.

358. In a miner's action for injuries caused by rock falling upon him, an in-

struction that though he knew, or by the exercise of ordinary care could have known, that the place where he was working was not safe, this did not defeat a recovery if he was negligently ordered into such place by the foreman and assured that the rock would not fall, and if the danger from such rock was not of such a glaring and dangerous nature as to threaten immediate injury in case he obeyed the order, is erroneous, as it did not require a finding that plaintiff relied upon such assurance of safety. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.

359. Assumed Risk. Where the instruction requested by defendant in an action for railroad brakeman's negligent death did not in terms place the burden of proving assumed risk on defendant, which the instruction given by the court on the subject properly did, it was not error to refuse the requested instruction. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637.

360. Instruction Properly Refused. Under Iowa Code Supp. 1913, §§ 4999a2, 4999a3, where plaintiff, a woodworker, was injured while working with a combined machine on which there was then a ripsaw which was not guarded, defendant's requested instruction that if the danger in using the unguarded saw was so imminent that a reasonably prudent person would not have continued in the work, the servant by continuing in his work waived the master's negligence, and assumed the risk, is properly refused, as it does not differentiate between conditions existing when the servant in the ordinary course of his employment had a duty to remedy the defects and conditions existing when no such duty rested on him. Correll v. Williams, etc. Co. (Iowa) 1918A-117.

361. Effect of Election — Defenses Excluded. In an action against a railroad for death of its switchman in service, the court's action in permitting the defenses of assumption of risk and contributory negligence to be submitted to the jury as to one count of the declaration, and in excluding them as to the other, which charged that the road had rejected the Workmen's Compensation Act, is not prejudicial to defendant. Devine v. Delano (III.) 1918A-689. (Annotated.)

### (8) Verdict.

362. Negligence of Foreman—Dangerous Method of Work. Where, in a carpenter's action against a railroad company for injuries received while working on an extension to repair shops, it appeared that defendant's subforeman, who was directing the work, caused a section of the extension to be raised when there was a strip of timber nailed to it making it impossible for it to be placed in position, and that, though' knowing that plaintiff was in a

dangerous position, he directed another employee to prize one end of the section loose, in consequence of which it swung against and injured plaintiff, sufficient negligence is shown to render it erroneous to direct a verdict for defendant. Thompson v. Cincinnati, etc. Co. (Ky.) 1917A-1266.

363. Railroads—Mail Crane Near Track. In an action against a railroad company for injury to a fireman who was struck by the arm of a mail crane standing near the track, evidence held to warrant a finding of negligence in maintenance of the crane. Rowlands v. Chicago, etc. R. Co. (Wis.) 1916E-714. (Annotated.)

# 3. LIABILITY OF MASTER FOR ACTS OF SERVANT.

## a. Existence of Relation.

364. Liability to Third Person for Act of Servant—Starting Fire. Railroad laborers who are living in bunk cars provided by the railroad company, and who, when off duty, build a fire upon the right of way to heat water to wash their clothes, are not acting within the scope of their employment in building such fire, so as to render the railroad liable for their negligence to the owner of adjoining property destroyed by fire communicated therefrom. Excelsior Products Mfg. Co. v. Kansas City So. R. Co. (Mo.) 1917B-1047. (Annotated.)

### b. Nature and Extent of Liability.

365. Fire Insurance Patrol—Liability for Tort. A board of underwriters organized under St. Wis. 1913, § 1922, authorizing the formation of such boards, is not a charitable corporation free from liability for the negligence of its employees, because engaged in protecting life and property from fire through its patrols, since such furtherance of the public interest is merely incidental to the selfish motive of reducing the fire risks of its members as underwriters. Sutter v. Milwaukee Board of Fire Underwriters (Wis.) 1917E-682.

(Annotated.)

366. Liability to Third Persons—Scope of Employment. A master is liable for the negligent acts of his servant only when those acts are within the scope of his employment, but where the servant fails to perform a clear duty imposed on him by his employment, the master is liable for such failure. Lovejoy v. Denver, etc. R. Co. (Colo.) 1916E-1075.

367. Person on Locomotive by Permission of Engineer — Liability for Injury. Where an engineer, in sole charge of an engine and cars, placed a five year old boy on the engine to give him a ride and then started the engine without taking proper precautions for the boy's safety, so that he was thrown off and injured, even if the act of placing the boy on the engine was

outside the scope of the engineer's employment so as not to render the company liable therefor, it was liable for the engineer's failure to perform the duty imposed on him by his employment to keep children off the engine. Lovejoy v. Denver, etc. R. Co. (Colo.) 1916E-1075.

(Annotated.)

#### Note.

Liability of fire insurance patrol in tort. 1917E-684.

# c. Pleading.

368. Action for Negligence. A complaint, which alleges that a railroad engineer in charge of a switching train, placed a five year old boy upon his engine and then started it without taking proper precautions for the boy's safety, does not allege that the railroad had failed to employ a competent engineer. Lovejoy v. Denver, etc. R. Co. (Colo.) 1916E-1075.

369. Care and Skill of Servant. In an action for the death of a person struck by an automobile truck, an instruction that if the driver of the truck was a person of ordinary and reasonable skill in the business in which he was engaged, and if he exercised the ordinary judgment and skill of a reasonably careful and prudent driver at and just before the time of the injury, the jury should find defendant, the driver's employer, not guilty is proper. Devine v. Brunswicke-Balke-Collender Co. (III.) 1917-887.

370. Damages — What Law Governs. Where plaintiff sues in Vermont for injuries sustained while working on defendant's railroad in Quebec, plaintiff's damages, if any, are to be assessed in accordance with the law of that province, and hence it is proper to refuse to charge that pain and suffering is not an element of damage, and submit the Canadian law on that branch of the case to the jury. Osborne v. Grand Trunk R. Co. (Vt.) 1916C-74.

### MASTER IN CHANCERY.

Review of findings, see Appeal and Error, 154.
Powers, see Referees, 2.
Compensation, see Referees, 8.

# MATERIAL ALTERATION.

See Alteration of Instruments, 4, 5.

# MATERIALITY OF ERROR.

For reversal, see Appeal and Error, 209-211.

# MATERIALMAN.

Defined, see Mechanics' Liens, 10. Right to lien, see Mechanics' Liens. 11.

#### MAXIMS.

Expressio unius est exclusio alterius, see Appeal and Error, 463.

Id certum est, quod certum reddi potest, see Deeds, 47.

Sic utere tuo ut alienum non laedas, see Constitutional Law, 39.

Salus populi suprema lex, see Jury, 13. Falsus in uno, falsus in omnibus, see Witnesses, 89.

#### MEASURE OF DAMAGES.

See Damages, 4-16.

## MEASURES.

See Weights and Measures.

### MECHANICS' LIENS.

- 1. Validity and Construction of Statutes,
- 2. Contract Under Which Lien Acquired,
- 3. Persons Entitled to Lien, 591.
  - a. Contractor or Subcontractor, 591.
  - b. Materialman, 592.
- 4. Lienable Claims, 592.
- 5. Property Subject to Lien, 592.
- 6. Notice or Statement of Claim, 592.
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- 7. Waiver and Estoppel, 594.
- 8. Priority, 595.
- 9. Foreclosure, 595.
  - a. Limitations, 595.
  - b. Parties, 596.
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Effect property owner's bankruptcy, see Bankruptcy, 15.
Filing claim of homestead, effect on lien,

see Homestead, 10.

Defect of parties, see Parties to Actions, 1.

#### ,1. VALIDITY AND CONSTRUCTION OF STATUTES.

- 1. Validity of Statute. The statute, giving a subcontractor a lien for labor and materials actually entering into the structure as against an owner with whom he had no direct contractual relation, does not violate the constitutional right of liberty of contract, and is valid. Becker v. Hopper (Wyo.) 1916D-1041.
- 2. Provision for Attorney's Fee—Validy. Comp. St. Wyo. 1910, \$ 3807, which rovides that, in all suits or actions brought in the district court to enforce a mechanic's lien in which plaintiff shall obtain judgment, the sum of \$25 for attorney's fees shall be taxed as costs and recovered from the adverse party, conflicts with the federal constitution's guaranty of equal protection of the law. Becker v. Hopper (Wyo.) 1916D-1041.

(Annotated.)

#### Note.

Validity of mechanic's lien law providing for taxing of attorney's fees. 1916D-

# 2. CONTRACT UNDER WHICH LIEN ACQUIRED.

- . 3. Contract by Agent-Scope of Lien. Colo. Rev. St. 1908, \$4025, giving mechanics, materialmen, etc., and persons performing labor or furnishing materials for the construction of any building, etc., a lien upon the property upon which they have rendered service or bestowed labor, or for which they have furnished materials or other fixtures, for the value of such services, labor, or material rendered or furrished at the instance of the owner or any person acting by his authority or under him as agent, contractor, or otherwise, for the work, labor, services, or materials done, furnished, or rendered at the instance of the owner of the building or other improvement, or his agent, gives a lien only upon the structure or improvement built or placed upon the land. Stewart v. Talbott (Colo.) 1916C-1116.
- 4. Colo. Rev. St. 1908, § 4025, which, after giving a lien to persons furnishing labor, etc., to be used in the construction, etc., of any building at the instance of the owner or his agent, provides that every contractor, architect, etc., or other person having charge of the construction, alteration, addition to, or repair of any building or improvement shall be held to be the agent of the owner for the purposes of that act, merely makes such person the statutory agent of the owner of the building or improvement, and does not make him the agent of the owner of the land upon which the improvement is placed. Stewart v. Talbott (Colo.) 1916C-1116.
- 5. If, under a long-term lease binding the lessee to erect a building on the demised premises at his own expense, to become a part of the realty, the lessee is presumptively the agent of the lessors within the mechanic's lien laws, the presumption is nullified and destroyed by a provision in the lease, which was duly recorded, that nothing therein should authorize the lessee or any person dealing with him to charge the lands or any interest of the lessors therein with any mechanic's lien or lien of any kind, notwithstanding a covenant by the lessee that it would not permit or suffer any bill of any mechanic, laborer, or materialman, or for furnishings or equipment, to remain unpaid, and that before commencing the erection and construction of the building it would furnish a bond guaranteeing due observance of the provisions of the lease relative to mechanics' liens, in view of Colo. Rev. St. 1908, § 694, providing that all deeds or agreements in writing affecting the title to real estate or any interest therein

may be recorded, and that from and after the filing thereof for record they shall take effect as to subsequent bona fide purchasers and incumbrancers, and section 707, defining "deed," as used in that chapter, as including mortgages, leases, etc., as the lease was constructive notice to those subsequently acquiring an interest in the premises, and whatever agency it might be presumed was created thereby was necessarily subject to the conditions of the instrument creating the agency. Stewart v. Talbott (Colo.) 1916C-1116. (Annotated.)

- 6. Under Colo. Rev. St. 1908, §§ 4025, 4027, 4029, a long-term lease binding the lessee to erect a building on the demised premises to become a part of the realty upon completion does not make the lessee the lessor's agent so as to invest him with authority to create a lien upon the lessor's interest in the fee, and persons doing work and furnishing materials under contracts with the lessee acquired no lien on the fee where the lessors neither participated in the erection or construction of the improvement nor approved the plans, and it does not appear that the rents reserved were greater than the reasonable worth of the vacant lots; since, if the improvements increased the value of the freehold estate. it was only as a future incident, and the lessor was not the owner of the building or structure, but would become such only upon the expiration of the lease or upon the completion of the building. Stewart v. Talbott (Colo.) 1916C-1116. (Annotated.)
- 7. A long-term lease requiring the lessee to erect a building at his own expense to become a part of the realty upon completion was not a contract with a contractor for the construction of such building within Colo. Rev. St. 1908, § 4025, providing, relative to mechanics' liens, that in case of a contract for the work between the reputed owner and a contractor the lien shall extend to the entire contract price, as a "contractor" is one who, as an independent business, undertakes to do specific jobs of work without submitting himself to control as to the petty details, especially as the contracts with the parties claiming the liens designated the lessee as owner and the lessors were not therefore the "reputed owners." Stewart v. Talbott (Colo.) 1916C-1116. (Annotated.)
- 8. Improvements by Tenant Right to Lien. Under Colo. Rev. St. 1908, § 4029, providing that any building, etc., constructed, altered, etc., upon any land with the knowledge of the owner or reputed owner shall be held to have been erected, constructed, etc., at the instance and request of such owner, so as to subject his interest to a lien unless he shall within five days after obtaining notice of the erection, construction, etc., give notice that his interests shall not be subject to any posted a written and printed notice to

such effect in some conspicuous place upon the land, building, or improvement, provided that this shall not apply to any owner or person who shall have contracted for any erection, structure, or improvement, a lessor under a long-term lease which bound the lessee to erect a building upon the demised premises at his own expense, to become a part of the realty upon completion, is not required to post the statutory notice, as he had entered into a contract with reference to the construction of the improvement, and was by the very letter of the provise exempted from the terms of that section. Stewart v. Talbott (Colo.) 1916C-1116. (Annotated.)

#### Note.

Mechanic's lien on realty for improvements made with consent but not at expense of owner. 1916C-1133.

- 3. PERSONS ENTITLED TO LIEN.
  - a. Contractor or Subcontractor.
- 9. Right to Lien—Contractor Paid in Full. Where a lien is claimed for labor performed or materials furnished to a contractor the right to the lien or its enforcement does not depend on the condition of the accounts between the owner and the contractor, and the fact that there is nothing due from the owner to the contractor does not defeat the lien. Becker v. Hopper (Wyo.) 1918B-35.
- 10. Who is "Subcontractor." Under the Mechanics' Lien Law (Cal. Code Civ. Proc. § 1194) prior to the amendment of 1911, declaring that laborers and materialmen should have preference over subcontractors in participation in the amount applicable to mechanics' liens, a firm which lathed and plastered a house, furnishing the material: a firm which constructed most of the floors and walls, furnishing the material; a company which erected part of the walls of bathrooms, furnishing the necessary tile; a company which put on a mission tile roof, furnishing the material; a firm which laid the flooring in certain rooms, furnishing the material; and a person who erected the tin work and galvanized iron and copper work, a substantial part of the structure, furnishing the materials—were all "subcontractors" under the statute, which divides the liens assertable against the property into four classes, laborers', materialmen's, subcontractors', and original contractor's, the "original contractor" being the person who agrees with the owner to construct a building on his property, "laborers" being those who perform labor in the construction of the building, "materialmen" being persons who merely furnish material to the contractors to be used in the construction of the building, and "subcontractors" being all persons who agree with the original contractor to furnish the material and construct for him

on the premises some part of the structure which the original contractor has agreed to erect for the owner, although literally a "subcontractor" is one who agrees with another to perform a part or all of the obligation which the second owes by contract to a third person. Hinn-Hammond Lumber Co. v. Elsom (Cal.) 1917C-798.

(Annotated.)

Note.

Who is "subcontractor" within Mechanics' Lien Law, 1917C-801.

# b. Materialman.

11. Materialman. A materialman, who is not the contractor, may maintain a mechanic's lien claim suit against the building and land of the owner when the specifications do not accompany and are not filed with the written contract. Davis v. Mial (N. J.) 1916E-1028.

# 4. LIENABLE CLAIMS.

- 12. Cartage of Materials. Where material was to be furnished on the ground at the place of construction, the materialmen's small items for cartage are properly added to lien claims for the cost of the material furnished. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 13. Transportation of Materials. Under N. J. statute, a mechanic's lien claim suit may be maintained for the transportation and delivery of materials, as for labor performed, for the erection and construction of a building. Davis v. Mial (N. J.) 1916E-1028. (Annotated.)

Right to mechanic's lien for transportation of materials to be used in connection with improvement. 1916E-1030.

# 5. PROPERTY SUBJECT TO LIEN.

- 14. Homestead Subsequently Declared. Wash. Const. art. 19, provides that the legislature shall protect from forced sale a certain portion of the homestead and other property of all heads of families, Rem. & Bal. Wash. Code, § 528 et seq., in general execute such constitutional provision, but section 533 subjects the homestead to the satisfaction of mechanics' liens on the premises. A house was built for defendants, and they did not claim a homestead therein until after materials had been furnished. It is held that the subsequent declaration of homestead by the owners could not preclude the prior rights of the materialmen. Brace, etc. Mill. Co. v. Burbank (Wash.) 1917É-739. (Annotated.)
- 15. Property in Hands of Trustee in Bankruptcy. Any rights of the trustee in bankruptcy, or defendant under such trustee are subordinate to the prior rights of plaintiff under his mechanic's lien, the

right to file which, at the time of the institution of bankruptcy proceedings, was a property right in plaintiff, and was not thus divested, and did not subsequently lapse or become defeated by the mere expiration of the 90-day period, but, instead, is by the terms of the statute saved to plaintiff; and it may thereafter perfect and perpetuate its lien by filing its lien statement, and after the doing of which the lien remains a prior lien to any right acquired by the trustee, or that subsequently acquired by the bankrupt. Morean Lumber Co. v. Johnson (N. Dak.) 1917C-290.

(Annotated.)

- 16. Estates Subject to Lien—Remainder. An estate in remainder is a legal estate and will support an action under the Mechanics' Lien Act. Davis v. Mial ((N. J.) 1916E-1028.
- 17. Mortgaged Property. Under Colo. Rev. St. 1908, § 4027, providing, relative to mechanics' liens, that such liens shall extend to and cover so much of the lands whereon the building or improvement shall be made as may be necessary for the convenient use and occupation of the building or improvement, and that the lien for work or materials done or furnished for any entire structure shall attach to the building for or upon which the work is done or materials furnished in preference to any prior lien, incumbrance, or mortgage, that any person enforcing such lien may have the building sold, and that the lien shall extend to and embrace any additional or greater interest in any of the property acquired by the owner at any time subsequent to the making of the contract or the commencement of the work, and before the establishment of the lien by process of law, the land upon which a building or improvement is erected or placed cannot be subjected to a lien unless the owner of the land has some ownership in the building and acts affirmatively relative to its construction. Stewart v. Talbott (Colo.) 1916C-1116.

## Note.

Mechanic's lien against homestead. 1917E-747.

# 6. NOTICE OR STATEMENT OF CLAIM.

# a. Necessity.

18. Necessity of Filing. Wyo. Comp. St. 1910, § 3799, giving a mechanic's lien upon compliance with the provisions of the chapter, and section 3803, requiring a subcontractor, within 90 days after the indebtedness accrues, to file a true and just account of the demand due him, were not affected by Sess. Laws 1911, c. 68, amending and re-enacting Comp. St. 1910, § 3805, to provide that a lien account as filed shall be admitted in evidence and making it a question of fact whether the account is

sufficient to charge the owner, since the filing of the lien statement is not a matter of evidence preserving the lien, but a prerequisite to the creation of the lien itself, nor does the amendment, if applicable purport to have a retroactive effect. Becker v. Hopper (Wyo.) 1916D-1041.

# b. Sufficiency.

- 19. Objection to Claim—General Objection. Where, in a suit to foreclose mechanics' liens, the owner's counsel objected to a lien claim, defective in that it did not claim a lien against the house as well as the lot, merely generally by desiring an exception and adding, "An exception as to the sufficiency of the description and the signature," such objection is not sufficiently specific as pointing out in what particular the description was defective so as to allow amendment, and on appeal the claim would be treated as amended. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 20. Effect of Defects in Lien Claim. Under Rem. & Bal. Wash. Code, § 1134, providing that the lien claim may be amended in the foreclosure action as other pleadings so far as third parties are not affected, where a mechanic's lien claim read that the claimant at the request of the general contractor, commenced to perform labor upon a certain lot, the performance of which labor ceased at a certain date, stating its value, and that for it the claimant claimed a lien on the property "herein described" for a certain sum, such claim is not materially defective; the failure to claim a lien on the improvement being merely an amendable defect. Brace, etc. Mill. Co. v. Burbank (Wash.) 1917E-739.
- 21. Signature to Lien Claim. Under Rem. & Bal. Wash. Code, § 1134, prescribing the form for mechanic's lien claims, a materialman's claim signed "W. & R., Attorneys for Claimant," but verified by the claimant in person, he signing the verification at the foot of the notice following his attorneys' signature, is a sufficient signing of the notice by him and a substantial compliance with the statute. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 0f Notice --- Person 22. Construction Claiming Lien. Under Wash. Laws 1911, p. 376, providing that a materialman, to claim a lien, must give notice to the owner that he is furnishing materials and that a lien may be claimed, where a contractor, in furnishing materials for a house, stated in its lien notice to the owner that the material had been ordered by the J. T. Plumbing Company (a company other than the one giving notice), such notice cannot be made the basis of a lien claim on the part of such plumbing company, whatever the rights of the company which served the notice might be thereunder, although the statute does not expressly provide that the

- lien which may be claimed in pursuance of such notice shall be only a lien by the person giving it, such being its plain spirit and intention. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 23. Necessity of Notice. Where material is furnished for a building on the order of the owner, instead of the contractor, formal statutory notice to such owner is not a condition precedent to the materialman's lien. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 23½. Showing Capacity of Complaint. In a consolidated action to foreclose mechanics' liens, where the lien claims of certain firms stated that they had respectively performed labor on the building, the claim of one stating that its members had performed certain labor in the construction of the house, and also had furnished certain materials used therein, a finding ranking such parties as materialmen or laborers is sufficiently sustained by the respective claims of lien. Hihn-Hammond Lumber Co. v. Elsom (Cal.) 1917C-798.
- 24. Sufficiency of Lien Statement. Under Wyo. Comp. St. 1910, § 3799, giving a lien to every person who performs labor upon, or furnishes material for, any building upon complying with the provisions of the chapter, and section 3803, requiring every subcontractor, within 90 days after the indebtedness accrues, to file in the office of the register of deeds of the proper county a just and true account of the demand due him after allowance of all credits, where it appeared that the subcontractor had a contract for the tin work, and for labor and material, including galvanized ironwork, steel ceilings, skylights, and glass, his lien statement, "Becker Hotel contract, tinwork, etc., \$1,292," was insufficient, since the abbreviation "etc." means "and other things," and since it was not sufficiently specific to enable one not a party to the contract to identify the things for which the lien was claimed. Becker v. Hopper (Wyo.) 1916D-1041.
- 25. Under Wash. Laws 1911, p. 376, providing that a materialman, to claim a lien, must give notice that he is furnishing materials and that a lien may be claimed, where a materialman mailed its notice to the owner stating that the material was being furnished to the general contractor at a street address which was correct, except that it failed to name the city, the contractor being correctly designated, such lien notice is sufficient, as it manifestly referred to a street and number in the particular city of the owner's and materialman's residence. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 26. Contents of Notice—Description of Property. Under Wash. Laws 1911, p. 376, providing that a materialman, to claim a lien, must give notice to the owner that he is furnishing materials and that a lien

may be claimed, where a materialman stated in its notice that it was furnishing material upon "lot 12, block 1, Thompson's University Add.," the description being sufficient as to the official name of the lot and block, except that the name of the city was omitted, the notice being in other respects sufficient, naming the contractor to whom the material was being furnished, such notice is sufficient, since the statute does not require that the premises be described in any particular manner; its requirements being satisfied when the notice is sufficient to inform one of ordinary intelligence to what premises it refers. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.

## c. Mailing.

27. Sufficiency of Mailing-Incorrect Ad-Under Wash. Laws 1911, p. 376, providing that every person furnishing materials to be used in construction work shall, within five days of delivery, deliver or mail to the owner a notice in writing claiming a lien, and that no materialman's lien shall be enforced unless the provisions of the act have been complied with, where a materialman mails its notice to the owner City," at "5519 First Avenue Northeast, his correct address being 1519 Fifteenth Avenue Northeast, City, the postoffice authorities correcting the address and the notice being received by defendant in due course, there is a compliance with the statute. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.

#### d. Verification.

28. Who may Take—Interested Person. The statute providing that the officer before whom verification is made must not be the attorney of either party, or otherwise interested in the event of the action or proceeding, applies only to pleadings which are to be filed in such action or proceeding, and not to the verification of a lien statement made when there was no proceeding pending. Becker v. Hopper (Wyo.) 1916D-1041.

# 7. WAIVER AND ESTOPPEL.

- 29. Waiver Agreement to Protect Against Liens. A contractor's bond, to indemnify the owner against any lien or claim for which the owner might become liable and which is chargeable to the contractors, to pay all indebtedness incurred by the contractors in carrying out the contract, and to complete the contract free from mechanics' liens, does not operate as a waiver of lien of the contractors themselves. Maynard v. Lange (Ore.) 1916E-547.
- 30. Attachment by Lien Claimant. The right to enforce a mechanic's lien is not lost by the fact that the lienor, by levying an attachment upon other property, there-

by obtains additional security. Martin v. Becker (Cal.) 1916D-171.

- 31. Waiver—Taking Additional Security. In view of Cal. Const. art. 20, § 15, declaring a mechanic's lien in favor of parties furnishing labor or material, and the law requiring notice thereof by record, the mere circumstance that a mechanic or materialman has taken additional security for his debt should not destroy his lien; nor should the conclusion that the additional security was meant to be a substituted security for the right to the lien be reached, unless it plainly appears from the nature of the contract that the security was in fact substituted, and not cumulative; and no argument for the destruction of a mechanic's lien can be based on the theory of its secrecy. Martin v. Becker (Cal.) 1916D-171.
- 32. Where a contract between the owner and the contractor requires the conclusion that they intended to waive the mechanic's lien, or where a contract is taken upon the same property, or where the payment to the lien claimant was to be made by a deed of part of the property, the contract is inconsistent with the right to a mechanic's lien, which will be denied. Martin v. Becker (Cal.) 1916D-171.
- 33. Waiver-Taking Additional Security. The taking of a new or additional security operates to destroy an existing lien, where the destruction is worked by virtue of a positive declaration of law, by the contract of the parties, by necessary intend-ment growing out of the agreement of the parties, in that the taking of the later security is inconsistent with the continued existence of the lien, and by the nature of the earlier or later security, as that it is concealed or undisclosed, giving rise to a situation where it would be fraudulent upon other claimants to permit the earlier lien to be held valid, whereupon equity interposes, and declares it to have been waived or lost by the taking of the later security, or in effect erects a bar to its enforcement. Martin v. Becker (Cal.) 1916D-171.
- 34. Waiver—Taking Mortgage Security. Under Cal. Code Civ. Proc. § 726, providing that there can be but one action for the recovery of any debt secured by a mortgage, a materialman, taking a mortgage on real property of the contractor in terms covering the contractor's debts for the material, may retain and resort to the security of the mortgage lien, and at the same time claim and foreclose a materialman's lien. Martin v. Becker (Cal.) 1916D-171. (Annotated.)
- 35. Estoppel of Subcontractor to Claim. A subcontractor having a lien for the reasonable value of labor performed and material furnished, not exceeding the original centract price, and required to prorate with other lien claimants of the same class in

case the claims exceeded the contract price, by taking the contractor's check for the amount of his lien and giving a receipt in full to enable the contractor to obtain money of the owner which otherwise would not have been paid, and which reduced the balance on the contract price to a sum less than the amount of lien, is estopped from enforcing such lien; the fact that some other lienor might have had a claim for a lien against the owner being unimportant. West v. Pinkston (Utah) 1916D-1065. (Annotated.)

- 36. In such case the subcontractor is entitled to recover against the owner only the balance of the contract price; the fact that the house when complete was worth more than such contract price being immaterial. West v. Pinkston (Utah) 1916D-1065. (Annotated.)
- 37. Waiver. Any lien claimant may waive his right to a lien, either by not filing a notice of his intention to claim a lien within the time prescribed by statute, or by informing the owner that he has received payment from the original contractor, or that he will not insist on his right to file a lien. West v. Pinkston (Utah) 1916D-1065.
- 38. Enforcement—Election of Remedies. The provision of Cal. Code Civ. Proc. § 726, that there can be but one action for the recovery of any debt secured by a mortgage, being intended for the benefit of the primary debtor, is one which, under the express provision of Civ. Code, § 3513, he may waive. Martin v. Becker (Cal.) 1916D-171.

## Notes.

Failure to comply with contract as defense to claim for mechanic's lien. 1916E-549.

Representations of subcontractor inducing payment to contractor as estopping former from claiming mechanic's lien, 1916D-1068.

Loss of mechanic's lien by taking mort-gage security. 1916D-179.

#### 8. PRIORITY.

- 39. Preference to Laborers and Materialmen Over Subcontractors. Cal. Code Civ. Proc. § 1194, declaring that laborers and materialmen shall have preference over subcontractors in participation in the amount applicable to mechanics' liens, is not violative of Const. art. 20, § 15, providing that mechanics, materialmen, artisans, and laborers of every class shall have a lien for labor or material furnished, since such provision serves merely to place on an equal footing mechanics, materialmen, artisans, and laborers who personally perform work. Hihn-Hammond Lumber Co. v. Elsom (Cal.) 1917C-798.
- 40. Payments Application. Where a lien was filed for tinwork, and the lienor

had also furnished hardware in the amount of \$375, for which no lien was filed, a payment of \$900 on account, made at a time when less than \$70 worth of the hardware had been furnished, should be applied on the lien account. Becker v. Hopper (Wyo.) 1916D-1041.

### 9. FORECLOSURE.

### a. Limitations.

- 41. Limitation of Action - Effect of Amendment. In a suit to establish a mechanic's lien, complainant did not make the trustees under a prior mortgage parties before the expiration of the ninety days from the service of notice of lien. An amended bill in which the trustees were named as defendants was filed. In that bill the complainant prayed that the court determine the interest, if any, held by the trustees, and that, if the mortgage be found a valid prior lien, complainant be permitted to subject the equity of defendants to the satisfaction of his claim. Shannon's Tenn. Code, § 4495, declares that at any time before trial new parties may be added. It is held that, as no relief was sought against the trustees, the notice required by section 3536, which is a condition precedent to a mechanic securing priority over the mortgage, not having been served, the amendment will be treated as relating back to the original bill, and the trustees cannot defeat the bill on the plea of limitation. Niehaus v. C. B. Barker Construction Co. (Tenn.) 1918B-23.
- Institution of Foreclosure Time. Rem. & Bal. Wash. Code, § 1138, declares that no lien shall bind the property for a period longer than eight calendar months after claim has been filed, unless action be commenced within that time to enforce such lien. Laws 1893, p. 407, § 1, passed at the same session of the legislature, declares that civil actions in the several superior courts shall be commenced by service of process. This section, as amended by Laws 1895, appears as Rem. & Bal. Code, § 220, providing that civil actions in the several superior courts shall be commenced by the service of a summons or by filing a complaint with the county clerk as clerk of the court, but unless service has been had on defendant prior to the filing of the complaint, plaintiff shall cause one or more of the defendants to be served personally. It is held that as the provision with respect to the duration of the lien is not a statute of limitation, but marks the extent of the lien, service of process on the owner of the property on which the lien is sought must be had within the eight-month period, notwithstanding the subsequent amendment of Laws 1893 (Rem. & Bal. Code, § 220) relating to commencement of actions. City Sash, etc. Co. v. Bunn (Wash.) 1918B-31.

## b. Parties.

- 43. Where a prior mortgage on the premises upon which complainant sought a mechanic's lien had been discharged save as to a few mortgage bonds, the holders of which could not be discovered, and the amount of such had been deposited for payment, a mechanic's lien against the premises cannot be defeated because the trustees under the mortgage who yet held the legal title were not made parties within ninety days after serving notice as required by law; for in such case the trustees were practically nominal parties. Niehaus v. C. B. Barker Construction Co. (Tenn.) 1918B-23. (Annotated.)
- 44. In such case the contractor and mortgagor cannot defeat the lien because the trustees of the mortgage, who held the legal title, were not brought in within the ninety-day period; for, while such parties were indispensable, yet, as no relief was sought against them, limitations do not apply any more than where the contractor is not originally made a party. Niehaus v. C. B. Barker Construction Co. (Tenn.) 1918B-23. (Annotated.)
- 45. Where one seeking a mechanic's lien failed to make the trustees of a prior mortgage parties, but later brought them in by amendment, such amendment does not, under Shannon's Tenn. Code, \$ 5237, declaring that the attachment laws shall be liberally construed, and plaintiff shall be permitted to amend any defect of form, destroy an attachment levied against the contractor and owner under the original bill. Niehaus v. C. B. Barker Construction Co. (Tenn.) 1918B-23. (Annotated.)
- 46. The decree in a mechanic's lien foreclosure suit, to which B. was a party defendant, under Ill. Mechanic's Lien Act (Hurd's Rev. St. 1913, c. 82, § 25), § 11, as a person having a claim to the premises, that R. was the owner of the premises in fee simple, and that W. was entitled to a lien thereon, and ordering sale of the premises free of all claims of the parties, is conclusive between the parties as to the matters actually determined, and to every other thing within the knowledge of the parties which might have been set up as ground for relief or defense, and is a bar to subsequent suit by B., based on the fact, known by him at the time of the lien suit, that R. had bought the premises with money embezzled by him from B., to have it decreed that the land was held in trust for B., and for that reason to have issuance of deed on sale under the decree in the lien suit enjoined. Bacon v. Reichelt (Ill.) 1918B-1. (Annotated.)
- 47. Under Utah Comp. Laws 1907, § 2914, providing that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, one who, under a contract for sale of land, by instalments, claims a lien prior and

- superior to mechanics' liens on the property, although not an indispensable party, is properly made a defendant in the proceeding to enforce the mechanics' liens, for the purpose of determining the amount and character of his claim. Cain v. Parfitt (Utah) 1918B-28. (Annotated.)
- 48. Under Wyo. Comp. St. 1910, §§ 3806, 3809, 3816, providing that in suits to enforce mechanics' liens the parties to the controversy shall be made parties, and constructive service may be had on any nonresident, and providing that, when the debtor has been served by publication, the judgment, if for plaintiff, shall be for the amount of the indebtedness to be levied out of the property charged with the lien. and requiring the contractor to defend an action to enforce a lien, and declaring that, pending the action, the owner may withhold from the contractor the amount of money for which a lien is filed, the contractor is a necessary party in a suit by a subcontractor to enforce a mechanic's lien in the sense that the owner may require that he be made a party, or by proper and timely objection defeat the action for failure to make him a party, though he is not an "indispensable party," who is one who must be brought into court before the controversy may be determined. Becker v. Hopper (Wyo.) 1918B-35. (Annotated.)
- 49. The failure of a subcontractor suing to enforce a mechanic's lien to make the contractor a party may be waived by the owner. Becker v. Hopper (Wyo.) 1918B-35. (Annotated.)
- 50. Wyo, Comp. St. 1910, § 3806, providing that in suits to enforce mechanics' liens the parties to the "controversy" shall be made parties, and those not made parties shall not be bound, adds practically nothing to what the law would be without it, for it leaves the matter of parties to be determined by the court, and does not make the contractor a necessary or indispensable party to a suit by one furnishing fabor and materials to the contractor; the word "controversy" being defined as a dispute arising between two or more persons in a civil action at law or in equity or a proceeding at law. Becker v. Hopper (Wyo.) 1918B-35. (Annotated.)
- 51. Where, in a suit to foreclose a subcontractor's lien, the petition named the contractor a party, but there was a failure te make him a party because of the insufficiency of constructive service on him while a nonresident, the owner, on discovering the facts, must raise the objection of failure to make the contractor a party by amended answer, setting forth defective constructive service on the contractor. Becker v. Hopper (Wyo.) 1918B-35.

(Annotated.)

52. The proceeding to establish and foreclose a mechanic's lien being one in rem, the owner of the property sought to be subjected to the lien is a necessary party, as jurisdiction of the property can be procured in no other manner, so such owner must be made a party within the time limited to institute action. City Sash, etc. Co. v. Bunn (Wash.) 1918B-31.

(Annotated.)

- 53. Consolidation of Proceedings—Effect—Party not Served in One Proceeding. Where several actions to foreclose a mechanic's lien were consolidated, the fact that the court had inherent power to consolidate the several actions does not relieve the several lien claimants of the duty to serve process on the owner of the premises, and by imputation make the service in favor of some of the lien claimants effective as to the others. City Sash, etc. Co. v. Bunn (Wash.) 1918B-31.
- 54. Mortgagor Necessity of Joining. Where a materialman took a mortgage on the contractor's real property in terms covering the debts of the contractor for the material so furnished him, the mortgagor is not a necessary party to an action to foreclose the materialman's lien, since the action is not against the primary debtor, the mortgagor, and has no bearing upon the primary contract. Martin v. Becker (Cal.) 1916D-171.
- 55. Nonjoinder of Parties Waiver. Where detendant owners, in a suit to foreclose mechanics' liens, allowed the trial court to proceed without requesting, until the end of trial, that their general contractor be made a party defendant, any right they had to insist upon such joinder is waived. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 56. Establishment—Necessary Parties—General Contractor. Under Rem. & Bal. Wash. Code, § 1129, providing that every contractor shall be held to be the agent of the owner for the purposes of the establishment of mechanics' liens, in a suit to foreclose mechanics' liens the general contractor who acted for defendant owner in building the house is not a necessary party defendant. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.

#### Note.

Necessary or proper parties to action to foreclose mechanic's lien. 1918B-3.

# c. Evidence.

57. Effect of Failure to Comply With Plans and Specifications. Under Ore. L. O. L. §§ 725, 726, providing that the evidence shall correspond with the substance of the material allegations and each party shall prove his own affirmative allegations, where the contract alleged in a suit to foreclose a contractor's lien provided for drainage from exterior moisture and seepage, which was omitted, and for an even and sufficient drainage to all floor drains

and traps, while the floor as fashioned would not completely drain to the outlets, the lien will not be enforced, but the contractors will be remitted to their remedy at law. Maynard v. Lange (Ore.) 1916E-547. (Annotated.)

# d. Findings and Judgment.

- 58. Foreclosure Decree as Adjudication. In an action to foreclose a contract for purchase of land because of a breach by failure of the purchaser to pay instalments, where plaintiff was made a defendant in a prior action by holders of mechanics' liens on the property, and answered, setting forth his contract, its breach, and claiming a lien prior and superior to the mechanics' liens, and obtained a judgment to the full extent of his claims, there is a binding adjudication of his claims, and he cannot bring another action to foreclose the lien. Cain v. Parfitt (Utah) 1918B-28.
- 59. Enforcement of Lien—Finding as to Payment. In a proceeding to enforce a materialman's lien against a bankrupt contractor and the owners, a finding that the contractor paid \$1,000 to a materialman on his general account, and not on account of material for a building for a certain owner, is a finding that the account for material furnished for that building was not reduced by any specific payment. Martin v. Becker (Cal.) 1916D-171.
- 60. Judgment in foreclosure is awarded that the property may be sold and the proceeds applied in payment of the amount secured by the lien, with costs, but no deficiency judgment as on the lien debt will be entered against defendant after the sale of the property. Moreau Lumber Co. v. Johnson (N. Dak.) 1917C-290.

(Annotated.)

# e. Costs.

- 61. Recovery not Exceeding Tender. A subcontractor entitled to enforce his lien only to the amount of the balance of the contract price which the owner had stood ready to pay, so that no action need have been brought to recover, is not entitled to costs against the owner. West v. Pinkston (Utah) 1916D-1065.
- 62. Hearing as to Costs. In a material-man's suit to enforce his lien, consolidated with a suit by another lien claimant, in which a party defendant, having no notice of the setting of the case for trial, and not appearing thereat, after adverse judgment moved for a new trial, the denial thereof, on the ground that the total amount due it had been deposited in court by one of the plaintiffs in full satisfaction of its claim, is irregular, in that such a party, entitled to prevail in the action, is not allowed to file a cost bill, and to establish the amount to which it is entitled in addition to its claim. Martin v. Becker (Cal.) 1916D-171.

- 63. Where the action was to foreclose mechanics' liens on a homestead, the inadvertent and erroneous presence in the decree of a provision that the purchaser of the premises at the sale should be let into possession, the error not being claimed by defendant, appellant, until his reply brief was filed, does not entitle him to his costs on appeal because of the modification of the decree correcting the error. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E-739.
- 64. On Appeal Correction of Trivial Error. Where, in a suit to foreclose mechanics' liens, the court drew a memorandum decision stating the amount and the interest to which each claimant was entitled, in which the interest allowed was slightly excessive because computed from the time of furnishing material, instead of from the time of filing liens, and further stating that the case would be further considered as to any claim of error in the opinion, and two weeks elapsed before the entry of final decree, without objection to the erroneous allowance of interest, the error is not of such substantial nature as to warrant the award of costs on appeal to defendant owner, the appellant. Brace, etc. Mill Co. v. Burbank (Wash.) 1917E—739.

### MEDICINE.

See Drugs and Druggists; Physicians and Surgeons.

#### MEETINGS.

Of stockholders, see Corporations, 85-100. Of city councils, see Municipal Corporations, 151, 152.

# MEMBERSHIP.

In joint-stock company, see Joint Adventures, 9, 10.

# MEMORANDUM.

Sufficiency under statute, see Frauds, Statute of, 14-18.

MEMORANDUM OF OBJECTIONS. See Pleading, 38.

## MEMORY.

Meaning, see Libel and Slander, 35,

# MENTAL SUFFERING.

In actions for defamation, see Libel and Slander. 154.

# MERCANTILE AGENCIES.

Reports of as evidence, see Evidence, 97. Publication of false report, see Libel and Slander, 28, 54, 55, 100.

# MERGER.

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#### MERGER OF ESTATES.

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## MERITORIOUS DEFENSE.

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# MILITIA.

See Army and Navy; Martial Law; War. Reduced rates of fare, see Carriers of Passengers, 8-10.

Courts-martial, see Courts, 1, 19, 20. Judicial notice that state pays for travel of, see Evidence, 17.

- 1. Right of Parent to Release of Minor. Where a minor over sixteen and under eighteen years of age enlists in the National Guard without the consent of his parents, such minor becomes a de facto and de jure soldier, subject to the jurisdiction of the military authorities and liable to be tried by a court-martial for a military offense, notwithstanding his parents exercised their right to avoid the enlistment. Hoskins v. Dickerson (Fed.) 1917C-776. (Annotated.)
- 2. As Rev. St. § 761 [3 Fed. St. Ann. (2d ed.) 469], commands the court, on hearing of the issues raised by petition for writ of habeas corpus and the return thereto, to dispose of the parties as law and justice require, the court will not, on habeas corpus brought by the parent of a minor over sixteen and under eighteen to avoid his enlistment in the National Guard, command his immediate surrender by the

military authorities, where by reason of his enlistment he committed a military offense, but will allow his retention by the military authorities so that he may be punished by the proper military tribunal for the military offense; the court issuing the habeas corpus having no jurisdiction over such offense. Hoskins v. Dickerson (Fed.) 1917C-776. (Annotated.)

- 3. Enlistment of Minor-Parental Consent. National Defense Act June 3, 1916, c. 134, § 27, 39 Stat. 185 (Fed. St. Ann. Pamph. Supp. No. 7, p. 63), declaring that no person under the age of eighteen shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian, providing that such minor has such parents or guardian entitled to his custody and control, applies to an enlistment in the National Guard called into the service of the United States, and is not applicable solely to enlistment in the regular army, though the section is found among provisions applicable to the regular army, the expression "enlisted or mustered into service of the United States" showing an intention of Congress that the section should apply to the National Guard, and hence the father of a minor under the age of eighteen years, who without his written consent enlisted in the National Guard, is entitled to avoid the enlistment. Hoskins v. Dickerson (Fed.) 1917C-776.
- 4. Liability of Officer to Subordinate—Recommendation Against Promotion as Libel—Privilege. Where a letter respecting the advancement of a sergeant of the Connecticut National Guard is sent by the colonel to the captain for explanation or indorsement, his indorsement thereon as to the sergeant's fitness for promotion is privileged, and he cannot be held for libel in the absence of "malice," which means being actuated by an unjustifiable motive. Gray v. Mossman (Conn.) 1917C-27.
- (Annotated.)
  5. Liability of Officers for Tort. In an action against officers of the state militia for destruction of a stock of liquors, where defendants admit plaintiff's ownership of the property and their destruction of it, they render themselves liable in nominal damages at least, unless they can offer legal justification for their act. Herlihy v. Donohue (Mont.) 19170-29.

(Annotated.)

- 6. Where plaintiff alleges and proves his ownership in liquors, their destruction by defendants, officers of the state militia, without his consent, and his damages consequent upon the act, he makes out a prima facie case. Herlihy v. Donohue (Mont.) 1917C-29. (Annotated.)
- 7. Where a militia officer, during labor troubles, orders the closing of saloons, except between 8 A. M. and 7 P. M., under penalty of destruction of the stock of

liquors, and a saloon keeper fails to observe the order, subordinate militia officers, who merely follow their superior officer's commands in destroying the offending saloon keeper's stock, are not subject to civil liability since the order for the destruction of the property is one which the commanding officer might lawfully make if the circumstances of the case warranted it, and, as it is valid on its face, the subordinate officers cannot refuse obedience until they have investigated the legality of the order. Herlihy v. Donohue (Mont.) 1917C-29. (Annotated.)

- 8. Where a county is declared to be in a state of insurrection on account of labor troubles, but rioters in a city are not threatening to break into a saloon to obtain intoxicants, so that destruction of its stock is not necessary to prevent excesses, such destruction by militia officers for violation of their commanding officer's order that saloons shall close, except from 8 A. M. until 7 P. M., is not a valid exercise of the state's "police power," its power to regulate and control every act or thing within its jurisdiction which tends to subvert the government, injure the public, destroy the morals of the people, or disturb the peace and good order of society, delegated by the governor, the supreme executive power of the state, to the militia Herlihy v. Donohue (Mont.) 1917C-29. (Annotated.)
- 9. Where the governor declares a county to be in a state of insurrection on account of labor troubles, and a militia officer orders the closing of saloons in a city, before any punishment can be inflicted upon a saloon keeper for disobeying the order, notice to him of the charge against him, opportunity for him to prepare and present his defense, and an adjudication of his guilt, by some competent tribunal are indispensable. Herlihy v. Donohue (Mont.) 1917C-29. (Annotated.)
- 10. Officers of the state militia, who destroy a saloon keeper's stock of liquors for violation of the closing order of the officer commanding in the district, declared to be in a state of insurrection on account of labor troubles, cannot justify their act as a military necessity where the liquors are not needed for or devoted to the use of the troops, and the destruction is not necessary to prevent the liquor falling into the hands of the enemy; no state of war existing. Herlihy v. Donohue (Mont.) 1917C-29. (Annotated.)
- 11. Order of Superior as Justification. A subordinate military officer is not rendered personally liable for injury resulting to private property from executing a lawful order issued by the governor as commander in chief of the military forces. Hatfield v. Graham (W. Va.) 1917C-1.

(Annotated.)

12. Calling Into Service of United States
-Failure to Take Federal Oath. Const.

art. 1, \$8 (8 Fed. St. Ann. 652, 654), declares that Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion, and to make provision for organizing and disciplining the militia and for governing such part thereof as may be employed in the service of the United States. Dick Law Jan. 21, 1903, c. 196, 32 Stat. 775, as amended by Act May 27, 1908, c. 204, 35 Stat. 399 (Fed. St. Ann. 1909 Supp. 346), authorized the President to call into service the state militia. Act June 3, 1916 (Fed. St. Ann. Pamph. Supp. No. 7, 40), for the national defense, establishing the National Guard, and intending to increase the efficiency of the militia, provides in section 58 that the National Guard shall consist of the regular enlisted militia armed and equipped as provided by the act. Section 70 provides that enlisted men in the National Guard of the several states and territories serving under enlistment contracts containing an obligation to defend the constitution of the United States and to obey the orders of the President, shall be recognized as members of the National Guard under the provisions of the act for the unexpired portion of their enlistment contracts, and that, when any such enlistment does not contain such obligation, the enlisted man shall not be recognized as a member of the National Guard until he shall have signed a new enlistment contract, etc. Members of the Massachusetts militia, who had taken an oath to faithfully observe and obey the laws for the regulation of the government of the volunteer militia of the commonwealth, and to support the constitution of the United States, were called into active service by the President to repel invasion by a foreign foe. It is held that, as the latter statute should receive a liberal construction, members of the Massachusetts militia who did not elect to sign a new enlistment contract are nevertheless, until the expiration of their terms, subject to being called into active service to repel invasion or put down insurrection, etc. Sweetser v. Emerson (Fed.) 1917B-244. (Annotated.)

- 13. What Constitutes Enlistment—Oath—Evidence of Taking Oath. Considering together the several provisions of La. Act 191 of 1912, upon the subject of enlistment, the conclusion is well-nigh irresistible that, in the contemplation of that statute; the taking of the prescribed oath is the determinative act. But, without saying that no one can be held to have enlisted without having taken such oath, the court finds that the evidence here adduced, of acts and omissions by relator, is insufficient to establish such intention or consent on his part. State v. Long (La.) 1917B—240.
- 14. Enlistment as Contract Imposing Additional Duties. Enlistment in the ac-

- tive militia of the state, save in times of war or public danger or disturbance, is voluntary, and is a "contract," and the state has no power, by the repeal of the law under which it was entered into (and which is the measure of the rights and obligations of the parties thereto) and the substitution of another law in its stead, to impose upon the other contracting party more onerous conditions and obligations to which he has not given his assent. State v. Long (La.) 1917B-240. (Annotated.)
- 15. Jurisdiction Breach of Peace. Where, during mobilization of state militia, at the time of the Mexican trouble, a company of soldiers marching to a meeting for the purpose of encouraging enlistments pushed its way through the crowd there gathered, but it is not shown that it was done violently, or that the prosecuting witness was even touched, or that there was malice, wantonness, or criminal intent, the military authorities, and not the state courts, have authority to try members of the company for such alleged breaches of the peace. In re Wulzen (Fed.) 1917A—274. (Annotated.)
- 16. If a member of the militia is charged with disorderly conduct in violation of a municipal ordinance, a paramount remedy is provided for by punishment by the military authorities. In re Wulzen (Fed.) 1917A-274. (Annotated.)
- 17. Although military authorities may have priority to try alleged offenses against state law or municipal ordinances, it does not necessarily follow that the victims of such offenses may not by proceedings in the state courts secure redress. In re Wulzen (Fed.) 1917A-274.
- (Annotated.)

  18. If military authorities have the right to try members of the militia for violations of state law or municipal ordinances, it is by virtue of a federal law, and if there is such a law it is paramount; nor does it deprive citizens of any rights under state law. In re Wulzen (Fed.) 1917A-274.
- 19. Criminal Jurisdiction of State Court, Under the Habeas Corpus Act (3 Fed. St. Ann. 162, et seq. Comp. St. 1913, §§ 1279-1293), a federal court may issue a writ of habeas corpus to inquire into the cause of detention of a member of the state militia held by a state on a criminal charge, if the petitioner alleges that the alleged offense was committed in the performance of his duty as a soldier of the United States, and the court may determine summarily whether such allegation is true, and, if true, may discharge the prisoner on the ground that the state court is without jurisdiction. In re Wulzen (Fed.) 1917A-274. (Annotated.) Notes.

Enlistment in militia as contract. 1917B-244.

Criminal jurisdiction of state court over member of National Guard. 1917A-279.

Power of federal government with respect to state militia. 1917B-250.

Civil or criminal liability of soldier or militiaman for injury to person or property. 1917C-8.

#### MILL RACE.

Duty to guard children, see Negligence, 24.

# MINES AND MINERALS.

 Statutory Regulation of Mining Operations, 601.

Conveyance and Reservation of Minerals, 601.

Mining Leases and Contracts, 601.
 a. Construction and Operation, 601.

b. Forfeiture and Abandonment, 601.

4. Tenancy in Common, 601.

 Injury to Property from Working of Mine, 602.

See Adverse Possession, 15-18.

Injury to adjoining property, see Adjoining Landowners, 12-17.

Condemnation of mineral land, see Eminent Domain, 34.

No partition of mines in kind, see Partition, 5, 8.

# 1. STATUTORY REGULATION OF MINING OPERATIONS.

1. Legal Meaning of "Any." Ala. Acts 1896-97, p. 1099, was entitled "An act to regulate the mining of coal in Alabama," and section 27 of that act provided that no boy under the age of 12 years should be employed to work or labor in or about the mines in the state. Code 1907, § 1035, which revised that act, provided that no boy under 14 should be employed in any mine in the state. Held, that the substitution in the Code section of the word "any," which in its ordinary significance means "all," "every," for the word "the" in the statute of 1897 indicated a legislative intent that the Code section should not be limited to coal mines as was the original statute by reason of its title. Cole v. Sloss-Sheffield Steel, etc. Co. (Ala.) (Annotated.) 1916E-99.

Note.

Meaning of "all" as used with respect to minerals. 1917E-70.

# 2. CONVEYANCE AND RESERVATION OF MINERALS.

2. Effect of Severance of Mineral and Surface Rights. Possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface, is not a possession of the underlying severed mineral interest, nor does such possession inure to the owner of the mineral; distinct estates being created by the severance. Northeut v. Church (Tenn.) 1918B-545. (Annotated.)

3. The grantor of minerals by implication of law conveys the right to obtain access to them through the surface, and against such purpose does not hold the surface adversely. Northcut v. Church (Tenn.) 1918B-545. (Annotated.)

#### Note.

Resulting rights of mine owner after severance of surface and mineral estates. 1918B-550.

# 3. MINING LEASES AND CONTRACTS.

Construction and Operation.

- 4. If such lease specifically provides that the amount to be paid for delay in drilling may be paid by the lessee to a bank named in the lease to the credit of the lessor, and payment is made in accordance with the terms of the lease, the lessor cannot avoid the effect of such payment by refusing to withdraw the sum from the bank to which it was paid by his direction. When so paid said fund became the property of the lessor and can be lawfully paid to no one except upon his order. Kachelmacher v. Laird (Ohio) 1917E-1117. (Annotated.)
- 5. Mining Lease—Nature of Instrument. Instruments called mining leases involved in this action are leases in fact as well as in name, and the amounts stipulated to be paid by the lessees are rents. State v. Royal Mineral Association (Minn.) 1918A-145.

#### Note.

Covenants in mining leases for diligent prosecution of work. 1917E-1120.

# b. Forfeiture and Abandonment.

- 6. Mining Lease—Effect of Failure to Prosecute Work. There being an express condition written in an oil and gas lease as to the right of the lessor to declare forfeiture thereof for delay in drilling the first well, no covenant authorizing forfeiture for such delay can be implied in direct opposition to the plain provisions of the written contract. Kachelmacher v. Laird (Ohio) 1917E-1117. (Annotated.)
- 7. Where a lease of land for ten years for oil or gas purposes provides that the lease shall be void if no well is drilled within four months from the date thereof unless the lessee shall pay the lessor the sum of fifty dollars for each and every year that the drilling of such well is delayed, payment of such sum by the lessee to the lessor, according to the terms and provisions of the lease, prevents forfeiture and continues the lease in force during the year for which such payment is made. Kachelmacher v. Laird (Ohio) 1917E-1117.

(Annotated.)

# 4. TENANCY IN COMMON.

8. Extraction of Ore by Cotenant—Measure of Damages. The measure of damages for the reckless, wilful, or intentional

taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser, without allowance to him for the labor bestowed or expense incurred in removing it and preparing it for market. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571. (Annotated.)

#### Note.

Right of tenant in common to remove minerals from soil. 1918B-580.

# 5. INJURY TO PROPERTY FROM WORKING OF MINE.

- 9. Injury from Ordinary Mining Operations. The defendant is not liable for drying up of a surface spring caused by his mining, if done in the usual and ordinary way. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.
- 10. Unguarded Shaft—Liability of Owner. The owner of a mining claim is not liable to the owner of live stock for damages resulting from live stock running at large falling into a pit, prospect hole, or mining shaft left open by the miner, and the locator or owner of mining claims is not bound by law to fence or inclose the same in order to protect live stock running at large on the public domain from being injured by falling into the same. Strong v. Brown (Idaho) 1916E—482.

  (Annotated.)

11. Shaft as Nuisance. It is lawful for the miner to sink holes, pits, and shafts on mineral lands, and to do so is not of itself an act of negligence, and an excavation, pit, or shaft made by a miner in the prosecution of his work is not of itself a nuisance. Strong v. Brown (Idaho) 1916E-482.

## Note.

Liability of mine owner or operator for injuries resulting from unguarded mining excavations. 1916E-484.

#### MINGLING GOODS.

See Confusion.

### MINIMIZING DAMAGES.

See Contracts, 76, 77.

#### MINING LEASE.

Defined, see Mines and Minerals, 5.

#### MINISTERIAL ACTS.

Mandamus to compel, see Mandamus, 8, 9, 17, 18.

MINORS.

See Infants.

# MISCARRIAGE.

Use of drug to procure, see Abortion, L. Caused by shot, see Homicide, 3.

MISCONDUCT OF COUNSEL.
See Prosecuting Attorneys, 2.

## MISDEMEANOR.

Defined, see Criminal Law, 7.

## MISLAID PROPERTY.

Rights of finder, see Lost Property, 1, 3-5.

#### MISREPRESENTATION.

See False Pretenses; Fire Insurance; Fraud; Insurance; Life Insurance.

MISREPRESENTATIONS.

See Fraud, 1-7.

MISJOINDER OF PARTIES.
See Parties to Actions.

#### MISTAKE.

As defense, see Assault, 5.
Of attorney as ground for vacating judgment, see Judgments, 42.
Payment by mistake, recovery, see Payment, 11, 12.

## MISTAKE OF FACT.

As affecting validity of will, see Wills, 102, 103.

### MISTAKE OF LAW.

As invalidating compromise, see Compromise and Settlement, 2.

# MITIGATION OF DAMAGES.

See Assault, 15-17; Damages, 3. Bad reputation of plaintiff, see Libel and Slander, 157-160.

#### MOBS,

See Unlawful Assembly. Suppression by militia, see Militia, 8.

- 1. Effect of Knowledge or Co-operation of Officers. A city is not relieved from liability for mob violence because its officers were cognizant of the purpose of the mob before the illegal action was taken, nor even where they co-operated with the mob. Blakeman v. Wichita (Kan.) 1916D-188.
- 2. The fact that these persons did not voluntarily come into the jail does not prevent their action from being that of a mob, nor is the primary purpose for which they assembled material if they in fact formed and executed the unlawful purpose after they were brought together. Blakeman v. Wichita (Kan.) 1916-188. (Annotated.)

3. Liability for Acts of Mob-Prisoners in Jail as Mob. A large number of persons confined together in a city jail, who joined together to whip another prisoner, and who did severely whip and injure him, are held to be a mob or riotous assemblage within the meaning of the statute making cities liable for damages resulting from mob violence. Blakeman v. Wichita (Kan.) (Annotated.) 1916D-188.

# MODIFICATION.

Of injunction, see Injunctions, 40.

MODIFICATION OF CONTRACTS. See Contracts, 44.

#### MONEY HAD AND RECEIVED.

1. Bills of Particulars-When Required -Action for Reimbursement of Expenses. In an action by a son against his father's estate for reimbursement for expenses in procuring his brother's parole from prison, plaintiff may be required to file a bill of particulars showing his claim in detail. Gordon v. Gordon's Adm'r. (Ky.) 1917D-

### MONEY LOANED.

Liability of infant, see Infants, 6.

## MONKS.

See Religious Societies, 1-4,

# MONOMANIA.

Defined, see Wills, 59.

## MONOPOLIES.

- 1. At Common Law, 603.
- 2. Under Statutes, 604.
  - a. Construction of Statutes, 604. b. Combination Within Statutes, 604.

  - c. Actions, 604.

Supply of fuel by city to thwart monopoly, see Municipal Corporations. 39. Prevention, see Public Service Commissions, 22.

# 1. AT COMMON LAW.

- 1. What Constitutes. A monopoly is created when, as a result of efforts to that end, businesses are so concentrated that one man or set of men practically control the production and disposition of a commodity to the exclusion of competition. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.
  - (Annotated.)
- 2. For a corporation to institute numerous suits against competitors for the violation of patents, some of which had expired, where the purpose is to stifle competition by harassing and wearing out competitors, is under competition. Attor-

- nev General v. National Cash Register Co. (Mich.) 1916D-638.
- 3. A corporation, which for the purpose of securing a monopoly has its agents harass and interfere with the salesmen of competitors, is guilty of unfair competition. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.
- 4. Unfair Competition to Obtain Monop-A corporation, which for the purpose oly. of obtaining a monopoly induces purchasers from its competitors to repudiate their contract, is guilty of unfair competition. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.
- Restraint on Future Occupation Validity. A contract by a person employed as draftsman and engineer that he will not engage as principal or agent in a business similar to that of his employer anywhere in the United Kingdom within seven years after the termination of the employment is unreasonable and void. Herbert Morris v. Saxelby (Eng.) 1916D-(Annotated.)
- 6. Necessity of Regulating Competition. Unregulated competition is the tool of unregulated monopoly. Idaho Power, etc. Co. v. Blomquist (Îdaho) 1916E-282.
- 7. Combination to Raise Prices. Where a conspiracy to raise the prices of necessaries of life is shown, it is no defense that a person, not one of the conspirators, sold the same commodity at as high a price as the conspirators had agreed on, or that one might think that the price agreed on was reasonable, or that the commodity could not be produced profitably at less than the price agreed on, in view of the conditions under which the conspirators carried on the business. State v. Craft (N. Car.) 1917B-1013. (Annotated.)
- 8. A combination by dealers in a necessary of life to raise, by agreement, the price thereof is indictable at common law. State v. Craft (N. Car.) 1917B-1013. (Annotated.)
- 9. Control by Manufacturer of Reselling Price -- Colorable License as Sale. The illegal function of controlling the price at which a patented machine may be resold after the manufacturer has been paid therefor, and after it has passed into the hands of dealers and the public, is the sole purpose that can be attributed to the attaching of a notice to such machine which states that such machine is licensed for the term of the patent having the longest time to run, and that it may not be delivered to any unlicensed member of the general public until "the full license price" stated in the notice is paid, since this notice is not intended as a security for any further payment, as the full price, called a "royalty," is paid before the manufacturer parts with the possession of the machine, and is not to be used as a

basis for keeping the manufacturer informed as to the condition or use of the machine, as no report of any character is required from the "ultimate user" after he has paid the stipulated price, and since such notice, notwithstanding its apparently studied avoidance of the use of the word "sale," and its frequent reference to the word "use," omits the most obvious requirements for securing a bona fide enforcement of the restrictions of the notice as to "use," and under it, even by its own terms, the title to the machines ultimately vests in the "ultimate users" without any further payment or action on their part upon the expiration of patents which, so far as the notice shows, may or may not be incorporated in the machine. Straus v. Victor Talking Machine Co. (U. S.) 1918A-955. (Annotated.)

## 2. UNDER STATUTES.

### a. Construction of Statutes.

- 10. What Constitutes "Commodity." An agreement to fix the price of laundering, not being an agreement to fix the price of a "commodity," "convenience" or "repair," as these words are used in the Ark. antitrust law (Acts 1905, p. 1, § 1), prohibiting combinations to fix the price of any commodity, convenience, or repair, is not unlawful. State v. Frank (Ark.) 1916D-983. (Annotated.)
- 11. Meaning of "Anything." An agreement to fix the price of laundering is not included within the terms "any article or thing whatsoever," as used in the Ark. anti-trust law (Acts 1905, p. 1, § 1), prohibiting unlawful combinations to fix the price of any article of manufacture, mechanism or merchandise, commodity, convenience, repair, any product of mining, or "any article or thing whatsoever"; the words quoted taking their meaning, under the doctrine ejusdem generis, from the thing specifically mentioned before. State v. Frank (Ark.) 1916D-983.
- 12. Strict Construction—Anti-trust Law. The Ark. anti-trust act (Acts 1905, p. 1, § 1), being highly penal in nature, must be strictly construed. State v. Frank (Ark.) 1916D-983.
- 13. Agreement not to Engage in Business—Permissible Scope of Covenant. By express provision of S. Dak. Civ. Code, § 1278, one selling the good will of a business may agree with the buyer not to engage in a similar business, in a specified county, city, or part thereof, so long as the buyer, or a person deriving title to the good will from him, carries on a like business therein. Public Opinion Pub. Co. v. Ransom (S. Dak.) 1917A-1010.
- 14. Under S. Dak. Civ. Code, § 1278, authorizing agreement by one selling the good will of a business not to engage in a similar business, on the sale of a business

and the good will thereof by a corporation, all those who, owing to their real control of such good will, are necessary to any real transfer thereof, and who, owing to their ownership of stock in the corporation, will be directly benefited by any increase in price received for such good will, may bind themselves not to become competitors. Public Opinion Pub. Co. v. Ransom (S. Dak.) 1917A-1010.

# b. Combination Within Statutes.

- 15. In order to bring a foreign corporation within Mich. Pub. Acts 1905, No. 329, \$4, declaring that no foreign corporation organized to establish or maintain a monopoly shall do business in the state, it is not necessary to show that the organizers of such a corporation, which had a practical monopoly, bound themselves to establish and maintain it; it being sufficient to show that they acted together in pursuance of that object. Attorney General v. National Cash Register Co. (Mich.) 1916D-638. (Annotated.)
- 16. A combination of ocean carriers to restrain competition is within the U. S. Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), although it was formed in a foreign country, where it affected the foreign commerce of the United States, and was put into operation in the United States by the carriers' local managers, who were more than simply agents, being participants in the combination. Thomsen v. Cayser (U. S.) 1917D-322. (Annotated.)
- 17. Violation of Sherman Act-Combination of Ocean Carriers. Ocean carriers between New York and South African ports violate the prohibition of the Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), against combinations in restraint of foreign trade or commerce, by uniting, with the intention and result of restraining competition, in establishing a uniform freight rate which included a socalled "primage charge," to be refunded subsequently to shippers upon condition that they should ship exclusively by the lines of the combining carriers, and should not, directly or indirectly, be interested in any shipment by other vessels and upon the further condition (afterwards revoked) that the consignees must also exhibit the same loyalty to the combining lines. Thomsen v. Cayser (U.S.) 1917D-322.

## (Annotated.)

#### c. Actions.

18. Where the articles of a foreign corporation did not disclose any intention to do unlawful business and a judgment of ouster might injure the patrons of the corporation within the state, the corporation, though found guilty of maintaining a monopoly contrary to Mich. Pub. Acts 1905, No. 329, § 4, should be fined instead

of ousted. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.

- 19. Foreign Corporation—Ouster for Monopoly—Discretion of Court. Where upon information in the nature of a quo warranto, a foreign corporation is found guilty of a violation of Mich. Pub. Acts 1905, No. 329, § 4, providing that no foreign corporation maintaining or organized for the purpose of establishing and maintaining a monopoly shall be allowed to do business in the state, the corporation may, in the discretion of the court, be fined under Comp. Laws, § 9961, providing either for forfeiture of corporate franchises or fine, if in the discretion of the court a judgment of ouster is not necessary. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.
- 20. Evidence of Monopoly Sufficient. Upon information in the nature of a quo warranto to forfeit the charter of a foreign corporation, under Mich. Pub. Acts 1905, No. 329, § 4, declaring that no foreign corporation maintaining a monopoly shall do business in the state, evidence held sufficient to show that respondent was maintaining a monopoly. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.
- 21. In such proceeding evidence of the acts of the corporation's agents and officers tending to stifle competition is admissible, for the corporation is bound by the acts of its officers. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.
- 22. Evidence of Existence. Upon information in the nature of a quo warranto against a foreign corporation to forfeit its license, under Mich. Acts 1905, No. 329, § 4, denying foreign corporations which maintain monopolies permission to do business in the state, evidence showing the monopolistic tendency of the corporate predecessors of the present respondent is admissible, where the several corporations have at all times been controlled by the same stockholders and officers. Attorney General v. National Cash Register Co. (Mich.) 1916D-638.
- 23. Action on Collateral Contract—Setoff. In an action on an account by a member of an unlawful combination under section 6391, Ohio General Code, for goods sold the price of which is advanced as a result of the unlawful combination, a defendant injured in his business by reason of the advance in price of the goods purchased by him from such member, may set up by way of counterclaim or set-off the damages allowed by section 6397, General Code. Guyton v. Eastern Electric Co. (Ohio) 1916D-944. (Annotated.)
- 24. Instructions. Error, if any, in failing to charge the jury in an action for

threefold damages, brought under the Antitrust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), § 7, by shippers egainst ocean carriers, that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable, does not demand a reversal where the record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all the elements of judgment, and careful instructions by the court for their estimate. Thomsen v. Cayser (U. S.) 1917D-322.

25. It cannot be said that the jury were permitted to consider supposititious profits as elements of damage in an action for three-fold damages, brought under the Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), § 7, by shippers against ocean carriers who had combined to restrain competition, where there were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury, who were told that they ought not to allow any speculative damages, and were not required to guess as to what damages plaintiffs claimed to have sustained, and that the burden of proof was upon plaintiffs, and that from the evidence the jury should be able to calculate the damages-especially where plaintiffs alleged an overcharge, and the verdict of the jury was for the amount of such overcharge and interest. Thomsen v. Cayser (U. S.) 1917D-322.

26. The fact of combination need not be submitted to the jury in an action for threefold damages, brought under the Antitust Act of July 2, 1890 (26 Stat. L. 209, c. 617, 7 Fed. St. Ann. 336), § 7, where there is no conflict in the evidence, and nothing, therefore, for the jury to pass upon. Thomsen v. Cayser (U. S.) 1917D—322.

27. Remedies of Person Injured—Sherman Anti-trust Act—Recovery of Treble Damages. Shippers who have been compelled to pay an unreasonable freight rate because of a combination of ocean carriers to restrain competition, contrary to the Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), have suffered damage to the amount of the excess over what was a reasonable rate, within the meaning of § 7 of that act, giving a cause of action to any person injured in his person or property by reason of anything forbidden by the act, and the right to recover threefold damages sustained by him. Thomsen v. Cayser (U. S.) 1917D—322.

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# 1. NATURE AND FORM IN GENERAL.

- 1. Sufficiency-Defect in Description. mortgage which did not give the range number of lands included is insufficient to pass the legal title. Neas v. Whitener-London Realty Co. (Ark.) 1917B-780.
- 2. Nature of Mortgage—Liability for Deficiency. A mortgage is, in equity, a hypothecation or pledge of property as security for a debt, and its effect is to leave the mortgagor personally liable for the balance of the debt, if, on foreclosure, the property fails to yield a sufficient sum to pay it in full. (Ala.) 1917C-981. Stollenwerck v. Marks
- 3. Subscribing Witness—Stockholder in Mortgagee Corporation. A stockholder, though incompetent to take an acknowledgment of a mortgage as a notary, because he is a stockholder of the mortgagee corporation, is not incompetent as a non-official witness to the signature of the mortgagor. Peagler v. Davis (Ga.) 1917A-232.(Annotated.)

# 2. EQUITABLE MORTGAGES.

4. Subrogation—As Between Mortgagees -First Mortgage Paid by Proceeds of Second. Where part of the proceeds of a loan secured by a wife's mortgage, which was invalid for want of joinder by the husband, was applied to the payment of a prior mortgage, in. which and in the note secured the husband had joined, and on which he was personally liable, equity will regard the prior mortgage as subsisting and the subsequent mortgagee as the equitable assignee thereof, and subrogate him to the prior mortgagee's rights against the husband. Gato v. Christian (Me.) 1917A-592.

5. Requisites of Equitable Mortgage—Indebtedness of Mortgager to Mortgagee. Where there is no debt due from a grantor to the grantee in a deed absolute in form, the deed is not a mortgage. Stollenwerck v. Marks (Ala.) 1917C-981.

# 3. MORTGAGE BY CONVEYANCE ABSOLUTE IN FORM.

- 6. Absolute Deed as Mortgage. The general rule is that though land be conveyed by debtor to creditor by deed absolute, to secure the repayment of a loan, but with a collateral contract for the repurchase and reconveyance of the property, the deed and contract will be treated as a mortgage and not an absolute conveyance. But the deed and contract involved in this case, considered in connection with the objects and purposes of the parties, as disclosed by the record, and their subsequent transactions and dealings relating to the property, did not constitute Mankin v. Dickinson (W. mortgage. Va.) 19Ĭ7Ď-120.
- 7. Deed as Mortgage in Favor of Third Person. A purchaser unable to complete the contract of purchase except with the assistance of a third person made a contract with the third person, who agreed to pay the vendor the balance of the price and an additional sum to the purchaser, on receiving a deed conveying the property to him. The purchaser bound himself to execute a warranty deed conveying the property to the third person in fee, free property to the third person in fee, from incumbrances, and to pay interest on the amount advanced by the third person and any sums which he might pay for taxes, street improvement assessments, insurance, etc. It was agreed that if the third person should sell the premises within a specified time he should pay one-half of the amount received above the amount advanced, and if he should sell the property for less than the amount advanced, with the approval of the purchaser, the contract was modified so as to permit a conveyance of the property to a railroad company in consideration of a conveyance by the company to the third person of other property, which should stand in lieu of the property acquired under the original contract. It is held that the transactions did not create a mortgage, because the purchaser was not indebted to the third person. Stollenwerck v. Marks (Ala.) 1917C-981. (Annotated.)
- 8. Where defendants bought property at an execution sale with money furnished by plaintiff upon an agreement to hold the title for plaintiff, an equitable mortgage for plaintiff's benefit arose, and he is entitled to a conveyance upon paying defendants the amount found due them. Hutchings v. Clerk (Mass.) 1917C-979.

  (Annotated.)

9. Sufficiency of Evidence to Establish. In a suit to redeem land from an alleged equitable mortgage, evidence is held to be insufficient to show that a deed absolute on its face was, in fact, a mortgage. Jackson v. Maxwell (Me.) 1917C-966.

- 10. One asserting that a deed absolute on its face was in reality an equitable mortgage has the burden of proving that fact by clear, certain, conclusive, and unequivocal evidence. Jackson v. Maxwell (Me.) 1917C-966.
- 11. Equitable Mortgage. The holder of the absolute title to land may convey to another by absolute deed and make the deed an equitable mortgage in favor of a third person. Jackson v. Maxwell (Me.) 1917C-966. (Annotated.)
- 12. Where a vendee of land assigns his contract to a third person as security for payments to be made on the contract, and the assignee, on completing the payments, takes from the vendor an absolute deed, the deed will stand as a mere security for the moneys advanced. Henry v. Britt (III.) 1917C-977. (Annotated.)

Construction of absolute deed as equitable mortgage in favor of third person. 1917C-970.

# 4. PROPERTY AND TITLE CON-VEYED.

- 13. Priority Over Liens Purchase Money Mortgage. A mortgage given at the time of the purchase of real estate to secure the purchase money, whether given to the vendor or to a third person, who, as a part of the same transaction, advances the purchase money, has preference over all judgments and liens against the mortgagor. Western Tie, etc. Co. v. Campbell (Ark.) 1916C-943. (Annotated.)
- 14. Priority—As Between Purchase-Money Mortgage and Deed. A mortgage given at the time of the purchase of the mortgaged land by the mortgagor, to obtain the money used by him to pay the price, and thereby procure the deed, has priority over a deed made by the mortgagor at a time when he had no title, to a grantee who knew of the negotiations for the mortgage and had agreed to take the property subject to it, although the only reference to the mortgage in the deed is in an exception to the warranty of title, Warren Mortgage Co. v. Winters (Kan.) 1916C-956. (Annotated.)
- 15. Property'Subject—Proceeds of Property—Award in Condemnation Proceeding. The lien of a mortgage extends to an award for the mortgaged property in condemnation proceedings. Connell v. Kaukauna (Wis.) 1918A-247.
- 16. Property Subject—Property Consumable in Use. A mortgage upon property

necessarily consumable in its use, where possession and use is reserved in the grantor, is fraudulent upon its face and void. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917 E-42.

- 17. "All Property"—As Used in Corporate Mortgage. In a mortgage, describing the property conveyed as mineral lands, furnaces, equipment, etc., and "all property and estate wherever situate," the quoted phrase refers to all property of a similar nature which may have been overlooked in the detailed description, and does not include cash on hand, commissary stock, iron ore, pig iron, etc., nor accounts receivable. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42. (Annotated.)
- 18. Notice of Divorce of Mortgagor—Effect of Vacation of Decree. One taking a mortgage and loaning money when the records of the court showed that the mortgagor had been divorced from her husband was in effect a purchaser pendente lite, with the risk that the decree might be vacated before final adjournment of the term in which it was entered, and after such vacation, is not entitled to the rights of a bona fide purchaser for value. Gato v. Christian (Me.) 1917A-592.

### 5. THE MORTGAGE DEBT.

- 19. Consideration Evidence Sufficient. In a suit by a wife against her insane husband to foreclose a mortgage, evidence held to support a finding that the mortgage was given for money loaned the husband by the wife, which had never been paid. Stevens v. Stevens (Mich.) 1916E-1259.
- 20. Words and Phrases "Debt." The word "debt," in the definition of a mortgage as a hypothecation or pledge of property as security for a debt, means a duty or obligation to pay, for the enforcement of which an action lies. Stollenwerck v. Marks (Ala.) 1917C-981.

# 6. RELEASE.

- 21. Right to Release Pro Tanto—Time for Demanding. A mortgage gave the mortgager the right to have lots covered thereby released upon payment of specified amounts. Held, that it was too late to demand a release after a decree of foreclosure had been made. Savings Investment, etc. Co. v. United Realty, etc. Co. (N. J.) 1916D—1134.
- 22. Railroad Mortgages—Power of Trustees to Release Mortgaged Property. Railroad mortgages construed and held neither expressly nor by implication, to authorize the trustees to release or sell, before default, pledged stock; it not being included in "mortgaged premises," parts of which, under certain circumstances, they might release, the clause defining such term as including "all . . . the premises and prop-

erty" being one as to operation by a receiver after default, and the "rights of holders," which the trustees were empowered to exercise as to the stock, being limited to the rights of the kind enumerated, and the power to sell, even to prevent waste, not existing unless conferred by the instrument, and not being impliable unless incidental or necessary to a power expressly conferred, which is not the case as to the power to hold the pledged security, certainly not when the power to deal with it before a default is carefully defined. Colorado, etc. R. Co. v. Blair (N. Y.) 1916D-1177. (Annotated.) Note.

Power of trustee of corporate mortgage to release mortgaged property. 1916D-1182.

# 7. EQUITY OF REDEMPTION.

23. Redemption from Foreclosure. Assuming a valid tender proven, it is held:

(a) That the defendant Torinus, the holder of the title acquired through the mortgage foreclosure sale, by accepting the redemption money paid by plaintiffs, judgment creditors, with full knowledge of the facts showing that they had no right to redeem, thereby suffered plaintiffs to succeed to his title and cannot now question the validity of their redemption.

(b) That the evidence does not show any rights or equities which required the court to relieve the defendant William Sutton junior to plaintiffs in the line of redemptioners, who attempted to redeem under a mortgage, recorded without the prepayment of the registry tax. Nor has Sutton alone, or in conjunction with any other defendant, any equities through which to attack plaintiffs' title.

(c) That the defendant Sauntry, the owner, after the expiration of the year of redemption, had no interest in the land so as to question plaintiffs' redemption, and his right to have the land applied to the payment of such of his debts as were liens thereon, depended entirely upon the lienholders making redemption in strict conformity with the statute. Orr v. Sutton (Minn.) 1916C-527.

# 8. FORECLOSURE OF MORTGAGE.

# a. Right to Foreclose.

- 24. Defenses—Payment. Foreclosure of a mortgage cannot be defeated by the defense of payment of the note thereby secured, where such defense is not available against the note because it as well as the mortgage is held by an innocent purchaser for value. Des Moines Savings Bank v. Arthur (Iowa) 1916C-498.
- 25. Second Foreclosure Parties not Joined in First. Though, in enforcing a mortgage lien upon lands, the existence of contract rights in the land acquired subse-

quent to the mortgage is known to the mortgagee, and such contract holders are not made parties to the foreclosure proceedings, a subsequent foreclosure of such contract rights may be had upon equitable principles. Crystal River Lumber Co. v. Knight Turpentine Co. (Fla.) 1917D-574.

#### b. Parties.

- 26. Railroad Mortgages Appeal by Trustees to Equity-Bondholders as Necessary Parties. Trustees do not have implied power to represent the cestui que trustent, in an appeal to the extraordinary jurisdiction of equity, to direct a disposition of the trust property not authorized by the instrument creating the trust, so that to bind the bondholders, secured by a railroad mortgage, by the judgment in a suit by the mortgagor for such a direction, they, or some of them, if the class is too large to allow all to be brought in, must be made parties, with an allegation of such fact, if only part are brought in, that the court may determine whether enough are before it to protect the interests of all, and dispense with the presence of the others under the rule of necessity. Colorado, etc. R. Co. v. Blair (N. Y.) 1916D-1177.
- 27. Foreclosure Necessary Parties Mortgagor Who Has Conveyed Equity. An Indian allottee, having the right to convey his allotment, who executes a mortgage on a part thereof and afterwards conveys the same land by warranty deed, has parted with all his title to and interest in such land, and is not a necessary party to the foreclosure proceedings commenced by his mortgagee, where no personal judgment is prayed against him. Freeman v. First National Bank (Okla.) 1918A-259.

### c. Judgment or Decree.

28. Liability for Deficiency—Persons Liable—Real Party in Interest. Where defendant corporation, purchasing certain real property and securing a large portion of the price by mortgages thereon, in order that its credit might not be affected by the execution of such mortgages, procured the land to be conveyed to K., who executed the mortgages as a mere straw man for defendant, and it was only on the understanding that defendant was the real party in interest that the grantor consented to the arrangement, defendant, and not K., is personally liable for any deficiency arising on foreclosure of the mortgages. Dexter Horton Nat. Bank v. Seattle Homeseekers Co. (Wash.) 1917A-685. (Annotated.)

# Note.

Personal liability for deficiency of person procuring mortgage to be given or assumed in name of another. 1917A-687.

# 9. SALES FOR PAYMENT OF MORT-GAGE DEBT.

## a. Order for Sale.

- 29. Marshaling Assets Subjection to Mortgage in Inverse Order of Alienation. Rcm. & Bal. Wash. Code, § 587, as to execution sale, providing that the sheriff shall offer the land for sale, the lots and parcels separately or together, as he shall deem most advantageous, in view of section 583, providing that when a portion of the land is claimed by a third person and he requires it to be sold separately, this shall be done, does not prevent application of the general equitable rule that it is the court's duty, in a mortgage foreclosure suit, to order a sale in parcels, and in the inverse order of alienation thereof by the mortgagor, when the equities of all par-ties will be subserved thereby, and when it can be done without impairing the security of the mortgagee. Black v. Suydam (Wash.) 1916D-1113. (Annotated.)
- 30. Part of a property which was subject to a paramount mortgage, was subjected to a second mortgage which expressly provided that it was subject to the existing mortgage. Held, that the rule of sale in the inverse order of alienation was not applicable, and that the part subject to the second mortgage must contribute to the payment of the paramount mortgage. Savings Investment, etc. Co. v. United Realty, etc. Co. (N. J.) 1916D-1134.

  (Annotated.)

31. Foreclosure—Separate Sale of Tract. Defendant W., in a mortgage foreclosure suit, claiming by his pleadings priority of title over defendant T. to nine acres of the mortgaged land, by reason of a contract of sale thereof made by the mortgagor before his conveyance of the whole tract to T., and T., while claiming the contract was a mere forfeited option, admitting if W. had any title, it was superior to T.'s, it is proper to order such nine acres sold separately, and after the rest of the land, the mortgagee not objecting, and it being necessary for protection of any interest of W., and not injurious to T., whether or not W. has any interest. Black v. Suydam (Wash.) 1916D-1113.

#### Note.

Inverse order of alienation within doctrine of marshaling assets. 1916D-1119.

# b. Enjoining Sale.

32. Grounds for Injunction — Existence of Conflicting Claims. Where there is no real impediment in the way of the trustee in the execution of a deed of trust, and the amount of the debt secured is certain, there is no necessity for the trustee to resort to a suit to remove impediments, or to have the debt adjudicated. To such cases the rules applicable to creditors'

suits and the like have no application. Nor will a sale by the trustee in such case be enjoined at the suit of the debtor to await the litigation of unrelated controversies between some of the parties. Mankin v. Dickinson (W. Va.) 1917D-120.

(Annotated.)

### Note.

Right to enjoin sale under mortgage or trust deed on ground of conflicting liens or rights or because of disputed title. 1917D-125.

# c. Effect as Divesting Owner's Title.

33. Invalid Sale - Subrogation of Purchaser to Rights of Mortgagee. When, for any reason, foreclosure proceedings are imperfect, irregular, or void, the purchaser at the sale becomes subrogated to all the rights of the mortgagee in and to the mortgage and the indebtedness that it secured, and becomes thereby virtually an equitable assignee of such mortgage and of the debt that it secured, with all the rights of the original mortgagee, and becomes entitled to an action de novo for the foreclosure of such mortgage against all parties holding junior incumbrances or the legal title, who had been omitted as parties to such original foreclosure proceedings under which he bought. Crystal River Lumber Co. v. Knight Turpentine Co. (Fla.) 1917D-574. (Annotated.)

#### Note.

Subrogation of purchaser at invalid foreclosure sale to rights of mortgagee or other claimant. 1917D-576.

# 10. AGREEMENTS COLLATERAL TO MORTGAGE.

- 34. Effect of Taking Additional Security. A mortgagee may take security other than and in addition to his mortgage security, and, if the contract with the giver of such security permits, may enforce his debt from such third party, without reference to the mortgagor and his security. Martin v. Becker (Cal.) 1916D-171.
- 35. Enforceability of Parol Agreement. Where K. accepted a conveyance of real property for defendant, and executed mortgages thereon for a large portion of the price as a mere straw man, and defendant orally agreed with the mortgagee that it was the real party in interest, and that K. was a mere figurehead in the deal, defendant's obligation to pay the debt, though resting in parol, is enforceable by a subsequent assignee of the mortgages, and this though there was no formal promise, if the evidence shows that the intention was that defendant should assume the liability. Dexter Horton Nat. Bank v. Seattle Homeseekers Co. (Wash.) 1917A-685. (Annotated.)

36. Subrogation -- Purchaser Mortgage. The owner of real estate executed a mortgage on it to a banking corporation, to secure a debt due to the bank. The president of the mortgagee and the mortgagor agreed that in consideration of the former paying to the bank the mortgagor's indebtedness, and to the mortgagor such additional sum as would total a certain amount, he would buy the property. It was further agreed between them that the purchaser was to be subrogated to the rights and remedies of the mortgagee. The purchaser paid to the mortgagee the mortgage debt, and the mortgagor executed to the purchaser a deed to the property. At the time of the taking of the deed the purchaser did not know of a judgment against the mortgagor, the execution issuing on which was entered in the clerk's office on the same day the deed was given. In ignorance of the prior judgment, the purchaser requested the bank to mark the mortgage satisfied, and it was also marked canceled on the record. Held, that the purchaser was entitled, by virtue of the agreement made with the mortgagor, to be subrogated to the rights and remedies of the mortgagee whose mortgage was paid by the purchaser. Peagler v. Davis (Ga.) 1917A-232.

### Note.

Mortgagee as creditor entitled to attack conveyance of same or other property by mortgagor. 1917C-953.

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- 1. INCORPORATION AND CHARTER.
- a. Creation and Nature of Corporation.
- 1. Power of Legislature to Create Public Agencies. The power of the legislature to create public corporations is practically unlimited, and it may create any conceivable kind of a corporation it sees fit for the more efficient administration of public affairs, endowing such corporation and its officers with such powers and functions as it deems necessary and proper for the administration of the corporate powers and affairs. Perkins v. Board of County Commissioners (Ill.) 1917A-27.
- 2. For the more efficient administration of public affairs the legislature may provide for the organization of municipal corporations embracing territory situated wholly within, or partly within and partly without, the boundaries of another municipal corporation. Perkins v. Board of County Commissioners (Ill.) 1917A-27.
- 3. Adoption of Charter—Option as to Form—Validity. Mass. St. 1915, c. 267, establishing four different types of city charter, with provisions by which cities might select for themselves the form which its voters decided to be best adapted to its needs, in place of enacting a special act whenever a city's government was to be changed, does not violate Const. Amend. art. 2, giving the general court full power to constitute city governments in any corporate town and to grant to its inhabitants such powers as the general court might deem necessary for its government, as such provision does not apply after the change from town to city has once been made. Cunningham v. Mayor (Mass.) 1917C-1100.

- 4. Definition of Municipal Corporation. A municipal corporation is a body corporate consisting of inhabitants of a designated area created by the legislature with or without the consent of such inhabitants for governmental purposes possessing local legislative and administrative power, and power to exercise within such area so much of the administrative power of the state as may be delegated to it and pos-sessing limited capacity to own and hold property, and to act in purveyance of public conveniences. Sutter v. Milwaukee Board of Fire Underwriters (Wis.) 1917E-
- 5. What Constitutes-Board of Fire Underwriters. A board of underwriters organized under Wis. St. 1913, § 1922, authorizing the formation of such boards, is not a municipal corporation. Sutter v. Milwaukee Board of Fire Underwriters (Wis.) 1917E-682.
- b. Amendment or Adoption of New Charter in General.
- 6. Effect of Adoption—Former Charter Superseded. Mass. St. 1915, c. 267, providing a new charter for such cities as adopt it, according to the form or type of city government which the majority voters decide upon, under which the voters of the city of Cambridge, at the state election in 1915, adopted one of the prescribed plans of city government, makes such plan effective as a new city charter and repeals or abrogates its former charter (St. 1912, c. 611), and such new charter became exclusive in its field, especially in view of part 1, § 11, declaring that the plan adopted should supersede the provisions of a city's charter and of the general and special laws relating thereto and inconsistent herewith. Cunningham v. Mayor (Mass.) 1917C-1100.
- 7. Home Rule Charter. Ore. Const. art. 11, § 2, providing that the legal voters of every city and town are granted power to enact and amend their municipal charter subject to the constitution and criminal laws of the state of Oregon, and forbidding the legislative assembly to amend or repeal any charter for any municipality, etc., does not extend the authority of such municipalities over subjects not properly municipal and germane to the pur-poses for which municipal corporations are formed. Woodburn v. Public Service Commission (Ore.) 1917E-996.
- 8. Classification. Section 3497, 3498, and 3499, Ohio General Code, regulate the method of transition of municipal corporations from one class to the other, and are not inconsistent with that constitutional provision. Murray v. State (Ohio) 1916D-864.
- 9. A municipal corporation which had a population of less than 5,000 at the last

federal census did not advance to a city when it was made to appear by an official census taken by the municipal corporation subsequently thereto that it had a population of more than 5,000. Murray v. State (Ohio) 1916D-864.

# c. Commission Form of Government.

- 10. Mo. Laws 1913, p. 517, allowing a city of the third class an opportunity by vote of its electors to adopt the commission form of government, with commissioners exercising quasi judicial as well as administrative authority, does not make such a municipality a sovereignty, and hence does not fall within the constitutional provisions apportioning the power of sovereign states. Barnes v. Kirksville (Mo.) 1917C-1121. (Annotated.)
- 11. Such act does not violate Mo. Const. art. 9, § 7, dividing the cities of the state into four classés, by creating a fifth class, since it does not alter the pre-existing classification of the defendant city as a city of the third class, but merely gives it, for purposes of administration, similar powers and functions, subject to surrender and resumption of its former powers at any time at the option of the voters.

  Barnes v. Kirksville (Mo.) 1917C-1121.

  (Annotated.)
- 12. Such law does not violate Mo. Const. art. 4, § 53, prohibiting special and local laws, since its classification according to population, both in the title and in the body of the bill, is applicable to any and all cities which shall or may in the future fall within such classification. Barnes v. Kirksville (Mo.) 1917C-1121.

(Annotated.)

13. Commission Government--- Validity of Statute. Mo. Const. art. 4, § 28, providing that a bill must contain but one subject, clearly expressed in its title, was not violated by Mo. Laws 1913, p. 517, entitled "An act providing for a [commission] form of government for cities of the third " etc., making provisions for the election of a mayor and four councilmen at large at a primary election, for electing candidates so selected at a general election, providing for the appointment of various city officers, and for initiative, referendum, and recall, to be effective only on adoption by vote of the electors of any city, since as to the provision for the election of four councilmen as a maximum, permitting three or two councilmen to be elected according to population of cities adopting the act, the title expresses the full limit of the councilmen to be elected by cities having the largest population within the prescribed limits when the election was held; nor is it violated by section 2, using words of present meaning in reference to the population entitling cities to organize thereunder, since they were intended to be applicable only when

cities on account of their future growth in population might be entitled to hold such elections, and since it is only requisite that the title shall be a fair forecast of the contents of the bill and its subject, so as not to mislead the lawmakers or the people. Barnes v. Kirksville (Mo.) 1917C-1121. (Annotated.)

14. Removal of Commissioner—By What Statute Governed. Under Mass. St. 1915, c. 267, providing several plans of city government to be adopted by vote of the inhabitants of cities, the city of Cambridge in 1915 accepted a plan of city government providing by part 3, § 6, for the removal of such an officer as the commissioner of public safety by the mayor, with the approval of a majority of the members of the city council, before the expiration of his term of office; by part 1, § 5, for a continuance of a city's executive and administrative organization until the new form of government should be established; and by part 1, § 11, that after adoption the new charter provisions should supersede the provisions of the city's former charter when officers provided for thereunder should have been duly elected and begun their term. Part 1 by section 1 defines "officers," etc., by section 31 makes the school committee elective, and part 3, §§ 3, 4, make the mayor and members of the city council elective. Petitioner, the commissioner of public safety, sought a writ of mandamus to compel the mayor to refrain from removing him from his unexpired office under the authority of the former charter (St. 1912, c. 611, § 2) for cause after a hearing. It is held that the word "officers" in St. 1915, c. 267, pt. 1, § 11, referred to elective officers, and not to appointive officers, heads of departments, etc., and that petitioner, though not appointed under the provisions of the new charter, could be removed only according to its terms. Cunningham v. Mayor (Mass.) 1917C-1100. (Annotated.)

#### Note.

Commission form of municipal government. 1917C-1103.

# d. Construction of Charter.

15. Effect as Superseding State Laws. The provisions of the charter of the city of Tulsa, adopted under the authority of section 3a, art. 18, of the constitution (section 329, Williams' Ann. Const.), and section 539, Okla. Rev. Laws 1910, supersede all laws of this state in conflict with such charter provisions, in so far as such laws relate to merely municipal matters. State v. Linn (Okla.) 1918B-139.

16. Such charter provisions do not supersede the general laws of the state of general concern, in which the state has a sovereign interest, and where the provisions of said charter conflict with the general laws of the state of this character,

such laws will prevail. State v. Linn (Okla.) 1918B-139.

17. Commission Government — Removal of Commissioner — Procedure. The Nashville commission charter (Tenn. Priv. Acts 1913, c. 22) provides for recall elections, section 32 declaring that such remedy shall be cumulative; hence the Ouster Act (Pub. Acts 1915, c. 11) may be taken advantage of to oust a commissioner for misconduct. State v. Howse (Tenn.) 1917C-1125.

(Annotated.)

# 2. STATE CONTROL AND SUPER-VISION.

18. Power of State to Regulate. The general power of a state over its municipalities extends to the regulation of the kind of laborers which may be employed in the construction of public works by or for such municipalities. Heim v. McCall (U. S.) 1917B-287.

- 19. All public matters concerning the people of the state at large, in common with people of any particular municipality, are matters of state jurisdiction within Ore. Const. art. 11, \$ 2, prohibiting the legislature from enacting, amending, or repealing any charter of any municipality, but empowering the legal voters of every city to enact and amend their municipal charter subject to the constitution and criminal laws of the state, and article 4, \$ 1a, reserving to the voters of every municipality the power over local, special, and municipal legislation, while all public affairs concerning the inhabitants of a locality as a municipality, apart from the people of the state at large, as supplying purely local needs, are matters of local concern, within the exclusive control of each municipality. Kalich v. Knapp (Ore.) 1916E-1051.
- 20. Relation of State to Municipality—Enforcement of Laws. The state has a sovereign interest in the enforcement of its general laws against the traffic in intoxicating liquors, against gambling and prostitution, within the territorial limits of the city of Tulsa. State v. Linn (Okla.) 1918B-139.

# 3. ANNEXATION OF TERRITORY.

21. "Any"—Legal Meaning of Term. Section 1220, Kan. General Statutes of 1909, which authorizes cities of the first class by ordinance to extend their corporate limits so as to include any tract of unplatted land not exceeding 20 acres whenever the same "is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary line of such city," means whenever two-thirds of any single boundary line or side of such tract lies upon or touches the boundary line of such city; the word "any" being construed as used in the sense of one in-

differently, out of an indefinite number. State v. Kansas City (Kan.) 1916E-1. (Annotated.)

22. Extension of Corporate Limits. The state brought proceedings in quo warranto to oust the city of Harper, a city of the second class, from exercising authority over certain territory. The answer alleged that in 1884, when the defendant was a city of the third class, the then owner of the land executed and filed for record a plat of the land as and for an addition to the city; that part of the land was platted and part unplatted, and that the land in controversy has ever since been treated by the owner and by the city in every respect as part of and within the corporate limits of the city; that in 1889, as part of the proceedings by which the defendant changed from a city of the third to a city of the second class, the mayor and council certified to the governor an accurate description by metes and bounds of all lands within the limits of the city as it then existed, which description included the territory now in controversy, and that thereupon the governor issued a proclamation declaring the defendant to be a city of the second class having the metes and bounds so certified: Held, that the answer stated a good defense, and that it was error to sustain a demurrer thereto. State v. Harper (Kan.) 1917B-464.

# 4. POWERS.

# a. In General.

- 23. Encroachment on Private Enterprise. The principle that municipalties can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained, as it is one of the main foundations of our prosperity and success. Laughlin v. Portland (Me.) 1916C-734.
- 24. Authorized and Implied Powers. A municipal corporation can exercise only such power as is conferred on it expressly, or such as arises by necessary implication as incidental to powers expressly granted, or such as are indispensable to the purpose of its creation. Akron v. McElligott (Iowa) 1916E-692.
- 25. Express Grant as Negativing Pre-existing Power. The passage of a statute expressly conferring power on a municipal corporation does not necessarily preclude the pre-existence of the power. Hopkins v. Richmond (Va.) 1917D-1114.
- 26. Any fair, reasonable doubt of the existence of a power of a municipal corporation is resolved by the courts against the corporation, and the power is denied. Hopkins v. Richmond (Va.) 1917D-1114.
- 27. Implied Powers of Municipality. A municipal corporation has the powers granted to it in express words, and the

powers necessarily implied or incident to the power expressly granted, and the powers absolutely essential to the declared object and purpose of the municipal corporation, and not simply convenient, but indispensable, and those granted by statute to such corporations generally. Hopkins v. Richmond (Va.) 1917D-1114.

- 28. Validity of Grant. The charter powers of a municipality have their origin in the police powers of the state. State v. Merchants' Exchange (Mo.) 1917E-871.
- 29. Limited to Express or Implied Grant. Municipalities are legal entities for local governmental purposes, and they can exercise only such authority as is conferred by express or implied provisions of law. The existence of authority to act cannot be assumed, but it should be made to appear. Malone v. Quincy (Fla.) 1916D-208.
- 30. Where particular powers are expressly conferred upon a municipality, and there is also a general grant of power, such general grant by intendment includes all powers that are fairly within the terms of the grant and are essential to the purposes of the municipality, and not in conflict with the particular powers expressly conferred. The law does not expressly grant powers and impliedly grant others in conflict therewith. Malone v. Quincy (Fla.) 1916D-208.
- 31. If reasonable doubt exists as to a particular power of a municipality it should be resolved against the city. Malone v. Quincy (Fla.) 1916D-208.
- 32. When there are both special and general grants of power to municipal corporations to pass ordinances, those given under the special grant, as a general rule, can only be exercised in the cases and to the extent as respects those matters allowed by the charter or incorporating act; and the powers given under the general grant do not enlarge or annul those conferred by the special grant in respect to its subject-matters, but give authority to pass ordinances, reasonable in their character, upon all other matters within the scope of the municipal authority not repugnant to the constitution and laws of the state, Malone v. Quincy (Fla.) 1916D—208.
- 33. A general clause conferring power upon a municipality can give no authority to abrogate the limitations contained in special provisions. Malone v. Quincy (Fla.) 1916D-208.
- 34. When authority and powers with reference to particular subjects are expressly conferred in specific terms upon municipalities, other authority and powers that in their nature or extent would materially increase or be inconsistent with the powers that are expressly given in specific and limited terms, are not to be implied, par-

ticularly when the powers expressly given do not include all the authority that may have been conferred with reference to the designated subjects. Malone v. Quincy (Fla.) 1916D-208.

35. When to accomplish a general municipal purpose authority and powers are expressly conferred upon a city, and it does not appear that only the powers expressly given are to be exercised, other authority and powers that are incident to cr consistent with those expressly given may be implied when necessary to fully effectuate the express powers and the general purposes designed, if such implication may fairly arise from the language used and the object desired. Malone v. Quincy (Fla.) 1916D-208.

#### Note.

Power of municipality to compel railroad or street railway to repair bridge within municipal limits. 1916C-1171.

# b. Power to Contract.

36. In the absence of constitutional or statutory inhibition, municipal corporations may contract for the payment of interest on warrants drawn to cover ordinary debts. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

(Annotated.)

- c. Power to Operate Public Utilities.
- 37. Power to Operate Ice Plant. La. Const. art. 224, provides that the taxing power may be exercised by the general assembly for state purposes and by parishes and municipal corporations and public boards, under authority delegated by the general assembly for parish, municipal and local purposes "strictly" public in their nature. Held, that the word "strict" was used in the sense of exact; accurate; precise; undeviating; governed or governing by exact rules; and "strictly" as in a strict manner; closely, precisely, rigorously; stringently; positively; and that the construction and maintenance of a municipal ice plant by a small city operating a municipal waterworks and electric lighting system was not "strictly" a public activity, and could not be maintained by the exercise of the taxing power. Union Ice, etc. Co. v. Ruston (La.) 1916C-1274. (Annotated.)
- 38. Operation of Electric Lighting Plant—Competition With Citizen—Sale of Fixtures. Under Mich. Const. art. 8, § 23, authorizing municipalities to own and operate public utilities for supplying water, heat, etc., and Mich. Comp. Laws 1897, §§ 3258, 3269, and 3270, authorizing municipalities to acquire and operate gas and electric light plants, a city which operates its own electric light plant is entitled to do all those things naturally connected with and belonging to the running of such

a business, and so may sell, if necessary, light fixtures. Andrews v. South Haven (Mich.) 1918B-100. (Annotated.)

39. Sale of Fuel to Inhabitants. Me. Rev. St. c. 4, § 87 (Laws 1903, c. 122), authorizing and empowering any city or town to establish and maintain a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants, is not unconstitutional, it being a public use for which taxation is permissible, since the furnishing of fuel to its citizens is a matter of public necessity, convenience, or welfare with which it is difficult for the citizens to provide themselves, due to the existence of monopolistic combinations. Laughlin v. Portland (Me.) 1916C-734. (Annotated.)

40. Telephone System. S. Dak. Laws 1907, c. 88, authorizing cities to acquire, construct, equip, and operate a telephone system is not in violation of Const. art. 13, § 1, declaring that neither the state nor any county or municipality shall loan its credit, make donations in the aid of individual corporations, or become the owner of the capital stock of any such corporation, nor shall the state engage in any work of internal improvement; for the constitution merely prohibits cities from becoming interested in public utilities owned by private persons. Spangler v. Mitchell (S. Dak.) 1918A-373.

(Annotated.)

41. S. Dak. Const. art. 13, § 4, as originally adopted, provided that the debt of any county, city, or other subdivision should never exceed five per cent of the assessed value of the taxable property. Thereafter the section was amended, and now declares that the debt of no county, city, or other subdivision shall exceed five per cent of the assessed valuation of the taxable property, provided that any county may incur additional indebtedness not exceeding ten per cent of the assessed valuation for the purpose of providing water-works, etc., and that cities having a population of 8,000 or more may incur indebtedness not exceeding eight per cent of the assessed valuation for the purpose of constructing street railways or other lighting plants, but that no county, city, or other subdivision shall be included within such district without a majority vote in favor thereof, and no such debt shall ever be incurred for any of the purposes provided, unless authorized by a majority vote of the electors. It is held that a city may incur indebtedness up to the five per cent limit for purposes not mentioned in the constitution, as the purchasing and equipping of a telephone system subject to the qualification that it may not issue bonds without a majority vote in favor thereof according to S. Dak. Pol. Code, § 1229, subd. 5. Spangler v. Mitchell (S. Dak.) 1918A-373. (Annotated.)

42. Right to Construct Improvement Jointly With Railroad Company. Denver Charter Amendment, May 20, 1913, § 355, created a tunnel commission to construct a railroad tunnel through the Rocky Mountains to transport freight, passengers, water, and electricity, provided that it the tunnel should be originally constructed for the transportation of freight and passengers, that right should not be destroyed or needlessly interrupted by the extension of the use for the passage of water, electricity, etc. The amendment also vided that two thirds of the cost of the tunnel should be paid by a bond issue of the city; that the other third should be paid by a railroad company, which should have the right to operate trains through the tunnel, the title to which should be in the city, but with the right of the railroad company to purchase the same. The city had not declared its intention to build a water system, power plant, or any public utility of which the tunnel was to form a part, nor by which it was to be of any use to the city whatsoever. It was to have the perpetual right to use the tunnel free of rent as an aqueduct, and to install conduits therein to bring water into the city, to operate a pipe line, and an electric line through the tunnel, and to use it for drainage if it so desired, also to have full benefit of any ore that might be found in driving the tunnel, and the right to subject it and the tracks herein to use of any other railroad desiring the same on terms which would be exceedingly onerous to any other railroad. Held, that the ordinance was violative of Const. art. 11, §§ 1, 2, prohibiting a city from lending its credit to any company or corporation for any purpose, and from making a donation of money or bonds in furtherance of a work jointly with any person, company, or corporation, etc. Lord v. Denver (Colo.) 1916C-893. (Annotated.)

# Notes.

Power of municipality to enter into partnership contract for construction of improvement. 1916C-909.

Right of municipality to enter into business competition with citizen. 1918B-104.

Power of municipality to construct and operate municipal telephone system. 1918A-380.

Power of municipality to engage in business of furnishing fuel to inhabitants. 1916C-742.

Power of municipality to operate plant for purpose of furnishing ice to inhabitants. 1916C-1287.

### d. Power to Regulate Rates.

43. The right to regulate rates is a matter of general concern, and does not pertain solely to municipal affairs. Wood-

burn v. Public Service Commission (Ore.) 1917E-996.

44. Since the right to regulate rates is an inherent element of sovereignty, such right can be delegated to a municipality only by clear and express terms, and all doubts must be resolved against the municipality. Woodburn v. Public Service Commission (Ore.) 1917E-996.

(Annotated.)

## e. Power Outside Limits.

45. Validity of Statute. The legislature had power to enact Utah Comp. Laws 1907, \$206, subd. 15, which gives to a city, to protect from pollution the streams from which its public water supply is taken, jurisdiction over the stream for ten miles above the point from which the water is taken. Salt Lake City v. Young (Utah) 1917D-1085.

# f. Power to Convey Property.

46. Right to Object — Federal Government. That the federal government had appropriated money to construct buildings for a commercial exposition, held on property belonging to a city, did not entitle it to object to the conveyance of the property by the city for private purposes to a private corporation, though a few of the buildings yet remained on the premises and were occupied by a museum. Board of Trustees of Phila. Museums v. Trustees of Univ. of Pa. (Pa.) 1917D-449.

# g. Power as to Nuisances.

47. Where express specific power is conferred upon a municipality to regulate a common utility, a continuance of its use is contemplated; and the power given to regulate the use does not authorize a prohibition of a lawful use in any part of the city. If the use degenerates into a nuisance it is within the power of the city of abate the nuisance or prohibit the use. Malone v. Quincy (Fla.) 1916D-208.

# 5. ORDINANCES AND RESOLUTIONS.

## a. Nature and Adoption.

- 48. Subject and Title. The ordinance attacked contains but one subject, and that subject is clearly expressed in the title. Kansas City v. Jordan (Kan.) 1918B-273.
- 49. Effect as Law. An ordinance properly enacted has all the force of a law within the limits of the municipality. Hopkins v. Richmond (Va.) 1917D-1114.
- 50. Supplementing Statute. It is no objection to municipal ordinances, under Ala. Pol. Code, 1907, § 1251, giving municipalities full power to pass ordinances, that they afford additional regulations complementary to the end state legislation would effect, if they are not in contravention of

any state enactment. Borok v. Birmingham (Ala.) 1916C-1061.

- 51. Force and Effect. City ordinances, authorized and duly enacted within the municipal power, have the same local force and effect as a statute. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 52. Ordinance as "Law." An ordinance is a "law," within Mo. Rev. St. 1909, §§ 6155, 6177, governing elections in cities empowered to enact ordinances, making it a crime to vote more than once at any such election, including one to pass on a public proposition submitted to vote by "law." In re Siegel (Mo.) 1917C-684.

(Annotated.)

53. Effect of Title and Preamble. The title and preamble are parts of an ordinance, as they are of a statute. Duquesne Light Co. v. Pittsburgh (Pa.) 1917E-534.

### Note.

Ordinance as "law." 1917C-687.

54. Power to Lease — Limitation not Retroactive. Ordinances and statutes limiting the period for which the city may lease property, not being retroactive, do not affect renewals under a prior valid lease by the city of New York for 21 years, with covenant for renewals in perpetuity. Burns v. New York (N. Y.) 1916C-1093.

# b. Validity.

## (1) In General,

- 55. Preventing Injury to Public. Any regulation, whatsoever its character, which is instituted for the purpose of preventing injury to the public, and which tends to furnish the desired protection, is constitutional. State v. Starkey (Me.) 1917A-
- 56. Reasonableness of Ordinance. A municipality can enact reasonable ordinances only, and the court will annul ordinances which are unreasonable, illegal or repugnant to law. State v. Starkey (Me.) 1917A-196.
- 57. Restraining Injurious Business. Though all by-laws made in restraint of trade, or which tend to create a monopoly, are void, yet a city or town, by reasonable general provisions, by ordinance, may regulate and restrain all noxious and injurious callings within its limits. State v. Starkey (Me.) 1917A-196.
- 58. Validity of Ordinance. Such ordinance was referable to the police power, and was not invalid on the ground of its unreasonableness. St. Louis v. Nash (Mo.) 1918B-134.

# (2) Segregation of Races.

59. Segregation of Races—Validity. A municipal ordinance prohibiting any white cr colored person from moving into and

occupying as a residence or place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied by persons of the opposite race, denies due process of law in violation of Const. U. S. Amend. 14 (9 Fed. St. Ann. 416), as property owners are denied the right to dispose of their property by prohibiting the occupation of it for the sole reason that the purchaser is a person of a particular race intending to occupy the premises as a place of residence. Buchanan v. Warley (U. S.) 1918A-1201.

(Annotated.)

- 60. The race segregation ordinance of the city of Louisville which prohibits any colored person from occupying as a residence or place of assembly for colored people a building in any block in which the greater part of the houses are occupied by white persons, and vice versa, but which provides that it shall not affect the location of residences or places of assembly made previous to its enactment, nor prevent any person who has theretofore acquired a building for a residence or place of assembly from exercising such right, does not take away the right of alienation, but is merely a restriction on alienation by taking away the probability of alienation to certain classes of purchasers, and, as such, cannot be held to deprive the owner of a vested right. Harris v. Louisville (Ky.) 1917B-149.
- 61. That ordinance does not conflict with the Bill of Rights, Const. § 1, recognizing inherent and inalienable rights, section 2 providing that absolute power over the life and property of a man does not exist in a republic, and section 26 providing that the rights secured by the Bill of Rights shall remain inviolate, or Const. U. S. Amend. 14 providing that no person shall be deprived of liberty or property without due process of law, since all these guaranties are not absolute, but are subject to the right to impose reasonable restraints on the use of property. Harris v. Louisville (Ky.) 1917B-149. (Annotated.)
- 62. The fact that the ordinance would have the effect of excluding colored people from the more desirable parts of the city does not deprive them of liberty or property without due process of law contrary to the Fourteenth Amendment, since they can improve their sections of the city until they are equal to those of the whites. Harris v. Louisville (Ky.) 1917B-149.

  (Annotated.)
- 63. That ordinance is a valid exercise of the police power of the municipal legislature as a reasonable measure for the public welfare, in view of the settled public policy of the state to secure the separation of races. Harris v. Louisville (Ky.) 1917B-149. (Annotated.)

- 64. The invalidity of so much of an ordinance providing for the segregation of the races as limits the rights of any white or colored person to occupy property of which he was the owner at the time the ordinance went into effect does not render invalid so much of the ordinance as applies to persons whose rights as owners or tenants accrued since the passage of the ordinance. Hopkins v. Richmond (Va.) 1917D-1114. (Annotated.)
- 65. An ordinance making it unlawful for any white person to occupy as a residence any building on any street on which a greater number of houses are occupied as residences by colored people than by white people, and making it ounlawful for any colored person to occupy as a residence any house on any street on which a greater number of houses are occupied as residences by white people than by colored people, is constitutional in so far as it applies to persons whose rights as owners or tenants have accrued since the passage of the ordinance, and is invalid only so far as it restricts the right of any white or colored person to move into and occupy property of which he was the owner at the time of the going into effect of the ordinance. Hopkins v. Richmond (Va.) 1917D-1114. (Annotated.)
- 66. An ordinance making it unlawful for any white person to occupy as a residence any house on any street on which a greater number of houses are occupied as residences by colored people than are occupied by white people, and making it unlawful for any colored person to occupy as a residence any house on any street on which a greater number of houses are occupied as residences by white people than by colored people, is prospective only in its application, and does not deprive any person of his rights or property existing at the time of its passage. Hopkins v. Richmond (Va.) 1917D-1114.

(Annotated,)

- 67. An ordinance providing for the segregation of the races within a municipality does not deny to any person the equal protection of the laws, for there is no discrimination between the races, and it operates alike on all persons and property under the same circumstances and conditions. Hopkins v. Richmond (Va.) 1917D-1114. (Annotated.)
- 68. An ordinance making it unlawful for any white person to occupy as a residence any building on any street on which a greater number of houses are occupied as residences by colored people than are occupied by white people, and making it unlawful for any colored person to occupy as a residence any house on any street on which a greater number of houses are occupied as residences by white people than by colored people, does not depend on any

subsequent action or consent of any one, but becomes effective on its passage, and there is no delegation of authority by the legislative body. Hopkins v. Richmond (Va.) 1917D-1114. (Annotated.)

- 69. Under Va. Code 1904, § 1038, conferring on cities and towns the right to preserve the peace and good order within their limits, a town has the implied and incidental power to pass an ordinance segregating the white and colored races, if it tended to promote peace and good order, under the exercise of the "police power," which includes the inherent sovereignty, which is the right and duty of the government, or its agents, to exercise whatever public policy demands for the benefit of society at large, to guard its morals, safety, health, and order, or to insure such economic conditions as an advancing civilization requires. Hopkins v. Richmond (Va.) 1917D-1114. (Annotated.)
- 70. Ordinances providing for the segregation of the races, when intended to operate as bona fide police regulations and reasonably necessary for that purpose, operate reasonably, without unduly interfering with private rights, and are constitutional. Hopkins v. Richmond (Va.) 1917D-1114. (Annotated.)
- 71. Sections 1 and 2 of the ordinance of the city of Atlanta, adopted June 16, 1913, and the corresponding sections of an amendment thereto, adopted November 3, 1913, prohibiting white persons and colored persons from residing in the same block, deny the inherent right of a person to acquire, enjoy, and dispose of property, and for this reason are violative of the due process clause of the federal and state constitution. Carey v. Atlanta (Ga.) 1916E-1151. (Annotated.)

### (3) Regulation of Dogs.

72. The regulation of dogs, a branch of its police power which the state may delegate to a city, is not limited to dogs running at large, but extends to the keeping of dogs. McPhail v. Denver (Colo.) 1916E-1143.

# (4) Regulating Presentation of Claims.

73. A municipality cannot by ordinance impose on its creditors the duty of presentation of claims as a condition to the bringing of suit. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

# (5) Prohibiting Earth Closets.

74. An ordinance forbidding the use of earth closets in designated portions of the city of Quincy, without reference to whether such closets are a nuisance, is not authorized by the charter act, chapter 5844, Fla. Acts of 1907; and a judgment of the municipal court imposing a penalty

for a violation of such ordinance is invalid and may be quashed on certiorari. Malone v. Quincy (Fla.) 1916D-208.

(Annotated.)

- 75. The express authority given the city "to regulate the construction, location and arrangement of earth closets" in the connection used in the charter act of Quincy, chapter 5844, Fla. Acts of 1907, has reference to the location of such closets as they are used on property in the city, and does not authorize a prohibition of the proper use of earth closets in any part of the city. Nor does the express authority to issue bonds for construction and maintaining waterworks and a "system of sewerage" give the city power to prohibit the use of earth closets. Malone v. Quincy (Fla.) 1916D-208, (Annotated.)
- 76. If earth closets in a city for any reason become a nuisance or otherwise unlawful, the municipality may by reasonable regulations abate them or otherwise deal with them as the charter powers may authorize. Malone v. Quincy (Fla.) 1916D-208. (Annotated.)
- 77. When the use of earth closets is contemplated by a municipal charter, and express limited authority is given to regulate the use of them, their proper use as such is not unlawful and cannot be prohibited by the municipality in the absence of express authority to do so, or unless such closets become a nuisance or their use is otherwise unlawful and within the power of the city to abate or prohibit. Malone v. Quincy (Fla.) 1916D-208. (Annotated.)
- 78. Power of a municipality to prohibit the use of earth closets within its limits cannot be implied merely from authority expressly given to regulate their use; and power to prohibit the use of earth closets in a city is not conferred by general powers given to conserve the public health and general welfare, when the authority to regulate the use of earth closets is expressly conferred in definite terms limited in their scope and purpose. Malone v. Quincy (Fla.) 1916D-208. (Annotated.)

# Note.

Validity of statute or ordinance regulating out-of-door closets or privies. 1916D-212.

# (6) Regulating Keeping of Animals.

79. Regulation or Keeping of Cattle. Beaumont City Ordinance, art. 991, provides that it shall be unlawful to establish or maintain any stock pens within 300 feet of any hotel or private residence in the city without a permit from the city council. Other provisions declare that the words "stock pen" shall include any lot wherein more than six head of cattle are kept. It is held that the ordinance was a proper exercise of the city's police power,

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and was not unconstitutional because the council might act arbitrarily, since it would be presumed that it would not do so, and, if it did, the person aggrieved would have an adequate remedy by mandamus. Ex parte Broussard (Tex.) 1917 E-919.

(Annotated.)

Note.

Validity of ordinance regulating keeping of eattle within municipal limits. 1917E-929.

# (7) Regulating Electricians.

80. Regulation of Electricians. Iowa Code, §§ 680, 695, 711, empowering municipal corporations to adopt ordinances to carry into effect duties conferred, and to make regulations against danger from accidents by fire or electrical apparatus, etc., does not authorize a town owning an electric light plant to require electric wire men to procure a license, and to execute a bond conditioned on their indemnifying the town and the superintendent of public works from liability for any damage arising from any negligence in doing their Akron v. McElligott (Iowa) work. 1916E-692. (Annotated.)

# (8) Regulating Wiring.

81. A town owning an electric light plant may make all reasonable rules as to the method of doing the work of wiring, and provide for inspection prior to connection with its system, and require conformity to standards reasonably necessary to safety and efficiency. Akron v. McElligott (Iowa) 1916E-692.

(Annotated.)

# (9) Regulating Manufacture of Bricks.

82. Ordinance Prohibiting Manufacture --Validity. A municipal ordinance enacted in good faith as a police measure, prohibiting brick-making within a designated area, does not take, without due process of law, the property of an owner of a tract of land within the prohibited district, although such land contains valuable deposits of clay suitable for brick-making which cannot profitably be removed and manufactured into brick elsewhere, and is far more valuable for brickmaking than for any other purpose, and had been acquired by him before it was annexed to the municipality, and had long been used by him as a brickyard. Hadacheck v. Sebastian (U. S.) 1917B-927.

(Annotated.)

83. Prohibiting by municipal ordinance the manufacture of brick within a designated area cannot be said to deny the equal protection of the laws to the owner of a brickyard within the prohibited district, where the record does not show that brickyards in other localities within the municipality where the same conditions exist are not regulated or prohibited, or that other

objectionable businesses are permitted within the same district. Hadacheck v. Sebastian (U.S.) 1917B-927.

(Annotated.)

# (10) Regulating Charities.

84. City ordinances creating a municipal charities commission and prohibiting begging in the public streets, while regulating the soliciting of contributions for charitable purposes, the last of which gave the commission arbitrary power to forbid any person from soliciting for charity regardless of his personal worth or fitness, not establishing any standard of character by which the commission should be guided in giving permits, merely requiring that it should find that the "object of said solici-tation is worthy and meritorious," are unconstitutional so far as giving such arbitrary power, and in provisions imposing a penalty upon any one soliciting contributions for charitable purposes without a permit and prohibiting the sale of any goods donated to charity without the solicitor first having obtained a similar permit. Matter of Dart (Cal.) 1917D-1127.

(Annotated.)

## Note.

Validity of statute or ordinance regulating solicitation of funds for private charity. 1917D-1133.

85. Police Power—Regulation of Private Charity. The occupation of soliciting contributions for charitable purposes may be regulated by laws or ordinances providing for reasonable supervision of the persons engaged, and for the application or use of the contributions received to the purposes intended, to prevent unscrupulous persons from obtaining money or other things under the pretense that they are to be applied to charity, to prevent the wrongful diversion of such funds to other uses, and to secure them against waste. Matter of Dart (Cal.) 1917D-1127. (Annotated.)

# (11) Regulating Use of Property.

86. Police Power—Restriction on Use of Property. A municipal corporation, invested by its charter or by general statute with power to preserve the peace and health, may restrict the use of private property in the interest of the public, providing the restriction is reasonable. Hopkins v. Richmond (Va.) 1917D-1114.

#### (12) Prohibiting Pollution of Water.

87. Police Regulations — Pollution of Water Supply—Pasturing Horses—Validity of Ordinance. A complaint by Salt Lake City, which charged that defendant unlawfully and wilfully and continuously for ten days and more permitted twenty-seven head of horses to be at all times accessible to the stream from which the city secured its water supply, to pasture along

its banks, to wade in the stream, and to run at large upon defendant's tract of land comprising about fifteen acres along the stream, contrary to a city ordinance, charges defendant with acts which the city may by its ordinance prohibit and is not demurrable. Salt Lake City v. Young (Utah) 1917D-1085. (Annotated.)

# (13) Making Facts Prima Facie Evidence.

88. An ordinance providing that certain circumstances, when established by evidence, should raise a prima facie presumption of guilt, which promulgates the same rule as the Fuller Bill (Acts Sp. Sess. Ala. 1909, p. 63), infracts no constitutional provision. Borok v. Birmingham (Ala.) 1916C-1061. (Annotated.)

Validity of ordinance providing that certain state of facts shall constitute prima facie evidence of violation thereof. 1916C-1062.

# (14) Regulation of Meat Dealers.

- 89. Inspection Provision for Expense. An ordinance of the town of Houlton, requiring meat offered for sale in the town to be inspected by an official inspector, was not invalid, because the expense of the inspection was not provided for therein. State v. Starkey (Me.) 1917A-196.
- 90. Regulation of Meat Dealers. An ordinance of the town of Houlton, providing that no carcasses of neat cattle, sheep, or swine, wherever slaughtered, shall be sold or offered for sale in the town, unless inspected at the time of the slaughter by an official inspector, etc., was a proper exercise of the police power of the state as delegated by Me. Rev. St. c. 4, § 93, cl. 3, providing that towns, cities, and villages may make and enforce ordinances respecting infectious diseases and health. State v. Starkey (Me.) 1917A-196.

(Annotated.)

Statutory or municipal regulation of meat dealers. 1917A-198.

# (15) Regulating Smoke.

91. Smoke Ordinance — Reasonableness. Where the evidence of expert marine engineers showed that there was no known appliance which could be used upon marine boilers to prevent the emission of smoke, an ordinance, declaring that the emission of dense, black or gray smoke from any smokestack used in connection with any steam boiler in any boat, etc., within the city limits should be a public nuisance per se, and that the owners of any steamboat and the general manager, fireman or other employee having charge of any steamboat within the city permitting it to emit such

smoke should be guilty of creating a public nuisance and of a violation of the ordinance, is unreasonable and invalid; though its invalidity is not a bar to a future prosecution thereunder if practical and efficient appliances may be had, or to liability for a common-law nuisance. People v. Detroit, etc. Ferry Co. (Mich.) 1918B-170. (Annotated.)

### c. Construction.

- 92. Reasonableness of Ordinance Judicial Review. Whether an ordinance is unreasonable, and hence void, is for the court; but, in determining the question, it must regard the circumstances of the municipality, and the objects sought to be attained, and the necessity existing for the ordinance. Hopkins v. Richmond (Va.) 1917D-1114.
- 93. Interpretation of Ordinance—Opinions of Members of Council. Where a city ordinance embodies a contract between the municipality and street railways, the court, in construing it, should look solely to its text and the situation existing between the railways and the city when the ordinance was passed, and not to the letters, statements, and opinions of the aldermanic body that passed it, since justice to the street railways who accepted the contract demands that the intention of the city council be determined from a consideration of the enactment itself. People v. Chicago R. Co. (Ill.) 1917B-821. (Annotated.)
- 94. A city ordinance embodying a contract between the municipality and street railways could be construed only in the light of its text, and not in the light of letters, statements, and opinions as to its meaning of members of the local transportation committee of the city council which it did not appear were brought to the attention of the council itself at large when the ordinance was submitted to it for passage, since it is the intention of the city council which the courts must endeavor to determine, not the intention of committee members, in construing an ordinance. People v. Chicago R. Co. (Ill.) 1917B-821. (Annotated.)
- 95. Reasonableness of Ordinance—Evidence of Extrinsic Facts. In certiorari to review a judgment based upon a city ordinance, evidence as to its reasonableness as applied to the subject-matter or local conditions is admissible. People v. Gibbs (Mich.) 1917B-830.
- 96. Motives of Municipal Council. Since courts will not inquire into the motives which actuate the members of the legislative body in passing an ordinance, whether an ordinance regulating public auctions was passed to benefit special interests cannot be considered. People v. Gibbs (Mich.) 1917B-830. (Annotated.)
- 97. Presumption of Reasonableness. City licensing and regulation ordinances

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are primarily presumed to be reasonable unless the contrary appear on their face, but if the inherent character of their provisions appear to be unreasonable, the ccurts must declare such provisions void. People v. Gibbs (Mich.) 1917B-830.

98. Reasonableness of Ordinance — Judicial Review. Whether an ordinance is reasonable, and within the discretionary power of the municipal authorities, is a judicial question. People v. Gibbs (Mich.) 1917B-830.

99. Applicability of Rules of Statutory Construction. The rules for the construction of a city ordinance are the same as those applied in the construction of a statute. People v. Chicago R. Co. (III.) 1917B-821.

#### Notes.

Opinions, acts, etc., of members of council as aid to interpretation of ordinance. 1917B-829.

Judicial inquiry into motives prompting enactment of legislative ordinance. 1917B-

# d. Time of Taking Effect.

100. When Effective. Under Hurd's Ill. Rev. St. 1915-16, c. 24, § 64, making appropriation ordinances take effect ten days after publication, and Hurd's Rev. St. 1915-16, c. 131, § 1, and c. 100, § 6, providing that time shall be computed by excluding the first and including the last day, an appropriation ordinance published January 29, becomes effective February 8 and a tax levy ordinance passed that day is valid. People v. Snow (Ill.) 1917E-992.

# e. Prosecutions for Violations.

101. Offense Under Ordinance—Negativing Exceptions. In charging an offense under a city ordinance, it is not necessary to plead any of the exceptions named in the ordinance, where such exceptions are not contained in the clause which creates the offense. Kansas City v. Jordan (Kan.) 1918B-273.

102. Nature of Proceeding. Action against a railroad company for violation of a city ordinance requiring the sprinkling of tracks, in which the railroad company was sentenced to pay a fine of \$400, is criminal in character. People v. Pacific Gas, etc. Co. (Cal.) 1917A-328.

(Annotated.)

103. Right of Appeal. A legislative act granting the state the right to appeal does not by implication grant the same right to municipalities existing under state law. The right of the sovereign to appeal must be authorized. Oklahoma City v. Tucker (Okla.) 1917D-984. (Annotated.)

104. (a) The right of the state to appeal from an adverse judgment rendered in a criminal prosecution is controlled by statute, and exists only by specific statutory authority.

(b) The right of the state to appeal on a question reserved by the representatives of the state in the trial court is based on section 5990, Okla. Revised Laws of 1910; but this statute does not confer the same right on municipalities. Oklahoma City v. Tucker (Okla.) 1917D-984. (Annotated.)

#### Notes.

Nature of action or proceeding for violation of municipal ordinance, 1917A-330.

Right of municipality to appeal from judgment in prosecution for violation of ordinance. 1917D-986.

#### f. Repeal.

105. Implied Repeal. Where a later ordinance contains no repealing clause, it will not repeal a former ordinance unless the later one is clearly intended as a substitute for the earlier, or there is an irreconcilable conflict between them, and then only so far as the inconsistency extends. Walsh v. Bridgeport (Conn.) 1917B-318.

# 6. APPROPRIATIONS.

106. The electors of a municipality voted to appropriate a sum of money to pay the cost of the construction of certain portions of a proposed sewer. The layout by the board of street commissioners was rejected by the court of common council, under the charter, which gave it plenary powers over the layout for sewers, and a new layout made. It is held that an assessment for the sewer as newly laid out was valid, notwithstanding the appropriation had not been apportioned, for until the assessment was made the court of common council had the right to discontinue the original proceeding, and the appropriation could be used only for the construction of the sewer on the original layout. Dellaripa's Appeal (Conn.) 1917B-862. (Annotated.)

107. Diversion. An appropriation of public moneys for one object cannot be used for another. Dellaripa's Appeal (Conn.) 1917B-862. (Annotated.)

108. Reasonableness—Judicial Review. The reasonableness of the appropriation demanded by Mo. Rev. St. 1909, § 9787 et seq., for the support of the metropolitan police system for Kansas City, is for the legislature and not for the courts. State v. Jost (Mo.) 1917D-1102.

#### Note.

Right to use public funds for purpose other than that of appropriation. 1917B-864.

# 7. FISCAL MANAGEMENT.

a. Power to Borrow Money and Issue Bonds.

109. Repeal of Authorizing Statute—Effect on Pending Proceedings. The omis-

sion of sections 372 to 381, Okla. Compiled Laws of 1909, from the Revised Laws of 1910 does not operate to abate a proceeding pending under said sections prior to the date when said Revised Laws of 1910 went into effect. In re Application of State, etc. (Okla.) 1916E-399.

(Annotated.)

#### Note.

Authority of public officer to complete bond issue after repeal of statute authorizing issue. 1916E-406.

# b. Submission of Question to Voters.

110. Authorization — Majority Vote — What Constitutes. S. Dak. Pol. Code, § 1229, subd. 5, declaring that no bond shall be issued by city council unless the legal voters of the city by a majority shall have determined in favor of issuing the bonds, warrants the issuance of bonds upon a majority vote in favor thereof, though the majority cast in favor of issuance is not a majority of the voters of the city. Spangler v. Mitchell (S. Dak.) 1918A-373.

# c. Debt Limit.

111. Debt Limit Statute Construed. Section 2218, N. Dak. Compiled Laws 1913, construed, and held not to authorize the making of the contracts in question. The evident purpose of that statute was to limit the public officers from incurring liabilities (within the constitutional debt limit) to such sum as may be liquidated during the current or subsequent years out of the revenues which may be raised within the maximum tax rate permitted by law. It does not purport to, nor could it legally, authorize the incurring of liabilities exceeding the constitutional debt limit. Anderson v. International School District (N. Dak.) 1918A-506.

112. Municipal Resources—Anticipating Revenues. In ascertaining whether the constitutional limit has been exceeded, funds in the treasury available for meeting the district's liabilities may be considered, also taxes levied and uncollected, but the district officers have no right to anticipate revenues to be derived from tax levies to be made in future years. Anderson v. International School District (N. Dak.) 1918A-506.

Aggregation of Debt—Computation—Aggregation of Deferred Payments. Defendant school district, whose debt limit was about \$16,000, entered into a contract on May 27, 1913, with defendant Bartelson for the erection of a schoolhouse at the agreed price of \$24,000. Eighty-five per cent of the labor and materials furnished was payable monthly upon estimates of the architect, and the balance within a short time after the completion of the building, which was to be completed on or before October 15, 1913. It also in July and

August, 1913, entered into two other contracts, one for heating and ventilating the building, and the other for lighting the same, which contracts called for the payment of \$3,679 and \$599.95, respectively, at the completion thereof.

Held, that these contracts created a present debt against the district at the date they were entered into, which debt, after deducting available funds in the treasury applicable to the payment thereof, greatly exceeded the constitutional debt limit; and to the extent of such excess the contracts are void, and further payments thereon are enjoined. Anderson v. International School District (N. Dak.) 1918A-506. (Annotated.)

114. Executory Contract as Creating Debt. The purpose of section 183 of our N. Dak. state constitution in limiting the debt of certain municipalities, including school districts, to five per cent upon the assessed valuation of the taxable property therein, is to prevent such municipalities from improvidently contracting debts for other than ordinary current expenses of administration, and to restrict their borrowing capacity, and the word "debt," as therein employed, should receive a broad meaning so as to cover liabilities created under executory contracts for public improvements, although nothing is due thereunder until the same are executed in part or in whole. Anderson v. International School District (N. Dak.) 1918A-506.

(Annotated.)

115. Expenditure Assessed Against Property. Though the charter of a municipality provided that the common council should not order any public work requiring an expenditure of more than \$10,000, unless approved by a majority at a city meeting, the board of street commissioners may make a valid assessment for the construction of a sewer, costing much more than \$10,000, before any appropriation has been made, for until the amount of the special assessment has been laid, the portion to be paid by the city cannot be determined. Dellaripa's Appeal (Conn.) 1917B-862.

116. Provision for Debt Limit—Notice of Provision Imputed. One dealing with a municipality must take notice of its debt limit provision. German National Bank v. Covington (Ky.) 1917B-189.

a city having power to make a street improvement, but without power to have the cost assessed against the abutting property in excess of fifty per cent of the value thereof, contracted for street improvements, the cost of which exceeded fifty per cent of the value of the abutting property, and issued bonds for the cost of the work and pledged its credit for their payment, and the bond issue was taken over by the contractor, who completed the work, the obligation incurred by the city is an

indebtedness within Ky. Const. § 157; limiting municipal indebtedness; and, where the debt created exceeds the debt limit, any holder of the bonds cannot recover from the city thereon. German National Bank v. Covington (Ky.) 1917B-189.

(Annotated.)

118. Where street improvement bonds are not payable wholly out of a special fund from assessment on the property benefited, but the faith and credit of the city are pledged for their payment, they are within Ky. Const. § 157, limiting municipal indebtedness. German National Bank v. Covington (Ky.) 1917B-189. (Annotated.)

119. Improvement Assessed Against Property Benefited. Contracts for local improvements, the cost of which is to be borne wholly by the property benefited, do not create any "municipal indebtedness" within Ky. Const. § 157, limiting municipal indebtedness. German National Bank v. Covington (Ky.) 1917B-189.

(Annotated.)

#### Notes.

Interest on municipal bonds as factor in determining whether municipality has exceeded constitutional debt limit. 1918B-598.

Right of municipality to contract for local improvement with special assessment against persons benefited where cost exceeds authorized debt limit. 1917B-192.

# d. City Warrants.

120. Where a resolution of the mayor and aldermen authorizes the clerk to issue interest-bearing warrants to plaintiff covering the amounts then due only, the action of the clerk in issuing interest-bearing warrants for debts subsequently accruing does not bind the city. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

121. Authorization of Warrants—Future Indebtedness. A resolution of the mayor and aldermen that interest-bearing warrants "be issued covering the amounts due" plaintiff applies only to warrants then due and outstanding, and not to future indebtedness. Alabama City, etc. Co. v. Gadsden (Ala.) 1916C-573.

122. Agreement for Interest. A resolution of the mayor and aldermen that interest-bearing warrants be issued to plaintiff lighting company whose claims were past due, which was entered in the minutes and carried into effect by the clerk's interlineation of the provision for interest in the then outstanding warrants, is to be construed as an agreement to pay interest in consideration of plaintiff's continuing to furnish light to the city. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

123. Interest on Warrants. Where no date for payment of interest-bearing city

warrants was stipulated, interest on the interest due should be allowed from the date of bringing suit, which event fixed the time when the interest became due and payable. Alabama City, etc. Co. v. Gadsden (Ala.) 1916C-573. (Annotated.)

124. Where a resolution of the mayor and aldermen provided for the issuance of interest-bearing warrants to plaintiff, whose claims were past due, which was carried into effect by the clerk's interlineation of the interest provision in outstanding warrants, plaintiff was entitled to interest for the time payment was thereafter further deferred. Alabama City, etc. Co. v. Gadsden (Ala.) 1916C-573.

(Annotated.)

125. A payment to the holder of city warrants having been accepted as a payment of the principal, with the understanding that the right to more interest than paid should be settled in court, the question whether the amount so paid should be applied first to the payment of interest was eliminated from the case. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

126. Where a city being confessedly unable to pay plaintiff's warrants, after negotiations with plaintiff agreed to pay interest so as to effect a postponement of payment, such negotiations and agreement were equivalent to a presentation for payment. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573. (Annotated.)

127. Ordinarily city warrants draw interest, if at all, only after presentation to the disbursing officer and denial of payment for want of funds, since a municipal corporation, unlike a private person, is not bound to seek its creditors. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

(Annotated.)

128. Ala. Code 1907, § 1205, providing that, if no interest is stipulated to be paid on municipal warrants, they shall draw the legal rate after presentation, recognizes a municipality's power to contract to pay interest, but it did not require further presentation of warrants upon which the city agreed to pay interest, upon demand made prior to the enactment of the statute. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573. (Annotated.)

#### Note

Interest on city warrants. 1916C-576.

# 8. LETTING OF CONTRACTS.

129. Deposit With Bid—Effect of Withdrawing Bid. Under Baltimore City Charter, as amended by Md. Laws 1908, c. 163, providing that a contract for supplies or work shall be awarded to the lowest responsible bidder; that bids when filed shall be irrevocable; that each bid shall be accompanied by a certified check of \$500;

and that the successful bidder, failing to execute the contract and furnish a bond, shall forfeit his cheek as liquidated damages—one may not withdraw his bid, even before the opening of the bids, and so, being refused permission to do so, and refusing to sign the contract, on it being awarded him, he cannot recover the amount of his cheek. Baltimore v. J. L. Robinson Construction Co. (Md.) 1916C-425.

(Annotated.)

130. Necessity for Readvertisement. Where the lowest bidder to whom contracts for paving have been awarded acknowledged his inability to give satisfactory security, as required by the city charter, the contracts may be awarded to the next lowest bidder without readvertisement. Leitz v. New Orleans (La.) 1916D-1188.

# (Annotated.)

Rights of parties with respect to certified check or other deposit made with bid. 1916C-427.

Implied liability of municipality under contract let contrary to statute requiring competitive bidding. 1917A-1263.

Necessity for readvertisement where bidder to whom municipal contract is awarded fails to comply with conditions or abandons work. 1916D-1189.

### 9. OFFICERS.

### a. Appointment.

131. Failure to Announce and Certify Appointment. Where the result of a ballot of the common council of a city electing a person as city attorney was declared and recorded, the person elected was not deprived of his office by the mayor's failure to declare him elected, or by the failure of the city clerk to comply with Wis. St. 1913, § 925—29a, providing that to the person appointed to any office the city clerk shall issue a certificate that such person has qualified for such position, since the duty of the clerk was ministerial and no part of the appointing power, and an appointment is made when the last act required of the person vested with the power has been performed. State v. Tyrrell (Wis.) 1916E-270.

132. Wis. St. 1913, § 4971, providing that words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons unless otherwise expressly declared, does not apply to the election of a city attorney under Lake Geneva charter (Laws 1885, c. 322) § 7, providing that the common council may elect a city attorney, as the authority is not a joint authority given to the aldermen and the mayor, but an authority given to the common council in its collective capacity as

common council. State v. Tyrrell (Wis.) 1916E-270. (Annotated.)

133. Election by Council—Effect of Disregarding Valid Ballot. Where a ballot taken by the common council of a city for city attorney, resulting in three votes for one person, two votes for other persons, and one blank ballot, elected the person receiving the three votes, the election is not invalidated by the fact that the members of the council mistakenly held that he was not elected, nor by their vote to defer action upon the election of a city attorney. State v. Tyrrell (Wis.) 1916E-270.

134. Reconsideration of Appointment. After the election of a city attorney by the common council of a city and his acceptance and qualification, the council had no power to reconsider their action and elect another person. State v. Tyrrell (Wis.) 1916E-270.

# b. Compensation.

135. Right to Compensation—Failure to Approve Bond. Under Rem. & Bal. Wash. Code, § 7722, requiring the marshal in towns of the fourth class, before entering upon his official duties, to execute a bond to the town, and providing that the bond shall be approved by the council, marshal appointed, giving bond and oath and entering upon and performing the duties of his office is entitled to salary as marshal de jure, notwithstanding failure of the council to approve his bond. Bartholomew v. Springdale (Wash.) 1918B-432.

136. Officer De Jure—Right to Compensation—Payment to De Facto Officer. The rule that an officer de jure cannot recover from a municipal corporation salary for the period he was deprived of his office where it was paid to an officer de facto applies to a police operator, declared by the city charter to be an officer; it being immaterial that he was an appointive officer, and that he was wrongfully discharged. Thompson v. Denver (Colo.) 1918B-915. (Annotated.)

### c. Removal.

137. Removal—Failure to Enforce Laws. The state may impose upon the local officers of the city of Tulsa specific duties in the matter of the enforcement of the laws of the state having force and effect within the city, and may provide penalties for failure to discharge such duties, and in respect to the duties so imposed the municipality and its officers are the agents of the state, and subject to its command and control at all times, and may be removed for a failure to enforce such laws. State v. Linn (Okla.) 1918B-139.

(Annotated.)

138. Procedure for Removal — Charter Remedy not Exclusive. The provisions in

the charter of the city of Tulsa for the removal of the chief of police of such city are not exclusive, but such authority is cumulative to and concurrent with the jurisdiction vested in the district court by the general laws of the state. State v. Linn (Okla.) 1918B-139.

139. Grand Rapids Charter, tit. 2, § 11, requiring a two-thirds council vote for removal, refers to members who attended and heard all the evidence, and a reading thereof by an unofficial stenographer does not empower those who have been absent to vote. Hawkins v. Grand Rapids (Mich.) 1917E-700. (Annotated.)

140. The city council is held not to have given an officer a fair trial, where several councilmen intimated their opinion of his guilt prior to the hearing, and the vote removing him followed an all-night session, and denial of accused's request to later present evidence. Hawkins v. Grand Rapids (Mich.) 1917E-700. (Annotated.)

141. A council committee which formulated the removal charges is not thereby disqualified from voting on them in the council. Hawkins v. Grand Rapids (Mich.) 1917E-700. (Annotated.)

142. Nature and Requisites of Proceeding for Removal—Fairness and Impartiality. Removal proceedings under Grand Rapids Charter, title 2, § 11, are of a quasi judicial character, and must insure a fair trial. Hawkins v. Grand Rapids (Mich.) 1917E-700. (Annotated.)

143. Procedure for Removal—Necessity of Prescribing Rules. Under Grand Rapids Charter, title 2, § 11, supra, and title 3, § 11, authorizing the council to enact rules of procedure in removal cases, it is held that proceedings complying with title 2 are not void because no rules of procedure had been prescribed under title 3. Hawkins v. Grand Rapids (Mich.) 1917E—700

144. Removal for Acts During Previous Term. Where a city officer succeeds himself, he may be removed for misconduct during the preceding term. Hawkins v. Grand Rapids (Mich.) 1917E-700.

145. Title 2, § 11, supra, was not impliedly repealed by Mich. Pub. Acts 1915, No. 145, authorizing the governor to remove elective city officers, for the removal power is concurrent. Hawkins v. Grand Rapids (Mich.) 1917E-700.

146. Grand Rapids City Charter, tit. 2, § 11, governing the council removal of city officers for misconduct, is not unauthorized by the constitution of 1850, article 15, § 13, 14, and article 4, § 38, conferring general legislative control over municipalities, include such authority. Hawkins v. Grand Rapids (Mich.) 1917E-700.

147. Officers—Power to Remove. A municipal corporation has inherent power to

remove its officers. Hawkins v. Grand Rapids (Mich.) 1917E-700.

148. Power to Remove Officer-Milk Inspector. R. I. Act March 14, 1870, c. 829, provided that the mayor and aldermen of any city and town council of any town might annually appoint one or more milk inspectors for their respective places, and Laws 1912, c. 863, required the election of a milk inspector in the city of Providence obligatory. Laws 1896, c. 333, § 1, authorized inspectors to employ, subject to the approval of the town council and the mayor and aldermen, one person as collector of samples, which collector, on being employed, is required to be engaged to the faithful discharge of his duties before the city or town clerk, who was required to keep a record thereof, and should receive such salary as the mayor and aldermen or town council should determine. Laws 1900, c. 785, § 1, provides that the inspector may at any time dismiss such collector, and, subject to the same approval, may appoint another person in his stead. Held that, since boards of aldermen and town councils are expressly authorized to act as local boards of health, and the city council of the city of Providence is vested with such jurisdiction by its charter, a milk sample collector appointed pursuant to such statutes in the city of Providence was not a state or public officer, but was an employee whom the city council could remove for cause, and whom the council might suspend from service pending the determination of charges. Chare v. City Council (R. I.) 1916C-1257.

# d. Personal Liability.

149. Though the mayor and councilmen of a city receive no compensation for such services, they are liable for injuries received by reason of a defective way, where, with notice of the defects, they do not repair them, although authorized by the charter to do so. Pullen v. Eugene (Ore.) 1917D-933. (Annotated.)

150. Defective Condition of Street. charter provision that a city should not be liable to any person for injuries caused by defects in sidewalks or streets unless the mayor, the chairman of street committee, or the street commission shall have had actual notice and reasonable opportunity to repair the defect, and that in no case shall more than \$100 be recovered as damages from the city, is not in violation of Ore. Const. art. 1, § 10, declaring that every person shall have remedy by due process of law for injuries done his person, property or reputation; for, as the city council is given power to repair the streets and sidewalks, one injured by reason of defects may maintain an action against the city officers for their breach of official duty. Pullen v. Eugene (Ore.) 1917D-933. (Annotated.)

# 10. COUNCIL MEETINGS AND PRO-CEEDINGS THEREAT.

151. Power of Majority of Quorum. Under Lake Geneva Charter (Laws Wis. 1885, c. 322) § 1, providing that all officers other than elective officers shall be appointed by the common council, section 7 providing that the common council at its first meeting may elect a city attorney, St. 1913, § 925-49, providing that the mayor and aldermen of cities shall constitute the common council, and that whenever a majority or certain proportion of the members is required to take action or form a quorum the mayor shall not be counted, and that he shall have no vote except in case of a tie, and section 925-51, providing that two-thirds of the members shall constitute a quorum for the transaction of business, where the mayor and the six aldermen were present when a ballot was taken for city attorney, resulting in three votes for one person, two votes for other persons, and one blank ballot, the person receiving the three votes was elected, as in the absence of any statute to the contrary the majority of a quorum is sufficient to elect, and a majority of the votes cast where all the aldermen are present is sufficient, though some do not vote, and whether, accurately speaking, the common council elects or appoints a city attorney, the power is to be exercised by the common council as a collective body, acting in its capacity as common council. State Tyrrell (Wis.) 1916E-270. (Annotate (Annotated.)

152. Action of Council—Right to Vote—Effect of Personal Interest. A member of a governing body cannot vote on any question involving his own character or conduct, or his right as a member, or his pecuniary interest, if that be immediate, particular, and distinct from the public interest; and hence a borough councilman is disqualified from voting for a resolution accepting his resignation from the council. Commonwealth v. Raudenbush (Pa.) 1917C-517. (Annotated.)

Notes.

Legality of action by majority of quorum of municipal council. 1916E-274.

Right of member of municipal council to vote on matter involving his personal interest. 1917C-518.

#### 11. MUNICIPAL BOARDS.

153. Where an ordinance enacted by a city under Pa. Act April 25, 1903 (P. L. 314), authorizing cities to establish certain institutions with power to acquire property, authorized a board of trustees created by the city to manage certain property, to hold property for the purposes comprised in the object of the board's creation, with the powers and subject to the restrictions prescribed by such statute, but made no other change in the board's status and did not provide for a

transfer of the property to it, the board remains merely the city's administrative agent with respect to the property. Board of Trustees of Phila. Museums v. Trustees of Univ. of Pa. (Pa.) 1917D-449.

154. Property — Powers of Administrative Board. A board of trustees created by a city as its administrative agent to manage a museum and the premises on which the museum buildings were located cannot, in the absence of a clear intent, shown by ordinance, to create a distinct entity as depository of the legal title or of any legal transfer to the board, question the city's right to convey the property. Board of Trustees of Phila. Museums v. Trustees of Univ. of Pa. (Pa.) 1917D—449.

### 12. RECORDS.

155. Necessity of Record. An informal agreement by the mayor and aldermen that interest should be paid on plaintiff's claims, which was not entered in the minutes of the board for fear other creditors would demand interest, is of no effect. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

156. The law requires a record of the proceedings of the mayor and aldermen, so that those acting under it may have no occasion to look beyond it, to avoid leaving such proceedings to be proved by parol evidence, and to make certain that rights shall not depend on the mere recollection of witnesses. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

### 13. FIRE AND POLICE DEPART-MENTS.

# a. Authority to Maintain.

157. The law creating a metropolitan police system for Kansas City is not unconstitutional because of the flexible provisions in Mo. Rev. St. 1909, § 9787, by which the determination of the population and the number of police districts is left to the police commissioners. State v. Jost (Mo.) 1917D-1102. (Annotated.)

158. Census—As Sole Source of Information—Construction of Statute. The law requiring an "estimate" of population "from the best known source," for the purpose of fixing the number of patrolmen for a metropolitan police system, does not refer to the federal census as the only source of information; a "census" being a finding of the population and not an "estimate." State v. Jost (Mo.) 1917D-1102.

159. The creation of a metropolitan police system for Kansas City by Mo. Rev. St. 1909, § 9787 et seq. is within the power of the state, though the city acts under a special charter adopted under Const. art. 9, § 16; such charters being subservient to general laws. State v. Jost (Mo.) 1917D—1102. (Annotated.)

160. Police Department — Metropolitan Police — Legislative Power to Establish. The peace and safety of its citizens being a matter of general state concern, the state can provide a metropolitan police system for cities and compel them to pay the expenses thereof. State v. Jost (Mo.) 1917D-1102. (Annotated.)

#### Note.

Validity of statutes creating metropolitan police. 1917D-1112.

# b. Compensation.

161. Fulton City Charter (Laws N. Y. 1902, c. 63), \$ 119, providing that call men shall be entitled to the same privileges as are accorded by the laws of the state to volunteer firemen, applies not only to the provision of Gen. Municipal Law, \$ 205, as amended by Laws 1914, c. 400 (McKinney's Consol. Laws, Book 23, p. 128), for payment of a certain sum to a volunteer fireman totally disabled while in the discharge of his duties, but to its further provision for payment to his representatives if such injuries result in death. Hammond v. Fulton (N. Y.) 1917C-1137.

162. Bridgeport City Ordinance March 15, 1909, § 134, provides for the regulation of the fire department of the city by a board of fire commissioners, prescribes the manner of paying their salaries, and declares that the board may continue the salary of a member of the department unable to perform his duties by reason of incapacity received while performing the usual duties of the department. In April, 1910, the city adopted an ordinance by which members of the fire department were divided into three classes, section 2 of which provided the yearly salaries of each grade, but made no reference to the method of compensation, the time when it was to be paid, or the power of the commissioners to continue the salary of a member when incapacitated from service. It is held that such later ordinance did not operate as an implied repeal of the former, so as to warrant payment of salary to a fireman while absent from duty because of illness not contracted in the service of the department. Walsh v. Bridgeport (Conn.) 1917B-318.

163. Pay of Fireman—Absence on Account of Sickness. Bridgeport City Ordinance March 15, 1909, § 134, provides that the board of fire commissioners may continue, in their discretion, the salary of any officer or member of the fire department who shall have received any injury while in the performance of his duty, incapacitating him from performing his usual duties in the department. It is held that such provision gives rise to a conclusive inference that firemen will not be entitled to salary during absence because of incapacity to perform their duties not received

while in the performance of duty. Walsh v. Bridgeport (Conn.) 1917B-318.

# e. Compensation for Injury.

Validity of Statute. Provision of N. Y. General Municipal Law (Consol. Laws, c. 24), § 205, as amended by Laws 1914, c. 400 (McKinney's Consol. Laws, Book 23, p. 128), for payment of a certain sum by a city to the representatives of a volunteer fireman dying from injuries received in the performance of his duties, extended by City of Fulton Charter (Laws 1902, c. 63) § 119, to its call men, being part of their contract of employment, is in the nature of insurance, part of the compensation agreed to be paid, and so does not contravene Const. art 8, § 10, inhibiting appropriation of public money to private purposes. Hammond v. Fulton (N. Y.) 1917C-1137. (Annotated.)

#### d. Status of Call Men and Volunteers.

165. Privileges of Call Men—Construction of Statute. Fulton City Charter (Laws N. Y. 1902, c. 63), \$119, providing that its call men shall be entitled to the same privileges as "are accorded" by the laws of the state to volunteer firemen, includes privileges under laws subsequently enacted; General Construction Law (Consol. Laws, c. 22), \$§ 48, 100 (McKinney's Consol. Laws, Book 21, pp. 63, 85), provides that words in the present tense include the future, unless the general object of the statute or the context of the language used indicates that a different meaning is intended. Hammond v. Fulton (N. Y.) 1917C-1137.

166. Fire Department—Privileges and Exemptions of Volunteers—"Call Mem." The word "privileges" in City of Fulton Charter (Laws N. Y. 1902, c. 63), § 119 providing that the "call men" of the fire department shall be entitled to the same privileges and exemptions as are accorded by the laws of the state to volunteer firemen, is used in the sense of rights, and so includes any right to payment in case of injury. Hammond v. Fulton (N. Y.) 19170—1137.

#### 14. TORTS.

a. Public or Governmental Functions or Duties.

167. Liability for Personal Injury—Parks. In establishing, caring for and maintaining streets, highways and public parks, municipalities act in their governmental and not in their proprietary capacity. Ackeret v. Minneapolis (Minn.) 1916E-897. (Annotated.)

168. Cities and villages are liable for injuries resulting from dangerous conditions in their streets; but, with this single

exception, municipalities are not liable in damages for negligence in performing their governmental functions, unless such liability has been imposed by statute Ackeret v. Minneapolis (Minn.) 1916E-897.

(Annotated.)

- 169. A municipality is not liable to a pedestrian injured by a door on private premises which opens outwards into the street, in the absence of a regulation forbidding such a construction which it has neglected to enforce. Evans v. Edinburg (Eng.) 1916E-455. (Annotated.)
- 170. Wharves-Personal Injury from Defect-Liability. Where a city maintained a floating public dock for the landing of launches and small water craft by day and night, and extended an implied invitation to the public to use it, plaintiff's failure to pay the required wharfage for landing his launch does not make him a trespasser, so as to affect his right of action against the city for personal injury from alleged negligent maintenance of the deck. Harris v. Bremerton (Wash.) 1916C-160. (Annotated.)

# b. Private, Local or Corporate Functions or Duties.

171. Operation of Electric Plant—Liability for Personal Injury. A city, owning and operating an electric plant, as authorized by Acts Tenn. 1891, c. 207, and Acts 1901, c. 11, though only to light its streets and municipal buildings, is engaging in performing a private function; and hence the rule of respondeat superior applies to it, so as to render it liable for negligent construction and maintenance of a heavily charged wire, which by coming in contact with a guy wire attached to a telephone pole caused the death of a lineman employed by the telephone company. Saulman v. Mayor, etc. (Tenn.) 1916C—1254. (Annotated.)

172. Liability for Acts of Agents—Business Function—Operating Filtration Plant. Where a city undertakes to construct and operate a filtration plant to supply water to its inhabitants, it is exercising a business, as distinguished from a governmental, function, and the maxim respondeat superior applies to the acts of its officers and agents in exercising such functions; and therefore it cannot avoid liability for the wrongful acts of its servants in holding what they believe to be the city's property. Armstrong v. Philadelphia (Pa.) 1917B-1082.

173. Liability for Tort in Cleaning Street. The duty of keeping the streets of a municipality free from matter which, if allowed to remain, would affect the health of the public is a governmental function, the exercise of which would exempt the municipality from liability to a suit for damages to an employee with-

out fault, who is injured by reason of a defective cart in which he is hauling "the sweepings of the streets" of such municipality, and which has been furnished him for that purpose by the agents of the municipality.

(a) This court will take judicial cognizance that the sweepings of the streets of a municipality contain matter which, if allowed to remain in the streets, will injuriously affect the health of the citizens

of such municipality.

(b) And this is so notwithstanding petition describes "the sweepings of the streets" as "dirt and trash." Mayor, etc. v. Jordan (Ga.) 1916C-240. (Annotated.)

#### Note.

Liability of municipality for tort committed in cleaning streets or in removal of garbage, ashes, or other refuse. 1916C-242.

# c. Torts of Officers, Agents and Employees.

174. A city that constructs and maintains walks and footpaths in its parks which are used as thoroughfares in passing from one part of the city to another is liable for injuries resulting from dangerous conditions in such walks caused by the negligence of its employees. Ackeret v. Minneapolis (Minn.) 1916E-897.

(Annotated.)

# d. Notice of Claim.

175. Presentation of Claims—Necessity. Ala. Code 1907, § 1191, providing that claims against a municipality must be presented within a certain time or they shall be barred, is a statute of nonclaim, and presentation within its provision is not prerequisite to the bringing of suit. Alabama City, etc. R. Co. v. Gadsden (Ala.) 1916C-573.

176. Injury from Defect—Notice of Claim—Amendment. Under the Seattle charter providing that all claims against the city for damages shall contain all items of damage claimed, where a claim for personal injuries made no claim for damages on account of the employment of a nurse, though such damage was known when the claim was filed, it is error to permit an amendment of the claim at the trial by including such damages, as the provision requiring the filing of a claim is statutory in its nature and there can be no amendment without statutory authority. Wagner v. Seattle (Wash.) 1916E-720.

177. Failure to File Claim—Infancy as Excuse. N. Y. General Village Law (Consol. Laws, c. 64) § 341, provides that no action shall be maintained against a village for injuries by reason of the negligence, ctc., unless commenced within one year after the cause of action accrued,

1916C-1918B.

nor unless, within 60 days thereafter, a written verified statement, etc. shall be filed with the village clerk. Held that, where a child of five was injured by the alleged negligence of a village, the fact of infancy did not incapacitate the infant from bringing a suit at once under Code Civ. Proc. § 468, providing that an infant's right of action shall not be deferred on account of infancy; and hence the cause of action accrued at the time of the injury, and not from the date of the subsequent appointment of a guardian ad litem. Murphy v. Fort Edward (N. Y.) 1916C-1040. (Annotated.)

178. Where an infant five years of age was injured by the alleged negligence of a village on September 28, 1910, its right of action is not barred because it did not file the notice required by N. Y. General Village Law, § 341, within the 60 days required by such section, nor until August 5, 1912, under the rule that the law does not seek to compel a man to do that which he cannot possibly perform; the failure of the father or mother to file the notice not being chargeable to the infant. Murphy v. Fort Edward (N. Y.) 1916C-1040. (Annotated.)

179. Purpose of Requirement of Notice. The purpose of the notice required by Iowa Code 1897, § 3447, subd. I, requiring actions founded on injuries to the person because of defects in sidewalks to be brought within three months, unless written notice of the time and place of injury be served within 60 days from the injury is to inform the city authorities of the location of the defect and the circumstances attending the accident, so as to enable them to investigate the city's liability while the facts are fresh, and ascertain the character of the defect and injuries while witnesses are obtainable. Palmer v. Cedar Rapids (Iowa) 1916E-558.

180. Injury to Wife or Child. Iowa Acts 22d Gen. Assem. c. 25, § 1, enacted in 1888, provided that, in cases of personal injury from defective streets, etc. no suit shall be brought against a municipal corporation after 6 months from the time of injury, unless written notice specifying the place and circumstances of the injury shall be served upon it within 90 days after the injury, which provision was, different language, carried into Code 1897, § 3447, which provides that an action may be brought within the times herein limited after they accrue, and not afterwards; subdivision 1, those actions "founded on" injury to the person on account of defective streets within 3 months, unless written notice specifying the time, place, and circumstances of the injury be served upon the municipality within 60 days from the happening of the injury; subdivision 3, those "founded on" injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statutory penalty, within two years. Held, that section 3447, subd. I, was applicable to an action for damages for the loss of the services, etc., of plaintiff's minor son by injuries from a defective sidewalk, so that an action could not be maintained, if notice of injury was not given as required thereby; the words "founded on" meaning to serve as a base or basis for, and not necessarily contemplating a direct injury to the person suing. Palmer v. Cedar Rapids (Iowa) 1916E-558. (Annotated.)

181. Notice of Claim by Parent for Injury to Child—Sufficiency. A notice given by a parent of a claim for injuries sustained by his minor child which contains the essential information required by the statute is sufficient, although it fails to state specifically that the parent claims damages on his own account and also as the statutory representative of his child, and fails to make an apportionment between the two of the amount claimed. Ackeret v. Minneapolis (Minn.) 1916E-897.

182. Officer to Whom Notice must be Given. Under such statute, the fact that plaintiff pointed out to the legal officers of the municipality the place of her injuries and gave them verbal notice thereof, does not excuse a failure to give the written notice, the purpose of the act being to provide written notice to the mayor and municipality, and it not appearing that the law officers of the municipality were authorized to waive such notice. White v. Nashville (Tenn.) 1917D-960. (Annotated.)

183. Actions for Personal Injury - Requirement of Notice of Injury—Validity. Tenn. Acts 1913, c. 55, entitled "An act to prescribe the method of bringing suits and to limit the time of bringing suits against municipal corporations on account of injuries to persons or property resulting from the negligence of the officers or employees of such corporations," and declaring that no suit shall be brought against any municipal corporation on account of personal or property injuries resulting from defective conditions of any street, alley sidewalk, or highway unless within 90 days after such injury has been inflicted, a written notice shall be served upon the mayor of the municipality, stating the time and place where such injury was received and the general nature of the injury, and that failure to give notice shall be a valid defense against any and all liability. It is held that as the act is general in its application and the classification is not unreasonable or capricious, the act is not invalid under Const. art. 11, § 8, or Const. U. S. Amend. 14, § 1 (9 Fed. St. Ann. 392) class legislation. White v. Nashville (Tenn.) 1917D-960.

184. Amendment of Notice. In an action against a city for personal injuries, the error in permitting the claim filed with the city to be amended to include damages not specified therein is harmless, where there was no attempt to prove such damages. Wagner v. Seattle (Wash.) 1916E-720.

185. Sufficiency of Notice—Address of Claimant. Under Rem. & Bal. Wash. Code, § 7995, a claim against a city of the first class for injuries to a person who had resided at 208 Twenty-first avenue for six years was not defective, though it stated her street address as 218 Twenty-first avenue, where she was well known to the residents of 218 Twenty-first avenue and proper inquiry there would have disclosed her residence, as the purpose of provisions requiring the filing of claims is to insure such notice to the city as will enable it to investigate the cause and character of the injury; and where there is a bona fide attempt to comply with the law and the notice filed actually accomplishes its purpose of notice, it is sufficient, though defective in some particulars. Wagner v. Seattle (Wash.) 1916E-720. (Annotated.)

186. Under Rem. & Bal. Wash. Code, \$7995, requiring claims for damages against any city of the first class to contain a statement of the actual residence of the claimant by street and number at the date of filing the claim and for six months immediately prior thereto, in an action for personal injuries the court has no power to permit an amendment of the claim as filed to state a different street address than that therein stated. Wagner v. Seattle (Wash.) 1916E-720.

187. Scope of Notice—Injuries Provable. While a claim against a city for personal injuries cannot be amended at the trial to include items of damage known at the time of the filing of the claim, but not included therein, injuries not specifically mentioned in the claim, but which naturally and proximately flow from the injuries described in the claim, are provable. Wagner v. Seattle (Wash.) 1916E-720.

# Notes.

Sufficiency of statutory notice of claim against municipality with respect to name and address of claimant. 1916E-722.

Notice to municipality as prerequisite to action for injury to wife or child of plaintiff. 1916E-560.

Infancy or other disability of claimant as suspending limitation of time for filing claim against municipality. 1916C-1042.

# e. Pleading.

188. Petition Insufficient. The petition was subject to general demurrer, and should have been dismissed. Mayor, etc. v. Jordan (Ga.) 1916C-240.

MUNICIPAL ELECTRIC LIGHTING PLANT.

See Municipal Corporations, 38.

MUNICIPAL ICE PLANT. See Municipal Corporations, 37.

MUNICIPAL TELEPHONE SYSTEM. See Municipal Corporations, 40, 41.

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### NAMES.

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Effect of name given statute on construction, see Statutes, 107.

- 1. Where an indictment alleges the larceny of a cow belonging to A. B., and the proof showed it to belong to A. B., Jr., there is no fatal variance; the addition of "Jr." to a name being a mere matter of description. Harris v. State (Wyo.) 1917A-1201. (Annotated.)
- 2. Where a given name is written, the middle name or letter may be disregarded in identifying the person. Riley v. Litchfield (Iowa) 1917B-172.
- 3. Disregarding Middle Name or Initial. Where two or more Christian names are

used, the middle name or names or letter is generally disregarded. Riley v. Litchfield (Iowa) 1917B-172.

4. Presumption That Letter Constitutes Name. A person's name is composed of the Christian name and a surname, and a Christian name may consist of letters only, and there is no presumption that letters are not themselves Christian names, and where a letter or letters appear before a surname they are treated, in the absence of any showing to the contrary, as the Christian name assumed by the person. Riley v. Litchfield (Iowa) 1917B-172.

(Annotated.)

- 5. Change by Judicial Proceeding-Discretion of Court. Under the statute requiring sufficient and reasonable cause for a change of name, a decree is not a matter of right, but of judicial discretion. Neb. Rev. St. 1913, c. 53. In re Taminosian (Neb.) 1917A-435. (Annotated.)
- "Wood" 6. Variance Between "Woods." The evidence is held to be sufficient to warrant a finding by the jury that defendant and deceased were as well known by the name "Wood," used in the indictment, as by their true name, "Woods," preventing a fatal variance. Woods v. State (Ark.) 1918A-348. (Annotated.)

7. Idem Sonans-Omission of Final "S." The names "Wood" and "Woods" are not idem sonans. Woods v. State (Ark.) 1918A-348. (Annotated.)

# Notes.

Validity and construction of statute authorizing change of name by individual. 1917A-437.

Effect of use of "Sr." or "Jr." in connection with name. 1917A-1211.

Addition or omission of final "s" as affecting application of doctrine of idem sonans. 1918A-351,

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Duty toward workman by physician employed by master, see Physicians and Surgeons, 16.

Malpractice, see Physicians and Surgeons,

Care required of physician, see Physicians and Surgeons, 23-27.

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Complaint for personal injuries, see Pleading, 5.

Demurrer to complaint, see Pleading, 40. In operating hand car, see Railroads, 52,

Care at grade crossing, see Railroads, 64-66.

Contributory negligence at crossings, see Railroads, 69-77.

Contributory negligence in accident on right of way, see Rallroads, 85-87. Liability of school district, see Schools,

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Liability of sheriff for negligence, see Sheriffs and Constables, 8-10.

Liability for collision, see Ships and Shiping, 2.

Liability of street railway companies, see Street Railways, 20-43.

In sending message, see Telegraphs and Telephones, 27, 28.
Of operators of "Ocean Wave," see The-

aters and Amusements, 8.

In damage to riparian land by floating logs, see Trees and Timber, 25.

Liability of warehouseman for damage by tides, see Warehouses, 3, 4.

Liability of water company for failure to furnish water for fire, see Waterworks and Water Companies, 10.

# ACTIONABLE NEGLIGENCE.

#### a. In General.

1. What Constitutes Negligence-Breach of Duty Essential. Actionable negligence arises only from breach of a legal duty. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420.

2. Liability of Manufacturer to Consumer. The manufacturer of chewing tobacco is not liable for injury to the ulti-mate consumer, a purchaser from a re-tailer, for injury from a bug imbedded in a plug, the manufacturer having no knowledge or notice of its presence and the consequent danger of using the tobacco. Liggett etc. Tobacco Co. v. Cannon (Tenn.) 1917A-179.

#### Notes.

Liability as for negligence of person obstructing highway under statutory or municipal authority. 1917A-1003.

Liability as for negligence of person who irjures bystander while acting in self-1916C-1150. defense.

Liability for injury to infant stealing ride on vehicle, 1917D-379.

# b. Degrees of Care Defined.

3. Degrees of Negligence. There is a distinction between the degrees of negligence, as being slight, ordinary, or gross. Massaletti v. Fitzroy (Mass.) 1918B-1088.

4. Degrees of Negligence — Gratuitous Undertaking. Justice requires that, to make out liability in case of a gratuitous undertaking, plaintiff ought to prove a materially greater degree of negligence than where defendant is to be paid for doing the same thing. Massaletti v. Fitzroy (Mass.) 1918B-1088.

5. Wall Abutting on Street. In an action against a railroad company for injury to an infant from being struck, while playing in the street, by a stone which fell from a railroad wall, an instruction that defendant was required to use "that degree and amount of care which is within the range of human precaution and foresight to keep the wall in such condition as not to cause injury to a person upon the public highway" is erroneous; the defendant being required to exercise only that reasonable care required of the ordinary prudent man under similar circumstances. Soriero v. Pennsylvania R. Co. (N. J.) 1916E-1071.

- e. Duty of Person Furnishing Accommodations of Public Nature.
- 6. A child six years old going on a county public dock with an elder brother visiting the dock to receive a newspaper is not a trespasser, but is legally thereon connected with a purpose for which it was intended, and the county cannot escape liability for injury to the child on the ground that he was a trespasser. Gregg v. King County (Wash.) 1916C-135.

(Annotated.)

7. A county maintaining a public dock for public use and convenience is chargeable with notice that it may be used as a public street or other public place by any member of the public, including young children, especially in view of the presence of a confectionery store on the dock constituting an implied invitation to children and others to visit the dock, and it cannot escape liability for injuries to a child on the dock on the theory that it could not anticipate the presence of the child thereon. Gregg v. King County (Wash.) 1916C-135. (Annotated.)

# d. Duty to Invitee.

8. Owners of Premises — Liability for Injury. An invitation not accepted or acted on creates no legal relationship so as to be the basis for a charge of negligence. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420.

# e. Condition of Premises.

# (1) In General.

- 9. Wharves Personal Injury from Defect—Liability. The degree of care required by a county maintaining a public dock for public use and convenience must be considered with reference to the uses and purposes for which the dock was constructed, maintained, and operated, and open to all classes of people, including children, who may be drawn there by curiosity or interest in the arrival of boats or who may be sent there on errands for their parents. Gregg v. King County (Wash.) 1916C-135. (Annotated.)
- 10. The common-law rule of liability of lessees who have control or occupancy of a wharf, for injuries caused by the defective or dangerous condition of the premises where such defective or dangerous condition reasonably should have been known to and remedied by the occupying tenant, is in force in this state. King v. Cooney-Eckstein Co. (Fla.) 1916C-163.

(Annotated.)

- 11. The liability of the lessee in damages for injuries to others caused by unsafe premises is grounded upon his duty in being the occupant to keep the wharf in reasonably safe condition for those who go thereon by express or implied invitation. King v. Cooney-Eckstein Co. (Fla.) 1916C—163. (Annotated.)
- 12. At common law the tenant and occupier of a wharf is bound, as between himself and the public, to keep the premises in such condition that they will be reasonably safe for persons who go lawfully upon the premises, by express or implied invitation; and such tenant or occupier is prima facie liable for damages caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by the tenant or occupier. This is the law even though the lessor covenanted to keep the premises in repair. King v. Cooney-Eckstein Co. (Fla.) 1916C-163. (Annotated.)
- 13. A county maintaining a public dock under Rem. & Bal. Wash. Code, § 8114, for public use and convenience, must exercise reasonable care for the safety of the public and all persons having occasion to use it. Gregg v. King County (Wash.) 1916C-135.
- 14. Defendant dock company, knowing that the employee of a shipbuilding company, a licensee, was engaged in repair work on the side of the steamer under its discharging rig, and that coal often dropped when the rig was in operation, and which did not notify decedent when the rig was started, is guilty of actionable negligence. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-167. (Annotated.)
- 15. In such case the defendant company is bound to refrain from acts of affirmative negligence unnecessarily increasing the danger to decedent or rendering the premises more dangerous, at least without notifying him of such increased danger. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-167. (Annotated.)
- 16. Decedent, the employee of a ship-building company, engaged in repairing a coal-laden steamer which defendant company is discharging at its dock, who is authorized to be there, and whose presence is known to defendant, which makes no objection, is not a trespasser, but is entitled to the privileges and protection of a licensee. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-167. (Annotated.)
- 17. Duty of Landowner—Extinguishing Fire Started by Another. An owner of premises, who discovers fire thereon for which he is not responsible, must use ordinary care to prevent it from spreading to adjoining property. Excelsior Products Mfg. Co. v. Kansas City So. R. Co. (Mo.) 1917B-1047.
- 18. Duty to Licensee. Where plaintiff goes on defendant's land at the place

where she is injured, along a path which defendant has permitted the public to use, she is not an invitee, but merely a licensee, as to whom defendant owes no duty, except not to injure her by wilful, wanton, or reckless conduct. Romana v. Boston Elevated R. Co. (Mass.) 1917A-893.

#### Notes.

Liability of proprietor for injuries received in turnstiles, revolving door, or swinging door. 1916D-1235.

Injuries to persons on or about wharves, docks, or piers. 1916C-139.

Liability of owner for injuries caused by collapse of building. 1917A-478.

### (2) Injuries to Customers on Business Premises.

- 19. The owner of a store, to which entrance was had through a swinging door, is not liable for an injury to a customer occasioned by the negligence of another customer, who jammed the door on the first one's hand. Smith v. Johnson (Mass.) 1916D-1234. (Annotated.)
- 20. Stores—Customer Injured in Swinging Door Liability of Owner. Where plaintiff, in entering defendant's store through a swinging door, put out her hand to guard her face from the door, which was swinging in her direction, and it was crushed between the door and the jamb, defendant was not liable; such door being in good condition and similar to those generally used, and there being no such crowd as would require the keeping of a doorman. Smith v. Johnson (Mass.) 1916D-1234.

  (Annotated.)
- 21. Wharves—Personal Injury from Defect—Liability. In an action for injuries by falling into a hole in the wharf of defendant transportation company, to which plaintiff had gone to receive an expected shipment on defendant's vessel, the evidence is held to sustain a finding that plaintiff was impliedly invited by defendant, on the particular occasion, to go to the river end of the wharf, where he was injured. Miller v. Delaware River Trans. Co. (N. J.) 1916C-165.
- 22. Bathing Resorts—Liability of Keeper—Failure to Provide Life Lines. Under the laws of this state an action may be maintained against a person who operates or maintains a bathhouse where bathing suits are furnished for hire, at the seaside resorts in the state, for negligence in failing to maintain proper and safe life lines and life rafts for the protection of his patrons, when the patrons who are not guilty of contributory negligence are injured as a proximate result of the negligence of such operator or his agents. Mc-Kinney v. Adams (Fla.) 1917B-326.

(Annotated.)

#### Note.

Duty to patrons of proprietor of bathing resort or beach, 1917B-333.

#### (3) Attractive Nuisances.

- 23. Railroad Engine. The doctrine that one who leaves an attractive and dangerous machine on his premises thereby invites children to play with it, and must use due care to protect such children from injury, does not apply, where a railroad engineer placed a five year old boy on his engine and then put it in motion without taking proper precautions for the boy's safety. Lovejoy v. Denver, etc. R. Co. (Colo.) 1916E-1075.
- 24. Unguarded Mill Race—Death of Trespassing Child. The owner of a mill race is not liable for the death of a child who, trespassing upon premises and playing upon the banks of the mill race, fell in and was drowned, though it was sometimes resorted to by children for amusement and was not protected by fence or guard. Riggle v. Lens (Ore.) 1916C-1083.

  (Annotated.)
- 25. Electricity Escaping from Pole. That defendant suffers its premises to be in such condition as would be likely to attract people to use a path thereon, and it did attract plaintiff, who in traversing the path was injured by electricity escaping from one of defendant's poles, does not constitute even an implied invitation to plaintiff to use the path. Romana v. Boston Elevated R. Co. (Mass.) 1917A-
- 26. Liability to Trespassing Infant. The basis of the doctrine of liability to a trespassing infant, injured through the dangerous condition of the premises, is implied invitation. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420.
- 27. Though a dangerous thing may not be an attractive nuisance, yet where it is left exposed, so that children are likely to come in contact with it, and where their getting in contact with it is obviously dangerous to them, the persons exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them, and are bound to take reasonable pains to guard it, so as to prevent injury. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721.

  (Annotated.)
- 28. Pool of Water—Liability. A drain to take off the hot water of the boilers of a cotton mill, the waters being discharged only once a day for two hours, difficult to approach at its head by reason of slag and briars, and greatly obscured, though situated in a square in which employees' and other children are wont to congregate, is not an attractive nuisance.

Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721. (Annotated.)

#### Note.

Liability of landowner for injury to trespassing child on account of unguarded pond, pool, well, etc. 1916C-1085.

# (4) Dangers Near Highway.

29. Coal Hole—Personal Injuries—Liability of Abutting Owner. A lot owner who maintains a coal hole in a city pavement as an appurtenance, whether constructed by him or not, must exercise reasonable care in keeping it in a reasonably safe condition for use by the public as part of the sidewalk. Whatever the public safety reasonably requires is the measure of diligence to be exercised by him. Hill v. Norton (W. Va.) 1917D—489.

(Annotated.)

- 30. If he knows, or by the exercise of reasonable diligence would know, the grating over a coal hole in the sidewalk in front of his property is defective, and fails to repair it, he is liable for an injury resulting therefrom to a pedestrian lawfully using the sidewalk. Hill v. Norton (W. Va.) 1917D-489. (Annotated.)
- 31. He remains liable for injuries to a pedestrian resulting from a defective coal hole grating in a pavement, when appurtenant to the premises, whether occupied in whole or in part by tenant, if the defect therein existed at the date of the demise. Hill v. Norton (W. Va.) 1917D-489.

  (Annotated.)
- 32. Door Opening Outward Into Street—Liability. The owner of premises on which is a door opening outward into the street is not liable to a pedestrian who is injured by being struck by reason of the sudden opening of the door by a third person, the injury resulting from the negligent use of the door and not from the manner of its construction. Evans v. Edinburg (Eng.) 1916E-455. (Annotated.)

#### Notes.

Liability of owner of building for injury to pedestrian resulting from erection of scaffold for repairing or painting building. 1916C-123.

Liability for injuries caused by door or gate opening outwards in street. 1916E-

Legal liability for injuries sustained by pedestrian from coal hole in sidewalk. 1917D-494.

### (5) Stationary Engines.

33. Stationary Engine. What constitutes ordinary care, in action for damages by fire from engines, depends upon the circumstances of the particular case, and the greater the danger of communicating

fire to the property of others, the more precautions will be required. Hodges v. Baltimore Engine Co. (Md.) 1917C-766.

(Annotated.)

#### Note.

Liability for fire caused by stationary engine, furnace, or the like. 1917C-771.

### f. Violation of Statute.

- 34. Though the violation of a penal statute constitutes negligence per se, it is not actionable, unless it is the proximate cause of the injury for which the action is brought. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 35. Where a standard of duty is fixed and its measure defined by law, the omission of such duty is negligence per se, rendering the violator liable for injuries proximately caused by such violation, irrespective of the questions of care or prudence. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 36. The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Hoopes v. Creighton (Neb.) 1917E-847.

### g. Proximate Cause.

- 37. Res Ipsa Loquitur—When Doctrine Applies. For a presumption from the fact of an accident to make out a prima facies case of negligence under the doctrine of res ipsa loquitur, it must appear that the instrumentality which involved the injury was one which, in the ordinary experience of mankind, would not have happened, unless from the negligence of the defendant or of others for whose negligence he is legally responsible. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 38. Where a pedestrian is struck by a falling cornice, the doctrine of res ipsa loquitur places upon the owner of the building the burden of establishing his freedom from negligence. Nicoll v. Sweet (Iowa) 1916C-661.
- 39. Fall of Wall. Where an infant eight or nine years of age, while playing upon a pile of railroad ties, resting against a railroad wall, upon a public street, was injured by the falling of a stone from the wall, and there was testimony from which it was inferable that the stones in the wall were loose and the wall in need of repair, held, that the defendant was prima facie guilty of negligence in maintaining the wall in a dangerous condition to persons lawfully upon the street. Soriero v. Pennsylvania E. Co. (N. J.) 1916E-1071.

(Annotated.)

40. Starting of Motor Truck Left Unattended. While there must be reasonable evidence of negligence, yet where the thing to be shown is under the management of the defendant or his servants, and the accident is one which does not happen in the ordinary course of things, the happening of the accident affords reasonable evidence of negligence. American Express Co. v. Terry (Md.) 1917C-650.

#### Note.

Application of doctrine of res ipsa loquitur to injury to person in highway caused by fall of wall or portion thereof. 1916E-1073.

#### 2. CONTRIBUTORY NEGLIGENCE.

### a. In General.

- 41. Forgetfulness of Known Danger. Momentary forgetfulness of a danger so hidden as not of itself to be a reminder of its existence to one coming within its presence does not, as a matter of law, constitute contributory negligence. Harris v. Bremerton (Wash.) 19160-160.
- 42. Pedestrian on Highway. A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of vehicles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained. Deputy v. Kimmell (W. Va.) 1916E-656.
- 43. A pedestrian is not guilty of contributory negligence solely because he steps on a coal hole grating in a public sidewalk. Hill v. Norton (W. Va.) 1917D-459. (Annotated.)
- 44. Statutory Changes in Common Law. In actions for the recovery of damages to a person or his property, alleged to have been occasioned by the negligence of the defendant, the common-law principle which prevents a recovery if the plaintiff's own negligence contributed proximately to his injuries has not been modified or changed, except as modified by sections 3148, 3149, 3150, of the Fla. General Statutes of 1906, and chapter 6521 of the Acts of 1916. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971. (Annotated.)
- 45. Leaving Vehicle in Dangerous Place. The mere placing of a team across a street railroad track, or such placing of the team and going to and across the sidewalk to lead a barrel, for instance, are not negligence per se. Pollica v. Twin State Gas, etc. Co. (Vt.) 1917C-1240. (Annotated.)

- b. Doctrine of Last Clear Chance.
- 46. Contributory Negligence of Pedestrian. The mere negligent act of one person will not excuse negligent injury to him by another. If, therefore, a person who negligently places himself in a situation of imminent danger is injured by one who by the exercise of reasonable care could have avoided such injury, the negligence of the former will not bar recovery. Deputy v. Kimmell (W. Va.) 1916E-656.
- 47. Running into Truck Left on Street. Where plaintiff's employee was negligent in placing his delivery wagon in such a position that it might be struck by a passing street car, the street car company is nevertheless liable if the motorman saw the signal made by plaintiff's employee, but failed to stop his car in time. Davidson Bros. Co. v. Des Moines City R. Co. (Iowa) 1917C-1226. (Annotated.)

# c. Contributory Negligence of Minors,

- 48. In the absence of evidence to the contrary, a child of six or seven years of age is presumptively incapable of contributory negligence. Gregg v. King County (Wash.) 1916C-135.
- 49. Causal Relation to Injury—Child Playing in Street. The fact that the infant was playing upon the ties did not charge it with contributory negligence, since the ties were upon a public street, and the fall of the stone, and not the act of playing upon the ties, was the proximate cause of the injury and, under the testimony in no wise connected therewith as a causal factor in the accident. Soriero v. Pennsylvania R. Co. (N. J.) 1916E-1071.
- 50. Child of Five. A boy five years of age is presumed to be unconscious of the danger of riding on a locomotive, and is not contributorily negligent in permitting the engineer to place him thereon for the purpose of giving him a ride. Lovejoy v. Denver, etc. R. Co. (Colo.) 1916E-1075.
- 51. Contributory Negligence of Children. In determining the question of contributory negligence, the conduct of children should not be judged by the same rules which govern that of adults. Ordinary caution for them is that degree of care and prudence which children of the same age are accustomed to exercise under like circumstances. Deputy v. Kimmell (W. Va.) 1916E-656.
- 52. Whether a child who has reached the age of discretion exercised the degree of care and caution that persons of similar age, judgment, and experience usually exercise is generally for the jury. Solomon v. Public Service R. Co. (N. J.) 1917C-356
- 53. Care Demanded of Child. The degree of care required of a child who has

reached the age of discretion and is considered sui juris will be no higher as a matter of law than such as is usually exercised by persons of similar age, judgment, and experience. Solomon v. Public Sorvice R. Co. (N. J.) 1917C-356.

# d. Attempt to Save Life.

54. Where an unattended motor truck, which is running down the street at an accelerating speed, will strike wagons, behind which there are men and horses, it is not negligence, as a matter of law, for the plaintiff to attempt to catch the truck and change its course. American Express Co. v. Terry (Md.) 1917C-650.

(Annotated.)

Contributory negligence in attempt to save human life. 1917C-654.

- e. Imputable Contributory Negligence.
  - (1) Negligence of Driver of Vehicle.
- 55. Negligence of Driver Imputed to Occupant of Vehicle. Where the plaintiff and the negligent driver of a private conveyance were, at the time of plaintiff's injury resulting from a collision with defendant's train at a railroad crossing, engaged in a joint enterprise, the driver's negligence is imputed to such plaintiff, and no recovery can be had. Christopherson v. Minneapolis, etc. R. Co. (N. Dak.) 1916E-683. (Annotated.)

Note.

Contributory negligence of driver as imputable to occupant of vehicle. 1916E-685.

### (2) Custodian of Child.

- 56. The contributory negligence of a parent is not imputed to a child six years old suing for a personal injury. Gregg v. King County (Wash.) 1916C-135.
- 57. Where a mother was ill and the father was away from home at the time a child six years old accompanied his elder brother to a public dock without the knowledge of either the mother or father, the parents are not as a matter of law guilty of any negligence defeating a recovery by the child for injuries while on the dock. Gregg v. King County (Wash.) 1916C-135.

#### Note.

Contributory negligence as defeating recovery where previous negligence of defendant has incapacitated him from avoiding injury to plaintiff. 1916D-501.

# 3. ACTIONS.

#### a. Pleading.

- (1) Complaint or Declaration.
- 58. Sufficiency. In actions for negligent injuries it may be necessary to allege only

- the relations between the parties out of which the duty to avoid negligence arises, and the act or omission that proximately caused the injury, coupled with a statement that such act or omission was negligently done or omitted. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971.
- 59. Several Inconsistent Charges of Negligence. In an action for wrongful death of a street car passenger, it is proper to plead the negligence of the company as occurring in several inconsistent ways, in separate counts, and, if any are sustained by evidence, plaintiff can recover. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.
- 60. Averment of Negligence—Sufficiency. A complaint for negligence must disclose a duty, breach of it, and resulting damages. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420.
- 61. A complaint for negligence must state facts, and not legal conclusions, and so must set forth facts from which it can be said, as matter of law, that defendant owed the injured person a duty at the time of the injury; and an allegation that defendant impliedly invited deceased is insufficient. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420.
- 62. Turntable Doctrine. To state a cause of action under the doctrine of the turntable cases, it is not enough for the complaint for injury to a trespassing child to show that the premises were attractive to children or that children generally were attracted thereto, but it must show that the attraction lured the particular child there with the resulting injury. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420.
- 63. Action Against Attorneys for Negligence. In a liability insurer's action against its attorneys for negligence, the declaration alleged the bringing of an action for injuries against a policyholder, that plaintiff was bound to indemnify the policyholder against loss not exceeding \$5,000 and was bound to defend the suit at its own expense, that it instructed defendants to enter an appearance and make a defense, that it attempted to settle the suit and could have settled it if a default judgment had not been rendered, that defendants failed to enter an appearance or make any defense, and that by reason thereof a judgment for \$15,000 was ren-dered by default, and that plaintiff was bound to pay the amount thereof. It is held that in the absence of any allegation that the policyholder had a defense to the action for injuries, or that the injured person was not justly entitled to recover \$15,000, the declaration stated no cause of action, as it was not shown that if the attorneys had made a proper defense no judgment or a judgment for a less sum would have been recovered, and

while it did allege that plaintiff was bound to pay the default judgment, though for more than its limited liability, there was no disclosure of facts showing such liability, and the allegation stated only a conclusion of law. Maryland Casualty Company v. Price (Fed.) 1917B-50.

(Annotated.)

64. In an action by a liability insurer, the declaration alleged that defendants had been for several years plaintiff's retained attorneys, that plaintiff notified them of an action against a policyholder and directed them to enter an appearance and instructed them to make such defense and take such steps as should be necessary to prevent a judgment, that they neglected to do so and a default judgment was recovered, and that plaintiff attempted to settle the suit, and could have settled it for \$2,000 if the default judgment had not been rendered. It is held that while defendants were not advised of any facts constituting a defense, and it was not even alleged that there was a defense or that plaintiff intended to defend on the merits, and the inference was permissible that plaintiff's real purpose was to have a formal appearance or plea entered which would prevent a judgment for a time and enable plaintiff to make an advantageous settlement, the declaration sufficiently showed defendants' employment by plaintiff. Maryland Casualty Company v. Price (Fed.) 1917B-50. (Annotated.)

65. In a liability insurer's action against attorneys, an amended declaration alleged the bringing of an action for injuries against a policyholder, that plaintiff was bound to indemnify the policyholder against loss not exceeding \$5,000 and to defend the suit, that defendants were instructed to appear and defend but neglected to do so and by reason of such neglect a judgment for \$15,000 was rendered by default which plaintiff was bound to and did pay, that defendants knew that plaintiff's liability was limited and that it was obliged to defend the suit, that if they had appeared and made a defense plaintiff's liability would have been only \$5,000, though the judgment against the policyholder might exceed that amount, and that their negligence was the direct cause of loss to plaintiff of the difference between \$5,000 and the amount of the judgment. It is held that, in the absence of any allegation that the policyholder had a meritorious defense which would have defeated a recovery or reduced the amount of the judgment, the declaration was insufficient, since it did not show that plaintiff was under any obligation to pay in excess of \$5,000, as the allegation that it was compelled to pay the judgment was a mere conclusion of law without any facts to justify it, and it was evident that it was not liable to the policyholder for more than \$5,000 if the policyholder had no

meritorious defense. Maryland Casualty Company v. Price (Fed.) 1917B-50. (Annotated.)

# (2) Plea or Answer.

66. Pleading Contributory Negligence—Necessity. Defendant's answer not containing any statement of fact showing contributory negligence on the part of the plaintiff, and not pleading such a defense according to its legal effect, and such an issue not arising out of the complaint, the defense of contributory negligence was not put in issue; and, not being available on the trial, cannot be raised on appeal. Titus v. Pennsylvania R. Co. (N. J.) 1917B-1251.

67. Quaere: Where contributory negligence appears from the plaintiff's case upon the trial, being theretofore unknown to the defendant, should not the rule of court, requiring contributory negligence to be pleaded, be relaxed, so that the defendant may have the advantage of that defense without having put it in issue? Titus v. Pennsylvania R. Co. (N. J.) 1917B-1251.

68. Violation of Bule—Manner of Pleading. A plea of contributory negligence which alleged that there was a rule of the company which prohibited employees performing the duties plaintiff's intestate was employed to perform, from riding on its tram cars, is not objectionable as failing to allege that plaintiff's intestate was required to conform to such rule. Cole v. Sloss-Sheffield Steel, etc. Co. (Ala.) 1916E-99.

# (3) Amendments.

69. Amendment Properly Refused. liability insurer suing its attorneys for negligence in failing to defend an action for injuries against a policyholder alleged that it was bound to indemnify the policyholder against loss not exceeding \$5,000 and to defend the suit, that by reason of the attorneys' negligence a default judgment was rendered for \$15,000, and that it could have settled for no more than \$2,000 if the default judgment had not been rendered. An amended declaration proceeded on the theory that the attorneys' failure to defend made plaintiff liable for the full amount of the default judgment and sought to recover the difference between the amount of the judgment and \$5,000. After the sustaining of a demurrer to the amended declaration, it asked leave to amend further by striking out the averment that it could have settled for not exceeding \$2,000 had the judgment not been rendered. It is held that it was not error to refuse to allow this amendment, where it was not shown that the allegation sought to be stricken was inadvertently made, or that it was not in precise accordance with the facts established, as in one

aspect of the case the facts averred would defeat a recovery if there was no meritorious defense to the action against the policyholder because the action would not then involve the jurisdictional amount. Maryland Casualty Company v. Price (Fed.) 1917B-50.

# (4) Variance.

- 70. Proof of One of Two Charges. Proof of either of two charges of negligence in the declaration is sufficient to warrant recovery if the negligence is shown to be the proximate cause of the injury, even though the charges of negligence are joined or coupled together in a single count. Devine v. Delano (Ill.) 1918A-689.
- 71. Proof of Negligence—Variance from Pleading. In order to recover, it is unnecessary for plaintiff to prove literally the acts of negligence averred in the declaration. If the allegations are substantially proved, this is sufficient. Hence, an instruction, in an action of case for personal injury, which tells the jury that it cannot find for plaintiff, unless it believes from the evidence "that the defendant was negligent in the very manner set out in the declaration," is erroneous, and should be refused. Deputy v. Kimmell (W. Va.) 1916E-656.

### b. Evidence.

- (1) Presumptions and Burden of Proof.
- 72. Burden of Proving Contributory Negligence. In an action for personal injury, where the defendants allege that plaintiff was guilty of contributory negligence and plaintiff's evidence shows the defendants guilty of negligence, with nothing in the circumstances establishing contributory negligence on his part, it is error for the court to refuse to instruct the jury that the burden of proving contributory negligence is on the defendants. Marth v. Kingfisher Commercial Club (Okla.) 1917E-235.
- 73. Although there is no presumption that he has exercised due care, in favor of one who goes on a railway track and is struck by an engine and the burden is on the one seeking recovery for his death, due care need not be shown by direct evidence, but it is enough if an inference of due care can reasonably be drawn from the facts shown. Ingram's Adm'x. v. Rutland R. Co. (Vt.) 1918A-1191.
- 74. Elements of Liability—Burden of Proof. In an action of tort the plaintiff is put to prove clearly the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove. Boylan v. New Orleans R., etc. Co. (La.) 1918A-287.

- 75. Burden of Proof—Cause of Accident. Where an injury might well have resulted from any one of many causes, plaintiff, by a fair preponderance of the evidence, must exclude the operation of those causes for which defendant is under no legal obligation. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 76. Owners of Premises Collapse of Building—Liability of Owner. In an action for injuries from the collapse of a building, in which plaintiff asserted negligence, he was bound to show enough to exclude the case from the class of accidental occurrences. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474. (Annotated.)
- 77. Burden of Proof—Effect of Statute. In a suit for damages for personal injuries against a railroad company, the effect of section 3148, Fla. Gen. St. of 1906, injury having been shown, is to require the defendant company to show by a preponderance of the evidence that its servants and agents exercised all ordinary and reasonable care and diligence, the presumption being against the defendant company. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.
- 78. A liability insurer suing its attorneys for negligence in failing to defend an action against a policyholder resulting in a default judgment for \$15,000 had the burden of showing that the party recovering the judgment did not have a valid claim against the policyholder for \$15,000. Maryland Casualty Company v. Price (Fed.) 1917B-50.

# (2) Admissibility of Evidence.

- 79. Evidence as to whether witness had ever known paint buckets, brushes, or ropes to fall from ladders or scaffolds used in painting buildings is irrelevant and inadmissible. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115.
- 80. Evidence of Subsequent Conditions. A witness cannot testify that at some indefinite and unlocated time after the electrocution of deceased he saw that the insulation was worn off of the wires which came from the pole to the top of the window and into the building where the death occurred. Smith's Adm'x. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 81. Other Causes. In an action for damages by fire from defendant's engine, defendant may show that the fire originated from other causes. Hodges v. Baltimore Engine Co. (Md.) 1917C-766.
- 82. Intoxication. The fact that a person is intoxicated when he is injured does not of itself show such contributory negligence as will defeat his recovery for such injury, but may be considered in determining whether his intoxication contributed to his injury. American Bauxite Co. v. Dunn (Ark.) 1917C-625.

S3. Conduct of Parties. Where, in an action against the landlord by a tenant's guest for injuries from falling in an unlighted hallway, the lease did not appear to have been in writing and there was no direct evidence as to its terms, evidence of the conduct of the landlord and the tenant, so far as it was open and notorious, is admissible to show what were the terms of the tenancy, as to lighting the hallway, within contemplation of the contracting parties. Gallagher v. Murphy (Mass.) 1917E-594. (Annotated.)

# (3) Sufficiency of Evidence.

- 84. Contributory Negligence at Crossing. Where on a dark morning the view was so obstructed that when deceased was crossing the track in a wagon his horses were on the track at the time he could first have seen the engine, and the train approached the crossing without sounding a bell or whistle at a high rate of speed, while a passing freight train, and also an automatic crossing signal bell, out of order and ringing continuously, were making considerable noise, deceased was free from contributory negligence as a matter of law, since reasonable care by deceased in looking and listening would not have engine in time to escape collision. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 85. Fall on Stairway. Evidence in an action for injuries received by plaintiff from a fall in the dark hallway of defendant's tenement house as she left the apartment of her son is held to sustain a finding that she was in the exercise of ducare. Gallagher v. Murphy (Mass.) 1917E-594.
- 86. Leaving Vehicle in Dangerous Place. In an action for damages to plaintiff's delivery wagon while unloading goods by being struck by defendant's struct car, the evidence is held to be sufficient to justify the submission to the jury of the question of the driver's contributory negligence in placing the wagon where the car could not clear it. Davidson Bros. Co. v. Des Moines City R. Co. (Iowa) 1917C-1226. (Annotated.)
- 87. Child Coasting in Street. It does not appear from the evidence that plaintiff's intestate was guilty of negligence as a matter of law. Terrill v. Virginia Brewing Co. (Minn.) 1917C-453.
- 88. Child Falling into Drain. In an action for injuries to a child, killed by falling into a drain into which the hot water of boilers of a cotton mill was discharged, evidence held sufficient to sustain a verdict for defendant. Thompson v. Alexander City Cotton Mills Co. (Ala.) 1917A-721. (Annotated.)
- 89. Finding Sustained. In such action evidence was held to sustain a finding that

- decedent was not guilty of contributory negligence. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-167. (Annotated.)
- 90. Liability of Manufacturer Manufacturer Installing Plant. Evidence in an action for death from explosion of gas from a gasoline lighting system in decased's house held to warrant a finding that, as between deceased and defendant, the manufacturer, defendant, and not a local agency, sold and undertook to install the system, and so could be held liable in that capacity, and not merely as manufacturer. Mahlstedt v. Ideal Lighting Co. (Ill.) 1917D-209.
- 91. Sparks from Sawmill. In an action for damages to plaintiff's timber by fire, evidence is held to be sufficient to go to the jury on the issue whether the fire started from a spark from the smokestack of defendant's engine operating a sawmill on plaintiff's premises. Hodges v. Baltimore Engine Co. (Md.) 1917C-766.

(Annotated.)

- 92. Stationary Engine. In an action for damages to plaintiff's timber by fire set by defendant's engine, which was used to run a sawmill on plaintiff's land, evidence is held to be sufficient to go to the jury on the issue whether defendant was operating such engine. Hodges v. Baltimore Engine Co. (Md.) 1917C-766.
- (Annotated.)

  93. Owners of Premises Canal—Injury to Trespassing Child. Evidence in an action for drowning of a child in the canal of an irrigation company is held to be insufficient to support a verdict on the theory that it fell in where the canal crossed a street, and should have been, but was not, covered; it being equally consistent with it having fallen in at another point. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420. (Annotated.)

# c. Province of Court and Jury.

- 94. In an action for personal injuries by the patron of an amusement device at a state fair against the fair association, its general concessionary, and the latter's subconcessionary, where plaintiff's ticket purported to be issued by the general concessionary, the question whether he or the subconcessionary was the immediate operator of the device is for the jury. Hartman v. Tennessee State Fair Assoc. (Tenn.) 1917D-931. (Annotated.)
- 95. Expert Evidence—Subjects of Opinion Evidence Uitimate Issue in Case. Where witnesses stated that it is not generally necessary to erect barriers on the sidewalk to prevent persons from using it when painting from a suspended stage, and that he had never seen a man fall from a stage, his opinion as to whether the suspension of the stage above the sidewalk made the sidewalk dangerous or more dan-

gerous is incompetent, since it is the very question the jury has to decide on all the evidence in the case. Weilbacher v. J. W. Putts Co. (Md.) 1916C-115.

- 96. Negligence in Running Sawmill. In an action for damages to plaintiff's timber from the fire caused by defendant's engine while running a sawmill on the premises, evidence is held to require the submission of defendant's negligence to the jury. Hodges v. Baltimore Engine Co. (Md.) 1917C-766. (Annotated.)
- 97. Contributory Negligence. Where reasonable men, acting within the limits prescribed by law, could reach different conclusions from the admitted or established facts, questions of contributory negligence are for the jury. Mahlstedt v. Ideal Lighting Co. (Ill.) 1917D-209.
- 98. The question of contributory negligence becomes one of law for the reviewing court only when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the injured person, and could have been avoided by the use of reasonable precautions. Mahlstedt v. Ideal Lighting Co. (III.) 1917D-209.
- 99. Whether deceased, killed by explosion of gas from a gasoline lighting system sold to him and installed in his house by defendant, was guilty of contributory negligence in not covering the carburetor, and in lighting a match in the cellar, is held to be, under the evidence, a question for the jury. Mahlstedt v. Ideal Lighting Co. (Ill.) 1917D-209.
- 100. When the evidence in regard to contributory negligence is such that different minds may reasonably draw different conclusions, either as to the facts or the conclusions to be drawn from the facts, then the question of contributory negligence is one of fact to be determined by the jury. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141.
- 101. The fact that plaintiff attempted to drive along a street which was open for travel and was the one he usually used, upon which a steam roller was standing, and that after his horse shied at the roller he attempted to lead it past, does not show contributory negligence, as a matter of law, but it is a question for the jury whether his acts were those of a reasonable man under the circumstances. Tanner v. Culpeper Construction Co. (Va.) 1917E-794.
- 102. Shooting in Self-defense. Ordinarily, where a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent by-stander, he is not liable for the injury, if guilty of no negligence; and the question of negligence is for the jury. Shaw v. Lord (Okla.) 1916C-1147. (Annotated.)

- 103. Capacity of Injured Plaintiff to Work. The value of evidence, in a personal injury action, that plaintiff is unable to do as much and as hard work since as before the injury is for the jury, though plaintiff is also shown to have a pulmonary disease. Miller v. Delaware River Trans. Co. (N. J.) 1916C-165.
- 105. Wharves—Personal Injury from Defect—Liability. Whether a county maintaining a public dock was negligent in leaving a fender pile loose and insecure, contrary to its own plan of construction adopted three or four years before an accident to a person on the dock, held for the jury. Gregg v. King County (Wash.) 1916C-135. (Annotated.)
- 106. In an action for personal injury from falling into the open space between the two floats constituting a public municipal dock, it is held that the city's negligence was for the jury. Harris v. Bremerton (Wash.) 1916C-160. (Annotated.)
- 107. Evidence, in an action for falling into opening in municipal dock, held to make the plaintiff's contributory negligence a question for the jury. Harris v. Bremerton (Wash.) 19160-160

(Annotated.)

108. Negligence — Question for Jury. Where the facts are such that reasonable men may differ as to whether an act was negligent, the question is for the jury. Jonas v. South Covington, etc. St. R. Co. (Ky.) 1916E-965.

108a. The question of negligence is for the jury where minds of reasonable men may differ as to its existence. Gregg v. King County (Wash.) 1916C-135.

- 109. In an action by one hurt when he was attempting to change the course of a runaway motor truck, the question of plaintiff's negligence is held to be for the jury. American Express Co. v. Terry (Md.) 1917C-650. (Annotated.)
- 110. When the question is whether a person has been guilty of negligence, i. e., whether he has used due care under the circumstances, or has acted as a prudent man would have acted, or whatever the form or phrase may be, the evidence is to be addressed to the jury, for them to determine, and in the absence of some error or mistake, their verdict will not be disturbed. Boylan v. New Orleans R. etc. Co. (La.) 1918A-287.
- 111. The credibility of plaintiff's testimony on whether she was in the exercise of due care at the time of her injury is held to be for the jury though it was shaken by cross-examination. Gallagher v. Murphy (Mass.) 1917E-594.

#### d. Instructions.

112. In an action against the operator of a scenic railway, where the court charged

that it was bound to exercise the highest degree of care as were common carriers, defendant, if fearful that the jury might apply tests of care applicable only to steam or electric railways, should request explanatory charges. Best Park etc. Co. v. Rollins (Ala.) 1917D-929. (Annotated.)

113. Failure to Submit Matters not Proved. In an action for damages sustained in an automobile collision, the court submitted the special question whether defendant wantonly, wilfully, and maliciously ran his automobile upon and against plaintiff's automobile, and in this connection charged that it was plaintiff's contention that defendant suddenly turned his steering wheel and ran into plaintiff, and defendant's contention that plaintiff's car struck defendant's car without defendant's fault; that there was nothing showing that the collision happened in any other way; that it was conceded that, if plaintiff's claim was correct, then the only conclusion drawn from that was that defendant wilfully, intentionally, and maliciously ran his car against that of plaintiff; and that this was the meaning of the question submitted. The evidence supported the statement that, if the accident happened as plaintiff claimed, the only conclusion that could be drawn was that defendant acted wilfully, intentionally, and maliciously. Held, that the instruction was not erroneous because of the failure to tell the jury what would constitute gross negligence; there being no necessity for any abstract discussion of gross negligence. Dishmaker v. Heck (Wis.) 1917A-400,

114. Presumption of Negligence from Injury. An instruction that injury from the operation of a car raises a presumption of negligence on the part of the company, and that the burden is on the company to prove itself free from negligence and to show contributory negligence of the passenger, is correct. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

115. Burden of Proof. Under the rule that, where plaintiff's evidence establishes his contributory negligence, the burden of proving it is removed from defendant, an instruction merely that if the jury found "from the evidence" that plaintiff was contributorily negligent sufficiently indicates that all evidence, plaintiff's as well as defendant's should be examined on that question. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

116. Injuring Bystander While Acting in Self-defense. It is error to instruct the jury in effect that one who, in his lawful self-defense, at close range shoots at an assailant, and, missing him, accidentally wounds a bystander, who, at the time, is to one side of the line of true aim at such assailant, and a few feet away from him, is, in an action for damages, liable to such bystander if he knew or is chargeable with knowledge of the presence of such by-

stander, as if this, of itself, constituted want of due care, and therefore was, per se, actionable negligence. Shaw v. Lord (Okla.) 1916C-1147. (Annotated.)

117. Falling Coal Bucket. The refusal to submit to the jury the question whether ordinary care or the precaution usually exercised upon the dock, was exercised, and whether decedent knew that the rig had started, and that coal was being hoisted before the hoisting of the particular bucket from which coal fell and killed him is not erroneous, where they do not cover any facts put in issue by the pleadings. Taylor v. Northern Coal, etc. Co. (Wis.) 1916C-167. (Annotated.)

118. Fall Into Elevator Shaft—Contributory Negligence. In an action for injuries to plaintiff's wife caused by a fall as she was entering an elevator in a store where, under the evidence, it is not clear whether she exercised a proper degree of care, this question is properly submitted to the jury. Blair v. Seitner Dry Goods Co. (Mich.) 1916C-882.

119. Misstatement of Fact—Reference to Speed of Truck as "Great." Plaintiff was injured in trying to change the course of a motor truck, which, when the driver dismounted to deliver a parcel, had started and was running down a slight grade at the rate of three or four miles an hour. The speed was accelerating, and the truck was pointed towards wagons, behind which were men and horses. It is held that a charge that if the defendant negligently permitted the truck to drive itself at a great" rate of speed, in such a manner as to endanger the lives and property of persons, and plaintiff, because of such conduct, while acting in a reasonable manner, was injured, verdict should be for plaintiff, was warranted under the question, the expression "great" being used in its comparative sense, and not as indicating unusual rapidity. American Express Co. v. Terry (Md.) 1917C-650.

120. Assumption of Facts. An instruction that, if the jury believe deceased, while in the exercise of ordinary care for her own safety, lost her life "by and through the negligence of defendant as charged in the declaration," they should find defendant guilty, does not assume that defendant was so guilty of negligence, and submit only the question of whether deceased lost her life by and through such negligence. Wende v. Chicago City R. Co. (III.) 1918A-222.

121. Last Clear Chance Doctrine. In an action for injuries to plaintiff's delivery wagon by being struck by defendant's street car, an instruction that it was the duty of defendant's employees in charge of the car to exercise ordinary care to determine whether plaintiff's wagon was in a place of danger and that, if they knew it was in such place of danger, defendant was

1916C-1918B.

negligent if it failed to stop the car in time to avoid injury, is not an instruction upon the last fair chance doctrine. Davidson Bros. Co. v. Des Moines City R. Co. (Iowa) 1917C-1226. (Annotated.)

# e. Verdict or Findings.

122. The rule that the existence of negligence cannot be left entirely to conjecture does not conflict with the rule that a verdict should not be disturbed where reasonable men may fairly differ on the question of negligence. Adams Express Co. v. Allendale Farm (Va.) 1916D-894.

123. Infant Stealing Ride on Vehicle. Where, in an action for injuries to a thirteen year old child from jumping or falling from defendant's moving wagon, it appears that he was endeavoring to steal a ride, and there is evidence that the driver struck or struck at him with the whip to make him get off, and that in doing so the child fell and was injured, it is error to direct a verdict for defendant. McCabe v. Kain (Pa.) 1917D-378. (Annotated.)

### NEGOTIABILITY.

See Bills and Notes, 20-27.

# NEGOTIABLE INSTRUMENTS.

See Bills and Notes: Checks: Letters of Credit.

#### NEGOTIATE.

Meaning, see Bills and Notes, 7.

#### NEGOTIATED.

Meaning, see Bills and Notes, 28.

#### NEGROES.

See Colored Persons.

# NEUTRALITY.

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Right of belligerent to requisition neutral property, see War, 5.

# NEWLY DISCOVERED EVIDENCE.

As ground for review, see Equity, 39. Ground for new trial, see New Trial, 19-26.

#### NEWSPAPER.

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Judicial notice of publication, see Evidence, 8.

Preventing publication of false political matter, see Injunctions, 8.

Reading papers as disqualifying juror, see Jury, 17, 18.

Reading by jurors as error, see Jury, 40. Suppression of paper as military measure, see Martial Law, 1.

Publication in german paper insufficient, see Trees and Timber, 2.

Prejudicial articles as ground for continuance, see Trial, 10, 11.

Derogatory article as ground for change of venue, see Venue, 4.

1. What Constitutes—Single Edition of Newspaper. A noon edition of the Chicago Evening Post containing substantially the same editorial and general news matter as its other six daily editions and sold generally at news stands, hotels, etc., is a "newspaper of general circulation" within Hurd's Rev. St. 1915-16, c. 100, § 5, requiring certain notices to be published in such a newspaper. People v. Snow (Ill.) 1917E-992. (Annotated.)

#### Note.

Publication in single edition of newspaper as sufficient publication. 1917E-

#### NEW TRIAL.

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Prohibition to prevent reconsideration of order, see Prohibition, 1.

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# POWER OF COURT.

1. Discretion as to Grant of Motion. motion for new trial on the ground of newly discovered evidence is addressed largely to the sound judicial discretion of the trial court, and the appellate court will not interfere unless a manifest abuse of such discretion is shown. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141.

2. Power of Court to Grant on Own Motion. Where the court discovers that it erroneously sustained a demurrer to the answer, it may at any time while it has jurisdiction of the cause grant a new trial on its own motion. Pullen v. Eugene (Ore.) 1917D-933.

#### Note.

Power of court to open or vacate order determining motion for new trial. 1917C-1151.

# 2. GROUNDS.

### In General.

- 3. Effect of Statute Specifying Grounds. L. O. L. § 174, prescribing grounds for granting new trial, does not restrict the court to the grounds specified. Pullen v. Eugene (Ore.) 1917D-933.
- 4. Error of Law. On motion for new trial, the court can only re-examine the facts, and should not consider errors of law. Pullen v. Eugene (Ore.) 1917D-933.
- 5. Erroneous Admission of Secondary Evidence. In an action for merchandise sold and delivered, the error in permitting, over proper objection, the seller to introduce in evidence copies of invoices which he claimed he had sent to the buyer is sufficient to support the discretion exercised in granting a new trial after verdict for the seller. Herman & Ben Marks v. Haas (Iowa) 1917D-543. (Annotated.)
- 6. Erroneous Admission of Evidence. Where the propriety of admitting evidence in favor of the successful party is at least doubtful, the doubt should be resolved in support of the action of the trial court granting a new trial. Herman & Ben Marks v. Haas (Iowa) 1917D-543.

(Annotated.)

- 7. Grant as of Right—Scope of Statute—Joining Cause of Action not Within Statute. Burns' Ind. Ann. St. 1908, § 1110, permitting a new trial as of right in a suit to recover real estate, in an action to quiet title to real estate, and in a partition proceeding wherein the title to the property was involved, does not apply where two or more substantive causes of action proceed to judgment in the same cause, one entitling the losing party to a new trial as of right, and the other not; and a motion for a new trial without cause will be denied. Gilchrist v. Hatch (Ind.) 1917E—1030.
- 8. Under such statute plaintiff, in an action to cancel a deed of land obtained from him by defendant's fraud and to

- quiet title in himself, setting out the contract for the purchase of shares in a company in payment for which the conveyance was made merely to show the deception practiced upon him and not to establish any rights thereunder, is entitled to a new trial as a matter of right, though there is no such right in an action brought merely to enforce or cancel a lien on realty or a contract in relation thereto. Gilchrist v. Hatch (Ind.) 1917E-1030.
- 9. In a cause where plaintiff sought to cancel a deed obtained from him by the fraud of defendants, and to quiet title in himself, and in which the ultimate issue was that of title, and where a defendant filed a cross-complaint seeking to quiet his title to the land in controversy and for possession and damages recoverable by a landlord against a defendant wrongfully holding over, plaintiff's right to a new trial, under Burns' Ind. Ann. St. 1908, § 1110, giving a new trial as of right in actions to recover realty or quiet title, is not abridged by the form of the issues or barred by the cross-complaint setting up the landlord's suit, as to which no such right to a new trial exists. Gilchrist v. Hatch (Ind.) 1917E-1030.
- 10. Granting New Trial on Single Issue. To reverse and grant a new trial on the issue of damages only does not deprive appellant of property without due process of law. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880. (Annotated.)
- 11. To reverse and grant a new trial on the issue of damages only does not violate Miss. Const. 1890, § 31, making the right of trial by jury inviolate. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880.

(Annotated.)

- 12. Disqualification of Juror—As Ground for New Trial. In a prosecution for murder, the fact that a juror on the day before the trial stated that "he had heard much about the case and he thought it was a bad case" is insufficient to authorize a new trial on the ground that the juror was disqualified from acting because of any opinion he had formed as to defendant's guilt. Chilton v. Commonwealth (Ky.) 1918B-851.
- 13. Necessity of Giving in Open Court—Prejudice. Where the judge in chambers after submission of the cause instructed the jury in writing at their request, in the absence of parties and counsel, as to a matter which was not then or since disclosed, except that the judge considered the question immaterial, such action is error requiring a new trial, not being within the provisions of St. 1913, c. 716, § 1, providing that no new trial shall be granted for any error in pleading or procedure if, in the opinion of the judge, on motion for new trial, the error did not injuriously affect substantial rights of the

parties. Lewis v. Lewis (Mass.) 1917A-395. (Annotated.)

- 14. Verdict Sustained. It is held that the court did not err in denying appellant's motion for a new trial, and that the evidence is sufficient to support the verdict of the jury and judgment of the court. McAlinden v. St Maries Hospital Association (Idaho) 1918A-380.
- 15. Argument of Counsel. When counsel in his argument to the jury assumes that prior remarks of opposing counsel justify and make necessary the reply which he is making thereto, opposing counsel may by objection take the ruling and instructions of the court thereon. If he makes no objection and appears to acquiesce in the assumption of counsel, he will not after verdict ordinarily be granted a new trial because of alleged impropriety of his opponent's argument. Kriss v. Union Pacific R. Co. (Neb.) 1918A-1122. (Annotated.)
- 16. Statements of counsel in argument to the jury are held not to warrant the granting of a new trial. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.
- 17. Prejudicial Error. Where prejudicial errors are committed on the trial against each party, either can obtain a new trial in case of an adverse verdict. Herman & Ben Marks v. Haas (Iowa) 1917D-543.
- 18. Insufficiency of Evidence. Where the evidence warrants the submission of issues of fact to the jury, the trial court will not, on motion for new trial, disturb the verdict because against the evidence, though the preponderance is against the verdict. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

#### Notes.

Conduct of counsel in getting inadmissible evidence before jury as ground for new trial. 1917A-441.

Admission of incompetent evidence as ground for granting of new trial by trial court. 1917D-545.

Bias of judge existing prior to trial as ground for reversal in absence of showing of prejudice at trial. 1917E-954.

Allowing recreation to jury during trial as ground for new trial. 1918B-855.

# b. Newly Discovered Evidence.

#### (1) In General,

19. Where plaintiff sought to recover on account of defendants' charges that he had made a criminal assault upon a woman, newly discovered evidence that plaintiff had received replies to letters making inquiries concerning the woman warrants a new trial, where plaintiff testified that he received no such replies, and that the woman was a mere dummy. Egan v. Dotson (S. Dak.) 1917A-296.

# (2) Materiality of Evidence.

20. Showing Insufficient. The showing for a new trial on affidavits, on the grounds of surprise and newly discovered evidence, is held to be insufficient. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.

# (3) Impeaching Evidence.

21. Matter of Impeachment. Under Code Cr. Proc. § 465, subd. 7, forbidding a new trial for newly-discovered evidence impeaching or discrediting a witness, that witness for the state signed affidavits while intoxicated inconsistent with his testimony on the trial, which he repudiated by counter affidavits, is not ground for new trial. People v. Becker (Kan.) 1917A-600.

# (4) Diligence.

- 22. Diligence Insufficient. A carrier against which a judgment had been rendered for the loss of freight sought a new trial for newly discovered evidence, and showed that the loss was reported in December, 1913, and that an investigation was at once started to find the article described in the bill of lading, as a "model plow"; that the agents of the carrier looked for something like a plow and could not find it; that the traveling claim adjuster after the trial found in unclaimed freight packages, in a warehouse between the initial and terminal stations, a small box which contained the model plow. When delivered for shipment the box was plainly marked, "Model Plow or Soil Pulverizer." It is held that denial of new trial was within the court's discretion. St. Louis, etc. R. Co. v. Dague (Ark.) 1917B-
- 23. Newly Discovered Evidence—Showing of Diligence. An affidavit, presented to show diligence, in support of a motion for new trial on the ground of newly discovered evidence, should specifically state the acts performed in order that the court may determine what diligence was used, and mere general assertions of diligence are insufficient, as they constitute only the opinions or conclusions of the affiant. McGregor v. Great Northern R. Co. (N. Dak.) 1917E-141.
- 24. A new trial should not be granted to admit alleged newly discovered evidence, when it develops on the trial of the motion that the witnesses whose testimony is proposed to be offered in evidence on a second trial could have been produced on the first trial, and that the defendant knew that the witnesses were in possession of the facts, if they were facts, to which they propose to testify on a second trial. State v. Pailet (La.) 1918A-102.

#### (5) Discretion of Court.

25. Whether a new trial shall be granted to let in after-discovered evidence is a mat.

ter for the trial court, whose ruling will not be reversed unless for clear abuse of discretion. Hunter v. Bremer (Pa.) 1918A-152.

# 3. MOTION FOR NEW TRIAL.

# a. Time of Motion and Hearing.

- 26. Time for Filing Motion. On the trial the jury made special findings of fact without rendering a general verdict. The court discharged the jury, with consent of the parties, and took the case under advisement. The plaintiff excepted to the special findings, and immediately filed a motion to set them aside and for a new trial. After considering the matters of law for some days, the court rendered a judgment in substance as requested by the defendant. Plaintiff within three days filed a motion for a new trial. Held, that such motion was in time, and was a sufficient compliance with the rule. Dinneen v. American Ins. Co. (Neb.) 1917B-1246.
- 27. Waiver of Failure to File Motion in Time. Consent or waiver by the people as to filing a motion for new trial after the time limited by Comp. Laws, § 11963, is immaterial; such statute making jurisdiction to grant a new trial dependent on seasonable filing of the motion. Nichols v. Houghton Circuit Judge (Mich.) 1917D-100.
- 28. Effect of Failure to File in Time—Power of Court of Own Motion. Comp. Laws, § 11963, providing that the court in which an indictment has been tried may, "at the same term or at the next term thereafter," on motion of defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, gives such court no power to grant a new trial on its motion at a time later than defendant has a right to file a motion. Nichols v. Houghton Circuit Judge (Mich.) 1917D-100.

# b. Notice.

29. Sufficiency of Notice. Notice of intention, though in terms to move the court to vacate the judgment, instead of the decision, and to grant a new trial, is sufficient. Fearon v. Fodera (Cal.) 1916D-312.

# c. Petition or Affidavit.

- 30. Statement of Grounds. In a motion for a new trial it is sufficient to set forth the grounds in the language of the statute, and where such a motion recites "erroneous rulings" as one of its grounds, appellant can have a review of any ruling made on the trial respecting the admission of evidence. Spadra-Clarksville Coal Co. v. Nicholson (Kan.) 1916D-652.
- 31. Proof of Misconduct of Jury—Conflicting Affidavits. Where a motion for a

new trial is supported by an affidavit of certain jurors that the jury commented on the defendant's failure to testify, but nine other jurors make affidavit that the only mention was a statement by one juror, after the reading of the instructions, that they could not consider the failure to testify, the motion for new trial is properly overruled. Mason v. State (Tex.) 1917D-1094.

- 32. Showing Required. Where a motion for a new trial is based on the ground of newly discovered evidence, such motion must, in addition to the affidavit of the applicant, be supported by the affidavits of the new witnesses, which must set forth the newly discovered evidence and the facts to which such witnesses will testify, or a satisfactory excuse must be given for not obtaining such affidavits. State v. Klasner (N. Mex.) 1917D-824.
- 33. Affidavit in Motion Newly Discovered Evidence Diligence. It is not enough for the affidavit for a new trial for newly discovered evidence to allege diligent inquiry before trial; but the particular efforts made must be stated. Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.) 1918B-420.
- 34. Newly Discovered Evidence Affidavit Showing Diligence—Necessity. In a prosecution for murder, where a new trial is sought for newly discovered evidence, the defendant must file his own affidavit stating that he did not know, and by the exercise of reasonable diligence could not have known, of the existence of the newly discovered evidence until after the trial was concluded. Chilton v. Commonwealth (Ky.) 1918B-851.

# d. Amendment, of Motion.

35. An amendment of a motion for new trial, setting up a new ground is a motion for new trial within Comp. Laws, § 11963, Imiting the time for filing it. Nichols v. Houghton Circuit Judge (Mich.) 1917D-100. (Annotated.)

Note.

Amendment of motion for new trial. 1917D-104.

### e. Evidence.

36. Hearing of Motion—Oral Testimony. Ky. Civ. Code Prac. § 340, subsec. 2, provides for new trial for the misconduct of the jury. Section 343 declares that the application must be by motion, and that the ground must be sustained by affidavits. Held, that as the statute did not authorize the taking of evidence, and as the court extended the time for the unsuccessful party to procure affidavits, the denial of her motion for permission to call witnesses and examine them orally to show misconduct of the jury, cannot be held an abuse of discretion. Smith's Adm'x. v. Middlesbore Electric Co. (Ky.) 1917A-1164.

# f. Order, Form and Contents.

37. That the statute in force prior to Miss. Code 1906, § 800, providing that every new trial granted shall be on such "terms" as the court shall direct, read "terms and conditions," is immaterial, as the words are synonymous; "terms" meaning propositions, limitations, or provisions stated or offered, and a "condition"; is that which limits or modifies the existence or character of something; a restriction or qualification. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880. (Annotated.)

38. Under Miss. Code 1906, § 800, relating to circuit courts, but made applicable by sections 4909 and 4919 to the supreme court, providing that every new trial granted shall be on such terms as the court shall direct, and section 4919, empowering the supreme court to render judgment such as the trial court should have rendered, unless necessary that damages be assessed by a jury, and that on remand the trial court shall proceed according to directions of the supreme court, the supreme court has power to award a new trial on the issue of damages only. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880. (Annotated.)

# g. Effect of Limitation.

39. Evidence Admissible on Retrial. Where the court on appeal remands a case on the issue of damages only, evidence as to liability is inadmissible on the new trial. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E-880.

#### h. Review of Decision.

- 40. Discretion of Trial Court. The grant or denial of a motion for a new trial for risconduct of jury is discretionary with the judge, and unless the discretion is abused, or there has been palpable error, or the trial court refused to consider the evidence by which its determination should be guided, such finding will not be reviewed, and each application must be determined solely by its own peculiar facts, with a view not so much to the attainment of justice in the particular case as to the ultimate effect of the decision on the administration of justice in general. Sales v. Maupin (S. Dak.) 1917C-1222.
- 41. Motion for New Trial to Review Order Denying Metion. The office of a motion for a new trial and of a petition for a new trial is the same; and a motion for a new trial to review the order of the court denying such motion or petition is unauthorized by statute and unnecessary, and does not have the effect of extending the time within which the trial court can reconsider its order denying a petition for a new trial beyond the term at which the same was made. Owen v. District Court (Okla.) 1917C-1147. (Annotated.)

- 42. Burden of Proving Abuse of Discretion. A party appealing from an order granting a new trial after verdict in his favor has the hurden of showing abuse of the trial court's discretion, and must show that the record is free from error as against the adverse party. Herman & Ben Marks v. Haas (Iowa) 1917D-543.
- 43. Discretion of Trial Court. The granting of a new trial rests largely in the discretion of the trial court, and will not be disturbed on appeal, except for an abuse of discretion. Herman & Ben Marks v. Haas (Iowa) 1917D-543.
- 44. New Trial Improperly Denied. The court erred in refusing a new trial. Sharpe v. Denmark (Ga.) 1917B-617.

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#### NIGHT WORK.

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Effect of failure to notify administrator of finding will, see Executors and Administrators, 9-11.

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Notice of termination of lease, see Landlord and Tenant, 45, 46.

Notice to quit, see Landlord and Tenant, 47.

Of claim to employer under Workmen's Compensation Act, see Master and Servant, 234-240.

Of hearing under Workmen's Compensation Act, see Master and Servant, 301.

claim of lien, see Mechanics' Liens, 18-28.

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Record as notice, see Recording Acts, 6-10. To city of defect in street, see Streets and Highways, 40.

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To owner of special assessment, see Taxation, 134-136.

When necessary as prerequisite to expulsion of trespasser, see Trespass, 2.

To non-residents on probate of will, see Wills, 119.

1. Necessity of Writing. The general rule is that notice required by law to be given is notice in writing, and whenever by statute or ordinance a duty is imposed on an individual, for the neglect of which he is subject to a penalty, notice is required before liability arises, unless the contrary is expressly provided. McPhail v. Denver (Colo.) 1916E-1143.

(Annotated.)

Note.

Necessity that notice required or authorized by law be in writing, 1916E-1147.

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b. Abatement by Injunction, 651.

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# 1. WHAT CONSTITUTES.

#### a. In General.

1. Definition. A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. Whittemore v. Baxter Laundry Co. (Mich.) 1916C-818.

# b. Power to Define by Statute or Ordin-

2. Statute Defining — Exclusiveness. Hurd's Ill. Rev. St. 1913, c. 38, § 22, declaring certain acts to be public nuisances, is merely declaratory of the common law as to those acts, and does not exclude other common-law nuisances not enumerated therein from being classed as public nuisances. People v. Clark (fll.) 1916D-785.

#### Note.

Validity of smoke ordinance or statute. 1918B-173.

### c. Specific Nuisances.

- 3. Fertilizer Mixing Plant as Nuisance. A fertilizer mixing plant is not a "nuisance per se," that is, a nuisance anywhere and under all circumstances, but, if a nuisance at all, is a "nuisance per accidens," that is, by reason of its location and other circumstances, such as the community in which it is located or the manner in which it is constructed or conducted. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149. (Annotated.)
- 4. What Constitutes Telephone Wires Erected Over Highway Without Permission. Under Me. Rev. St. c. 55, § 17, providing that telephone lines shall not be constructed upon or along highways or public roads without written permission from the selectmen of towns, etc. specifying the method of locating the wires, and declaring wires so erected to be legal structures, but not declaring those otherwise maintained to be nuisances, the wires of an unauthorized company and of private individuals maintaining lines to connect therewith, running eighteen to twentytwo feet above the ground, and not interfering with public travel, do not constitute a nuisance, and will not be enjoined. Mt. Vernon Tel. Co. v. Franklin Farmers', etc. Tel. Co. (Me.) 1917B-649.
- 5. Storage of Gasoline. For defendant to sink storage tanks on the extreme edge of its property and within a few feet of complainant's residence, in which over 20,000 gallons of gasoline were to be stored, constitutes a private nuisance, in view of the dangerous character of gasoline and the liability to explosion. Whittemore v. Baxter Laundry Co. (Mich.) 1916C-818. (Annotated.)
- 6. Fruit Stand in Street. The establishment of a fruit stand in a public street, on the outside of a portion of two sides

- of a building in violation of ordinances in a city is a nuisance per se, and the maintenance thereof a public offense which the police authorities of the city may summarily abate. Pastorino v. Detroit (Mich.) 1916D-768. (Annotated.)
- 7. What Constitutes Public Nuisance-Permitting Street Cars to be Overcrowded. The act of a street railway company in permitting its cars to be overcrowded does not constitute a nuisance within a statute (R. S. Can. c. 146, § 221) defining a common nuisance as "an unlawful act or omission to discharge a legal duty which act or omission endangers the lives, safety, health, property or comfort of the public or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects? since the overcrowding does not affect the public but only those persons who have obtained a license from the company to enter its cars. Toronto R. Co. v. Rex. (Eng.) 1918A-991. (Annotated.)
- 8. Brick Kiln as Nuisance. The operation of a brick manufacturing plant, so as to seriously affect the property and health and enjoyment of persons living in the neighborhood by the escape of smoke and soot, creates a nuisance, which equity may perpetually enjoin, by enjoining the burning of any of the kilns in such a way as to cause dense soot or smoke to fall on the neighboring property, or operating the kilns immediately adjoining the neighboring property with any other than smokeless fuel. Face v. Cherry (Va.) 1917E-418.
- 9. A bill to enjoin the operation of a brick manufacturing plant as a nuisance, injuriously affecting plaintiffs' property and health and the enjoyment of their home, which alleges that the smoke, soot, etc. affects plaintiffs' dwelling and "other property in the neighborhood," complains only of a private nuisance, within the rule that nuisances of a private nature occur in the erection of structures obnoxious or hurtful to buildings used for residence and business purposes, and that a business which imperils the comfort or health of inmates of neighboring dwellings may be enjoined. Face v. Cherry (Va.) 1917E-418.

  Notes.

Brick kiln as nuisance. 1917E-420.

Fruit stand or similar structure on public highway as nuisance. 1916D-773.

Storage of gasoline or other explosive as nuisance. 1916C-820.

Place for storing or mixing fertilizer as nuisance. 1917D-1152.

### 2. ACTIONS.

#### a. Right to Relief.

 Public Nuisances—Right of Individual to Enjoin. To prevent multiplicity of actions, promote justice, and secure the public tranquillity, courts refuse to entertain private actions to remedy purely public nuisances, which may and should be remedied through the public process of indictment. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.

11. Where a public nuisance affects some members of the public in a different manner and inflicts upon them injury of a different kind from that suffered by the general public, it is, as to them, a private ruisance for which they have the private remedy of an action. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.

# b. Abatement by Injunction.

- 12. Obstruction of Highway Right of Individual to Injunction. Relief by an injunction against a nuisance by which the highway is obstructed need not be sought by an abutting owner, but may be had by any individual who can show special damage to himself. Memphis St. R. Co. v. Rapid Transit Co. (Tenn.) 1917C-1045.
- 13. Where statute authorizes the regulation of jitneys, and prohibits their operation, except upon conditions named, and those conditions are not fulfilled, but many jitneys are operated with consequent danger to persons and property, they constitute a nuisance, and may be enjoined on the bill of a private individual who can show special damage to himself. Memphis St. R. Co. v. Rapid Transit Co. (Tenn.) 1917C-1045. (Annotated.)

# c. Pleading.

14. In an individual action for damages from a fertilizer mixing plant, prima facie only a private nuisance, it is not necessary to the sufficiency of the complaint that it allege injury to plaintiff differing in kind from that suffered by others who may have been affected. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.

(Annotated.)

- 15. Unnecessary Averments Injury to Third Persons. In an action for damages from defendant's fertilizer mixing plant near plaintiff's residence, the allegation that plaintiff's mother and sister lived with her and suffered from the odors, noises, etc. though not strictly necessary to the statement of plaintiff's cause of action, is not irrelevant thereto, because tending to show the nature and extent of plaintiff's damages. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.
- 16. That which is per se or prima facie a public nuisance is presumed to affect all the public alike, though it may not affect all to the same extent, and one complaining of such a nuisance must allege some injury to himself differing in kind and not merely in degree from that suffered by the general public, and, if he fails to do so,

shows no cause of action. Woods v. Rock Hill Fertilizer Co. (S. Car.) 1917D-1149.

# d. Estoppel to Object.

17. Estoppel to Object — Consent to Structure. Where the owner of apartment houses consented to and encouraged the construction of private garages in the rear of such buildings, securing the preference for his tenants, he cannot subsequently seek an injunction on the ground that the noises and smells from such garages prove a nuisance by reason of the residential nature of the neighborhood. Mahoney Land Co. v. Cayuga Investment Co. (Wash.) 1916C-1234. (Annotated.)

#### Note.

Acquiescence in or consent to erection of structure as precluding objection thereto as nuisance. 1916C-1235.

NUISANCE PER ACCIDENS. See Nuisances, 3.

# NUMBER PLATES.

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### NUNCUPATIVE WILL.

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#### OFFER AND ACCEPTANCE.

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#### OFFICERS.

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### OPEN SHAFT.

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#### OPINION.

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### OPIUM.

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### OTHERS.

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# OUTCRY.

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### OUT OF AND IN COURSE OF EMPLOY-MENT

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### OUTSTANDING TITLE.

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#### OVERSEER OF POOR.

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#### OWNERSHIP.

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# OWNERS OF PREMISES.

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child, see Negligence, 93.

Liability to invitees, see Negligence, 8, 23-28.

Duty to extinguish fires, see Negligence, 17.

Duty toward licensees, see Negligence, 14-

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19, 32.
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# PARADES.

Prohibition of red or black flags, see Flags, 1, 2.

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As affecting testamentary capacity, see Wills, 57.

#### PARDONS.

Effect on disbarment, see Attorneys, 62. Contract to procure parole, see Contracts,

Detention of pardoned convict, see False Imprisonment, 2.

- 1. When Effective. A pardon is effective upon delivery and acceptance. Weigel · v. McCloskey (Ark.) 1916C-503.
- 2. Where a contractor of convict labor delegates his custody of the convicts to a warden appointed by him and confirmed by the court under the statute, it is the duty of the warden, on delivery of a pardon to him, to himself examine the books to see if the pardon covers all the offenses for which the convict was committed if he would escape liability for false imprisonment in holding the convict. Weigel v. McCloskey (Ark.) 1916C-503.

- 3. Parole. The parole of a convicted criminal does not wipe out the conviction, but merely suspends its operation by remitting for the time being the confinement at hard labor, until the end of the term or an unconditional pardon is granted; the offender in the meantime being subject to prison discipline and to be taken into custody on violation of any of the conditions as though the parole had not been granted. In re Sutton (Mont.) 1917A-1223.
- 4. Right to Impose Condition. In the granting of a pardon, the governor is authorized, by Const. art. 7, \$ 9, and Mont. Rev. Codes, \$ 9556, to impose conditions without restriction. without restriction, so long as they are neither illegal, immoral, nor impossible of performance. In re Sutton (Mont.) 1917A-1223.

# PARENT AND CHILD.

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2. Rights of Parent, 653.

a. Earnings of Child, 653.b. Action for Loss of Services, 654.

3. Liability of Parents for Support of Child, 654.

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Conveyance by father for support, validity, see Fraudulent Sales and Conveyances, 2.

Liability of parent for alienation, see Husband and Wife, 48, 49.

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ance, 8.

Married daughter as dependent under Workmen's Compensation Act, Master and Servant, 268.

Parent's right to release minor, see Militia.

Imupted negligence of parent, see Negligence, 56, 57.

# 1. NATURE OF RELATION.

1. Respective Rights of Parents. Under the law of Iowa the rights of parents in relation to their children are equal. Cain v. Garner (Ky.) 1918B-824.

# 2. RIGHTS OF PARENT.

# a. Earnings of Child.

2. Contract by Parent for Services of Child. A contract whereby the father of an infant undertook to bind him to work for plaintiff as a stable boy and race rider for three years for a fixed compensation, to be paid to the father, signed by the father.

the son, and the plaintiff, all the covenants of which purported to be the covenants of the infant, whether regarded as executed directly by him or by his father, is the contract of the infant. Cain v. Garner (Annotated.) (Ky.) 1918B-824.

#### Note.

Contract by parent for services of minor child as binding latter. 1918B-827.

- b. Action for Loss of Services.
- 3. Action Parties Plaintiff. A father who is supporting the family may maintain an action for loss of the services of a minor child without joining the mother as a party plaintiff. Ackeret v. Minneapolis (Minn.) 1916E-897.
- 3. LIABILITY OF PARENTS FOR SUP-PORT OF CHILD.
- 4. Liability of Parent—Necessaries Furnished Child. Parents are bound to provide a minor child with necessaries. If they neglect to so provide, they may be-come liable to a third person who furnishes necessaries even without their consent. Where they are ready to so provide, a third person can claim liability only on ground of contract, express or implied. This action is for necessaries supplied to a minor son, and it is based upon an implied contract. Lufkin v. Harvey (Minn.) 1917D-583.

# 4. EMANCIPATION.

5. Sufficiency of Evidence. Defendants rely on a claim that their son had been emancipated, and hence a contract on their part to pay should not be implied. Emancipation may be complete, in which case it relieves the minor from custody and control of the parents and destroys the filial relation, or it may be partial. The evidence shows no more than a gift to the son of his earnings and the right to make contracts of employment. Complete emancipation cannot be inferred from such evidence. If the earnings given are sufficient to supply the son with all necessaries, the parents are under no further liability; if not, the parents remain liable for any necessaries which the wages are not sufficient to supply. Lufkin v. Harvey (Minn.) (Annotated.) 1917D-583. Note.

Sufficiency of evidence to show emancipation of infant. 1917D-585.

#### 5. CONTRACTS INTER SE.

6. Presumption and Burden of Proof. No presumption of undue influence in the case of a conveyance by a parent to a child, in consideration of support of the grantor, arises from the mere relation of the parties, and, therefore, the burden is upon the party attacking the conveyance

to show undue influence. Soper v. Cisco (N. J.) 1918B-452. (Annotated.)

- 7. Services by Adult Child Right to Compensation. A child remaining in the family after becoming of age is not entitled to pay for services rendered unless the services were performed pursuant to a prior agreement for compensation therefor; but where such services are performed pursuant to a prior agreement for compensation, they constitute a valid consideration for a conveyance of real estate. Thysell v. McDonald (Minn.) 1917C-1015.
- 8. Services by Adult Child-Agreement for Compensation. The evidence sustains the finding that the services in question were performed pursuant to an agreement for compensation, and that the son was a good-faith purchaser of the land. Thysell v. McDonald (Minn.) 1917C-1015.

### PARI MUTUEL.

See Gaming, 1.

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# 1. IN GENERAL.

- 1. Defect of Parties Waiver. Under the express provision of Wyo. Comp. St. 1910, § 4383, an objection to a defect of parties not appearing on the face of the petition is waived, unless taken by answer, except only the objection to the jurisdiction of the court, and that the facts stated are not sufficient to constitute a cause of action. Becker v. Hopper (Wyo.) 1916D-1041.
- 2. Effect of Omission of Party. In the federal courts, a suit in equity may proceed without any necessary or proper party, who is not an indispensable party, if his presence would oust the jurisdiction of the court.

An "indispensable party" is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

The original debtor is not an indispensable party to a suit in equity by his creditor on the promise of the grantee of the debtor to pay the creditor's claim. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571.

# JOINDER OF PLAINTIFFS.

3. Bill for Contribution-Parties. Where some, but not all, of the members of an insolvent firm, by written agreement, ratified by the chancery court, appointed trustees to close the partnership affairs, all the partners should be made parties to a bill to compel one member who signed the agreement to pay his pro rata share of debts, for he is entitled to an accounting. Webb v. Butler (Ala.) 1916D-815.

 Action for Negligence of Attorney. Where one claimant against a debtor assigned his claim to another, so that one suit could be brought on both claims, and both claimants signed the attachment bond, and were required to pay the amount thereof, both are proper parties plaintiff in an action against the attorney who brought the former suit for negligence which resulted in their being compelled to pay the amount of the attachment fund. Noziska v. Aten (S. Dak.) 1916C-589.

#### 3. JOINDER OF DEFENDANTS.

- 5. Joinder of Parties Persons Interested in Realty to be Charged. On a bill to charge the estate of a decedent with a sum alleged to be the property of his surviving children to which they were entitled upon his death, as part of the proceeds of their mother's estate, where an exhibit filed with the bill showed that two of the children of complainants' deceased mother were married, the joinder of such children and their husbands and wives is required to bind their interest, if the property is to be treated as realty. Henderson v. Harper (Md.) 1917C-93.
- 6. Husband and Wife-Action for Restoration of Property-Parties. In an action by a divorced husband for property conveyed for the benefit of the wife in consideration of marriage, the children are not necessary or proper parties, though under the conveyance they have an interest in the property. Anheier v. De Long (Ky.) 1917A-1239.
- 7. Successor of Official. In a suit for an injunction against officers of certain labor unions and others, it is error to grant personal relief by injunction against persons who, pending the suit, were chosen to succeed some of the original defendants as officers of such unions, but who were not served with process and did not appear, on the ground that they were before the court by representation, as there is no such privity between the holder of an office in a voluntary association and his successor as to bind the latter by process issued against the former, and the suit was not a representative one within equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), providing that when a question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.
- 8. Injunction in Individual Capacity Only. In a suit to enjoin certain persons

individually and as officers of labor unions. the error, if any, in enjoining them only in their individual capacities, and not in their official capacities, may not be com-plained of by them. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.

- 9. Improper Inclusion of Persons in Injunction. In a suit for injunction against officers of labor unions, a clause in the decree, enjoining as confederates all present and future members of the unions, is not a matter of which the defendants may complain. Hitchman Coal, etc. Co. v. Mitchell (U. S.) 1918B-461.
- 10. Injunctions—Protection of Property—Proper Parties. Where an owner of a city lot makes a contract of sale, and, upon payment of a part of the purchase money, executes a bond for title, and places the purchaser in possession, the obligor and the obligee are proper parties to a suit against the city to enjoin an illegal interference with the possession of the property. Carey v. Atlanta (Ga.) 1916E-1151.

# 4. MANNER OF RAISING OBJECTION.

11. Remedy for Nonjoinder. In an action for damages to land resulting from seepage, defendant is not entitled to a directed verdict because the land was mortgaged and the mortgagee not made a party, the remedy being to ask to have the mortgagee joined as a party. North Sterling Irrigation District v. Dickman (Colo.) 1916D-973.

# PARTIES TO CRIME.

See Robbery, 3.

### PARTITION.

1. By Act of Parties.

2. By Judicial Proceedings.

a. Jurisdiction.

- b. Who may Maintain Action.
- c. Property Subject.

d. Parties.

e. Actual Division of Property.f. Sale of Land.

g. Determination of Legal Title and Right to Possession.

See Remainders and Reversions, 1-3, Appealability of judgment, see Appeal and Error, 34.

#### 1. BY ACT OF PARTIES.

1. By Agreement - What Constitutes. Cotenants may make any agreement they choose in respect to the use by each other of the common property, but such agreements do not constitute a partition thereof unless they provide or contemplate that title to specific portions thereof shall vest in such cotenants in severalty. Hunt v. Meeker County Abstract, etc. Co. (Minn.) 1916D-925.

Impliedly 2. Agreement Suspending Right to Partition. Such right may be suspended for a limited time by express agreement, or by acquiring the property for, or devoting it to, some purpose which will be defeated by a partition; but such right is not suspended by the existence of an interest in the property, or of a right to occupy or use it, which may continue and be given effect notwithstanding the partition. Hunt v. Meeker County Abstract, etc. Co. (Minn.) 1916D-925.

(Annotated.)

### 2. BY JUDICIAL PROCEEDINGS.

#### a. Jurisdiction.

3. Service by Publication. Under N. J. Chancery Act, §§ 10, 11 (1 Comp. St. 1910, p. 413), providing that a suit in equity may proceed against a defendant by name and his heirs where complainant is unable to ascertain whether defendant is dead and is unable to ascertain the names or residences of his heirs, provided notice as is required by law to be published against absent defendants is given, the court of chancery has jurisdiction on notice by publication to nonresident owners and persons believed to be dead, their heirs, devisees or personal representatives, to decree a partition or a sale in lieu of partition and make good title thereto by decree for actual partition or through deed by a master in chancery in pursuance of a decree for sale. Cona v. Henry Hudson Co. (N. J.) 1916E-999. (Annotated.)

### Note.

Validity of service by publication in action for partition. 1916E-1002.

# b. Who may Maintain Action.

4. Right to Partition. A cotenant has the right to compel a partition of the common property unless such right has been suspended or waived by some agreement, in respect to the property, made by himself or by one through whom he claims. Hunt v. Meeker County Abstract, etc. Co. (Minn.) 1916D-925.

### c. Property Subject.

5. Known oil lands, like mines, cannot be judicially partitioned in kind, at the suit of one of the co-owners; or by a creditor of a co-owner. Gulf Refining Co. v. Hayne (La.) 1917D-130. (Annotated.)

#### Note.

Partition of mining interests and mining rights. 1917D-135.

#### d. Parties.

6. Proceeding to Validate—Inurement of Title. Though the purchaser from the executor was not made a party, the executor's title, having been perfected, inured to the benefit of the purchaser; no relief against him being sought. Glover v. Bradley (Fed.) 1917A-921.

7. Virtual Representation. In a partition suit, where actual appearance of minor children in interest of certain legatees could have been enforced, their interest cannot be bound by the judgment on the theory of virtual representation. Chambers v. Preston (Tenn.) 1918B-428. (Annotated.)

# e. Actual Division of Property.

8. Mining Property—Power to Partition in Kind. A lessee under a mineral contract may not contest the title of his lessor as an owner in indivision with others, and compel him and his co-owners to make a judicial partition in kind of the property leased. Gulf Refining Co. v. Hayne (La.) (Annotated.) 1917D-130.

# f. Sale of Land.

9. Testamentary Restriction on Right-Sale Subject to Restriction. Where one willed a farm in fee to his wife, directing that his daughter should have a home thereon, though the daughter acquired no interest in the land, a charge thereon was created in her behalf; and where the mother died intestate, and a partition sale of the land would not secure to the daughter the full benefit of the provision made for her, a sale would not be decreed at the suit of other children of the mother, the effect of which would deprive the daughter of possession, but a sale may be ordered, subject to her possessory rights. Chew v. Sheldon (N. Y.) 1916D-1268.

(Annotated.)

# g. Determination of Legal Title and Right of Possession.

10. Under and pursuant to a contract made at the time of the construction of the building in controversy, plaintiff is in possession of the second floor thereof and defendant of the first floor thereof. It is held that their respective rights of occupancy under this contract may exist after partition the same as before, and that plaintiff may compel a partition, but that such partition will be subject to such rights of occupancy. Hunt v. Meeker County Abstract, etc. Co. (Minn.) 1916D-(Annotated.) 925.

#### PARTNERSHIP.

- 1. The Partnership Relation, 657.
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Partnership as disqualification, see Judges,

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# see Municipal Corporations, 42. THE PARTNERSHIP RELATION.

### a. In General.

- 1. Intent as Essential to Creation of Partnership. Persons may form a partnership, though not intending so to do, since a partnership may be implied by agreement, whereby persons assume a relation in law constituting a partnership. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E-446. (Annotated.)
- 2. Definition of Partnership. By express provision of Cal. Civ. Code, sec. 2395, a partnership is the association of two or more, for the purpose of carrying on business together, and dividing its profits between them. Westcott v. Gilman (Cal.) 1916E-437.
- Knowledge of Parties as to Status. It is not necessary, as regards liability to third persons, that parties know that their contract in law creates a partnership; but it is enough that by contract, or conduct, or both, they have in law engaged in a partnership venture. Westcott v. Gilman (Cal.) 1916E-437. (Annotated.)
- 4. Partnership for Single Adventure. partnership may be for the prosecution of one or two adventures, and need not be for the conduct of a general and continuous business. Westcott v. Gilman (Cal.) 1916E-437.
- 5. The existence, or not, of a partnership cannot be determined by dissecting the whole relationship, and considering each fragment as though it were the complete whole; but, especially as to third persons, it is to be determined by the contract, taken with the conduct and the dealings

with the world of the parties to it. Westcott v. Gilman (Cal.) 1916E-437.

6. While the element of profit sharing does not alone and of itself establish a partnership, it is essential to a partnership. Westcott v. Gilman (Cal.) 1916E-437.

#### Note.

Intent as essential to creation of partnership. 1916E-440.

# b. What Constitutes a Partnership.

- 7. Sufficiency of Agreement to Create Partnership. That the agreement between G. and P. for obtaining fruit by purchase or on consignment, and shipping and selling it, while making G. the buyer, gives P., the seller, the right to veto prospective purchases if the price is not satisfactory to it, does not prevent the contract being one of partnership, at least as concerns third persons. Westcott v. Gilman (Cal.) 1916E-437.
- 8. That by the agreement between G. and P. for procuring, shipping, and selling fruit G. is to devote his service to procuring the fruit, while P. is to devote its services to handling and selling it, each without charges, does not prevent the existence of a partnership between them. Westcott v. Gilman (Cal.) 1916E-437.
- 9. Scope of Firm Business. The business agreed to be done by and between G. and P. is not limited to mere shipping, the contract, in the form of a letter from P. accepted by G., being: "We will do a joint account business with you on equal division of profits and losses. The business is to be the shipping of oranges and lemons, which you are to secure without any expense to the joint account, on consignment, or if any purchases are made, it shall only be done with our consent .... when the amount of purchase exceeds \$100. You are to furnish the packing house and are entitled to \$5 per car for each car packed. We will furnish the funds required to handle the business and do the selling free of expense to the joint account, all legitimate packing house expenses are to be charged against the joint account." Westcott v. Gilman (Cal.) 1916E-437.
- 10. Creation—Intention as Essential. A partnership agreement executed to protect one of the parties thereto in respect to money loaned by him to the other and with no intention that it shall become operative according to its terms does not create a partnership. Kelly, Douglas & Co. v. Sayle (Brit. Col.) 1916E-444.

(Annotated.)

# 2. PARTNERSHIP PROPERTY.

11. Firm Realty—Equitable Conversion. Whether real estate bought by the mem-

bers of a partnership and standing in the name of one or both partners constitutes personal assets of the firm depends largely on what funds were used in the purchase, what use was to be made of the property, and the intentions of the partners at the time. Sieg v. Greene (Fed.) 1917C-1006.

12. Real estate which belongs to a partnership is treated in equity as personal property only so far as it may be needed to pay the debts of the partnership and adjust the equities of the partners. Sieg v. Greene (Fed.) 1917C-1006.

# 3. RIGHTS AND LIABILITIES INTER SE.

# a. Accounting Between Partners.

- 13. Evidence. There being no evidence that the apparent overdraft in a firm's bank account, when one of the partners left the business in the hands of others, represented any partnership loss, and was not met by deposits with the bank's eastern correspondent of the proceeds of stock shipped east by the firm, as in the ordinary course of business it would be, the other partners were not entitled to be credited as against their partner, on a final accounting, with the amount of such apparent overdraft on the final overdraft, all the rest of which, at least, represented a misappropriation by them. Gorman v. Madden (S. Dak.) 1916D-842.
- 14. That among the checks of the partners, with whom a firm's business was left by the partner, which checks created an overdraft of the firm's bank account, was one for the amount of the purchase price of a horse bought for the firm before the settlement of the previous year's business, does not show that the horse was paid for with such check, so as to entitle such partners to credit therefor on an accounting with their partner; the balance of the overdraft, at least, being a misappropriation by them. Gorman v. Madden (S. Dak.) 1916D-842.
- 15. Though the answer, in action by one of the partners against the others for an accounting of the affairs of the firm of M. & G., engaged in buying and selling live stock, alleges that during the course of said partnership plaintiff engaged in a business "contrary to the provisions of this said partnership," yet it alleging that he "bought and sold live stock as such part-ner," from which business he has made profits of which he has made no accounting to defendants, defendants may thereunder show that plaintiff, as representa-tive of the firm of M. & G., under an agreement between the members thereof that he should do so, engaged in such other business as partner with others; so that the firm of M. & G. was entitled to his share of the profits in such other business. Gorman v. Madden (S. Dak.) 1916D-842.

# b. Competition by Partner.

- 16. Right of Partner to Engage in Competing Business. A partner, without the consent of his copartners, cannot carry on a business of the same nature and competing with that of the firm, and, if he does so, equity may enjoin its continuance. Crownfield v. Phillips (Md.) 1916E-991.

  (Annotated.)
- 17. Where after disagreement between partners, and pending dissolution, the outgoing partner sets up a competing business which seriously interferes with the business of the firm, the continuing partner is entitled to a preliminary injunction restraining the continuance of such competing business pending settlement of the partnership affairs. Crownfield v. Phillips (Md.) 1916E-991. (Annotated.)

#### Note.

Right of partner to carry on business in competition with firm. 1916E-993.

# c. Power of Majority.

- 18. Power of Majority of Partners. In case of a diversity of opinion regarding the internal affairs of a partnership, partnerships act by a majority, and such a majority, when acting in good faith and within the scope of the partnership business, binds the firm. Reirden v. Stephenson (Vt.) 1916C-109. (Annotated.)
- 19. A majority of the members of a partnership engaged in manufacturing butter tubs which had sold its plant and most of its personal property, but which still had some personal property and some debts due it, and which so far as appeared had not gone out of business, have implied authority to employ a person to examine the books and affairs of the partnership and ascertain its financial standing and to fix his compensation either before or after the work is completed. Rierden v. Stephenson (Vt.) 1916C-109. (Annotated.)
- 20. In an action against a partnership by a person employed by a majority of the members to examine its books and affairs and ascertain its financial standing, where, though it appeared that it had sold most of its property, there was no finding that it had gone out of business, or that the firm was not to continue, this cannot be assumed in order to hold a judgment for plaintiff erroneous on the ground that such members of the firm had no authority to bind it. Rierden v. Stephenson (Vt.) 1916C-109. (Annotated.)

#### Note.

Power of majority of partners to bind firm. 1916C-110.

### d. Contribution.

21. Where a firm of attorneys acting honestly and in good faith, but under a

mistaken conception of the law, rendered services in the settlement of the estate of a testator contrary to the terms of the will and obtained compensation therefor, and the court directed the attorneys to refund the same to the estate, a partner making the refund was entitled to contribution from a copartner as against the objection that the attorneys were wrongdoers. Estate of Ryan (Wis.) 1916D-840.

- 22. Illegal Transaction. The rule that there can be no contribution between wrongdoers is subject to the modification that a claim for contribution by one partner against a copartner will not be rejected unless the firm is an illegal one, or unless the act relied on as the basis of the claim was not only illegal, but the illegality was such that it must or ought to have been known to the partners claiming contribution. Estate of Ryan (Wis.) 1916D-840. (Annotated.)
- 23. For Firm Debts. A partner forced to pay firm debts may require contribution from his copartners. Webb v. Butler (Ala.) 1916D-815. (Annotated.)
- 24. Liquidation of Assets—Agreement as to Method. Where defendant, who was one of several banking partners, signed an agreement appointing trustees to administer the firm property, and the agreement was confirmed by the chancery court, he cannot, by demurrer, question a bill to compel him to pay his pro rata part of the debts, the firm being insolvent, on the ground that the statute provided the only method of settling the affairs of the bank. Webb v. Butler (Ala.) 1916D-815.

# 4. LIABILITY TO THIRD PARTIES.

# Nature of Liability.

- 25. Liability of New Firm. An agreement of a new firm, formed from an old one by the addition of a new member, to pay debts of the original firm, must be consented to by all the members of the new firm. Webb v. Butler (Ala.) 1916D-815.
- 26. Incoming Partner—Liability for Past Debts. One becoming a partner of a going firm does not thereby become liable for debts previously incurred, in the absence of an agreement, express or implied, to that effect, but the presumption is against the assumption of liability. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E—446.

#### b. Authority to Bind Firm.

27. Where two of three partners, engaged in forming a corporation, to take over land on which they had an option, assure purchasers of interests therein that the partnership will attend to the detail work and bear the expense of forming a corporation to take over the land, such

agreement is within the scope of the firm business and is binding upon the third partner. Tanner v. Sinaloa Land, etc. Co. (Utah) 1916C-100.

28. A partner may bind the firm when acting therefor within the scope of the partnership business. Reirden v. Stephenson (Vt.) 1916C-109.

### Discharge of One Partner from Liability.

29. Right to Hold Single Partner. Creditors may discharge one partner and recover against another, because the credit is extended to the firm on the individual liability of each. Webb v. Butler (Ala.) 1916D-815.

# d. Firm and Individual Creditors.

30. Lien of Creditor on Partnership Property. A creditor of a firm acquires no lien on the property of a new firm created by a third person acquiring the interest of a partner in the former firm. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E-446.

# e. Actions.

31. Action—Continuation in Name of Survivors. It was not error to strike out the names of two deceased partners as plaintiffs and permit the action to proceed to judgment under the names of the surviving partners. Sweetser v. Fox (Utah) 1916C—620.

### 5. TRANSFER OF PARTNER'S INTER-EST.

- 32. Incoming Partner—Liability for Past Debts. Where a purchaser of a partner's interest in a firm became a partner with the copartners in a new firm, the purchaser, as partner, was liable for goods ordered by the firm before the purchase and delivered thereafter, and for goods ordered and delivered after the purchase, but was not liable for goods ordered and delivered before the purchase. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E-446.
- 33. A purchaser of a partner's interest in a going firm is not liable for existing firm debts for goods purchased merely because the new firm receives and uses them for its own benefit. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E-446.
- 34. The purchase of a partner's net interest in a going firm is not of itself sufficient to create an assumption of his individual liability for existing firm debts. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E-446.
- 35. The purchaser of a partner's interest in a going firm is not personally liable for existing firm debts merely because he recognized that the firm property was subject thereto, and did not expect to obtain the

partner's interest free from the debts, but expected that a corporation, to be formed, should pay them in taking over the firm property, and though he advised a copartner to apply proceeds of sales of firm goods to the payment of firm debts, irrespective of the time of their creation. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E-446.

- 36. A purchaser of a partner's interest in a going firm did not intend to enter the firm and there was no agreement that he should become a partner, but it was the purpose of the purchaser and the remaining partners that the business should be incorporated. The formation of the corporation was unavoidably deferred, and it, in fact, was never formed, and, while the purpose to form it remained, the business went on under the firm name under the management of a copartner as before. Held, that the purchaser became a partner in a new firm composed of himself and the remaining partners in the old firm. Freeman v. Huttig Sash, etc. Co. (Tex.) 1916E-446. (Annotated.)
- 37. Mode of Determining Value. The assets must for the purposes of such a purchase be valued by appraisal and the annual accounting and balance sheet of the firm is not conclusive. Wood v. Gauld (Can.) 1917C-939.
- 38. Valuation of Assets—Inclusion of Good Will. In valuing the assets of a partnership for the purpose of a purchase by the survivor of the interest of a deceased partner, the value of the good will of the firm is to be included, though the annual balance sheets of the firm took no account of it. Wood v. Gauld (Can.) 1917C-939.

Note.

Right of surviving partner to purchase deceased partner's interest. 1917C-946.

# 6. RETIREMENT OF PARTNERS.

- 39. Liability of Retiring Partner. A retiring partner is not released from liability to the creditors, unless they agree with the new firm for such release. Webb v. Butler (Ala.) 1916D-815.
- 40. Change in Personnel—Effect. Every change in the personnel of a partnership works a dissolution. Webb v. Butler (Ala.) 1916D-815.

# 7. DISSOLUTION.

#### a. Dissolution by Death of Partner.

41. Rights of Surviving Partner—Purchase of Interest of Decedent—Preferential Right. A preferential right of the surviving partner to purchase the interest of a deceased partner will be implied from provisions in the articles of partnership that the interest of the decedent shall not be withdrawn for a year and for an arbitration of disputes between the surviving

partner and the representatives of the decedent as to the value of the assets. Wood v. Gauld (Can.) 1917C-939. (Annotated.)

- b. Rights of Partners to Capital on Dissolution.
- 42. Time to File Claims Against Estate. Under Wis. St. 1913, § 3844, providing that every claim against an estate not presented for allowance within the time fixed by the order limiting the time for the presentation of claims shall be barred, and section 3860, declaring that if a claim shall accrue after the expiration of the limited time it may be presented and proved at any time within one year after accrual, a claim by an attorney for contribution against the estate of his deceased partner based on a judgment rendered after expiration of the time limited by order for presentation of claims and that payment thereof by the attorney is not barred when presented within one year after the judgment. Estate of Ryan (Wis.) 1916D-840.

#### Note.

Right of contribution between partners. 1916D-820.

- c. Jurisdiction in Equity to Adjust Rights.
- 43. Accounting. In a suit to dissolve a partnership, a court of equity will force an accounting, though the accounts were not complicated. Webb v. Butler (Ala.) 1916D-815.

# d. Contribution.

- 44. The partners, who overdrew the partnership account for their personal benefit, are, in the absence of partnership assets to meet the same, personally liable for the amount of the overdraft, on an accounting after dissolution, to the other partner who alone repaid the bank. Gorman v. Madden (S. Dak.) 1916D-842. (Annotated.)
- 45. Where two of the partners drew out for their personal benefit funds from the firm's bank account, the third partner, on an accounting after dissolution, is entitled to recover a third of such account from the other partners' share of the partnership assets remaining, or, in the absence of such assets from them personally. Gorman v. Madden (S. Dak.) 1916D-842.

(Annotated.)

46. Between Partners. On dissolution of a partnership, the partner, who, in accordance with partnership agreement, advanced money for the business, is entitled, as against the other partners, to be repaid the same from the partnership assets. Gorman v. Madden (S. Dak.) 1916D-842.

(Annotated.)

# PART PAYMENT.

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As removing bar, see Limitation of Actions, 44-46.

#### PART PERFORMANCE.

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#### PASSENGERS.

Who are, see Carriers of Passengers, 11-14. Carriers' duties toward, see Carriers of Passengers, 15-46.

# PATENTS.

- 1. Power of Patentee to Impose Conditions on Use—Restriction as to Materials. The owner of a patent may not, under U. S. Rev. Stat. § 4884 (5 Fed. St. Ann. 419), giving him the exclusive right to use the invention, restrict its use by a purchaser, by a notice attached to the machine embodying the patent, to specific materials necessary to its operation, but which are no part of the patented machine, and are not themselves patented, nor can he, by such notice, make the use of the machine subject to further conditions as to use or oryalties that may be imposed thereafter in his discretion. Motion Picture Patents Co. v. Universal Film Mfg. Co. (U. S.) 1918A-959. (Annotated.)
- 2. The exclusive right to use the invention or discovery granted by U. S. Rev. Stat. § 4884 (5 Fed. St. Ann. 419), to the patentee, his heirs or assignees, did not invest the assignee of the Latham patent No. 707,934, who had licensed another to make and sell a motion picture exhibiting machine embodying the invention, with the power to limit, by a notice attached to the machine, its use by a purchaser or the latter's lessee to films containing the in-

1916C-1918B.

vention of the reissued Edison patent No. 12,192, so long as the assignee continues to own such patents, nor by such notice to condition the use upon other terms to be fixed by such assignee and complied with by the user while the machine is in use and while the assignee owns the patents. Motion Picture Patents Co. v. Universal Film Mfg. Co. (U. S.) 1918A-959.

(Annotated.)

#### PAUPERS.

See Poor and Poor Laws.

# PAWNBROKERS.

Loan brokers, see Brokers, 14.

- 1. Constitutional Law Regulation of Loan Brokers-Validity. Cal. St. 1909, p. 969, amended by St. 1911, p. 978, which by section 1 declares that one engaged in loaning or advancing money on the security of chattel mortgages, or personal property, or on security of a lien or assignment of, or power of attorney relating to, wages, shall be deemed a "personal prop-crty broker," sections 2 and 3 of which allow such brokers to charge and receive 2 per cent a month, and section 5 of which requires such brokers, on making any loan or advancement, to give the borrower a memorandum showing the name of the lender, the nature of the security, etc. and which declares the failure to give such memorandum to be a misdemeanor, is not in conflict with Const. art. 1, § 11, declaring that all laws of a general nature shall have a uniform operation, nor with section 21, forbidding the granting of special privileges and immunities to any class of citizens, which on the same terms are not given to all, since such business is peculiar and well known and capable of classifica-tion. Matter of Stephan (Cal.) 1916E-617. (Annotated.)
- 2. Such act is not within the meaning of Cal. Const. art. 4, § 25, subd. 23, forbidding special laws "regulating the rate of interest on money." Matter of Stephan (Cal.) 1916E-617. (Annotated.)

# Note.

State or municipal regulation of personal property loan brokers. 1916E-618.

#### PAYMENT.

1. What Constitutes Payment.

2. Application of Payments.

a. In General.

b. Application by Debtor.c. Application by Third Party.

3. Proof of Payment.

4. Recovery of Voluntary Payment.

Assignment of, see Assignments, 19. Liability of bank for unauthorized payments, see Banks and Banking, 56. Of negotiable paper, see Bills and Notes.

Of negotiable paper, see Bills and Notes, 35-37.

Check as payment, see Escrow, 3, 7. Removing bar by part payment, see Frauds,

Statute of, 7.

Application in order of priority, see Mechanics' Liens, 40.

Payment of note held by third party as defense to foreclosure of mortgage, see Mortgages and Deeds of Trust, 24.

Payment in full as prerequisite to subrogation, see Subrogation, 7.

Sufficiency of part payment to import new contract, see Sundays and Holidays, 4. Recovery of taxes erroneously exacted or

Recovery of taxes erroneously exacted or paid, see Taxation, 101-106.

Recovery of taxes erroneously collected under Foreign Corporation Tax Act, see

Taxation, 170.

# 1. WHAT CONSTITUTES PAYMENT.

- 1. Note as Payment—Question of Law or Fact. Whether defendant's note in suit was given by him and accepted by plaintiff in lieu of cash as payment and satisfaction pro tanto of part of the purchase price under a conditional sale of chattels is a mixed question of law and fact. Norman v. Meeker (Wash.) 1917D—462.
- 2. Note as Payment—Effect of Negotiation by Payee. The negotiation by the payee of a note evidencing a debt does not operate as a payment of the debt so as to discharge the lien of a conveyance made by way of collateral security. Moody v. Stubbs (Kan.) 1917C-362. (Annotated.)

# Note.

Negotiation of note of debtor as constituting payment of original debt. 1917C-364.

# 2. APPLICATION OF PAYMENTS.

#### a. In General.

3. In the absence of an agreement providing otherwise, payment upon a debt for salary of a municipal employee consisting of principal and interest not actually applied by the debtor or creditor is first applicable to the interest due and then to the principal. Shepard v. New York (N. Y.) 19170-1062. (Annotated.)

#### b. Application by Debtor.

- 4. The debtor may elect to have all his payments upon the indebtedness treated as payments, first upon the legal interest and principal, in which case no usury can be sued for until the entire debt has been paid. Taulbee v. Hargis (Ky.) 1918A-762.
- 5. Evidence of Proper Application. A surety company guaranteed payment for materials used by a construction company in paving certain streets, another construction company, with the same officers and the same general manager, had a contract for paving certain other streets, and each

company purchased its materials from plaintiff. Held, that the evidence is sufficient to support a finding that certain checks signed by the first construction company and delivered to plaintiff by the manager of both companies, with direction to credit the same to the account of the second company, were properly applied as directed, and that under the circumstances in evidence the surety company cannot complain. Wyandotte Coal, etc. Co. v. Wyandotte Paving etc. Co. (Kan.) 1917C-580.

# c. Application by Third Party.

6. Right of Third Person to Control. Third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of several debts, cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons. Wyandotte Coal, etc. Co. v. Wyandotte Paving etc. Co. (Kan.) 1917C-580. (Annotated.)

#### Note.

Right of third person to control application of payment. 1917C-582.

#### 3. PROOF OF PAYMENT.

- 7. Payment—Evidence for Jury. In an action on notes admittedly received as collateral, the question whether the principal obligation had been paid is held to be for the jury. Estate of Philpott (Iowa) 1917B-839.
- 8. By Third Person—Evidence—Failure to Present to Payee. In an action for deceit in the sale of a ship and her freight, which were encumbered by a disbursement draft, evidence that the draft was never presented for payment to the bank to which it was first indorsed and by which it was indorsed to another, and that the next time the cashier saw it it was in the hands of plaintiff's attorney, is admissible as tending to show that plaintiff paid the draft. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.
- 9. That evidence is not objectionable as not being the best evidence of the payment of the draft. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.
- 10. Possession of Draft by Third Person. Where defendant sold a ship and its freight to plaintiff without informing the latter of a disbursement draft which was made a lien on the freight and the ship, possession by plaintiff's agent of the draft is prima facie evidence, in an action for the deceit, that plaintiff had paid it. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

# 4. RECOVERY OF VOLUNTARY PAY-MENT.

11. Mistake of Law—Recovery Back—Payment by Officer. Where the officers of

a township, under a mistake of law, wrongfully pay over road and bridge funds to the treasurer of a city whose corporate limits are within the township, the township may recover the amount of such funds from the city. Lamar Township v. Lamar (Mo.) 1916D-740. (Annotated.)

12. Payment to Secure License—Right to Recover Back. Where a village council refused to issue licenses until the applicants had paid a certain sum to the village treasury under an invalid ordinance, and the applicant, without seeking redress in the courts, made the payment to protect the value of his property, there was no duress, and the payments cannot be recovered. Baldwin v. Chesaning (Mich.) 1918B-512. (Annotated.)

#### Note.

Payment to prevent apprehended injury to business as payment under duress. 1918B-516.

#### PEACE.

See Breach of Peace.

#### PECUNIARY INTEREST.

See Interest.

#### PEDDLERS.

See Hawkers and Peddlers.

#### PEDESTRIANS.

Duties and rights, see Automobiles, 22. Injury to, see Independent Contractors, 15. Duty toward vehicles, see Negligence, 42.

#### PENALTIES.

See Fines and Penalties; Forfeitures.

# PENALTY.

Notice a prerequisite to liability, see Notice, 1.

# PENDING ACTION.

See Actions and Proceedings, 8.
When action is pending, see Limitation of Actions, 15.

Effect of repeal of statute, see Statutes, 125.

#### PENDING APPEAL.

See Appeal and Error, 47.

#### PENSIONS.

1. Soldiers' Home—Nature of Institution. The Michigan Soldiers' Home, established by Mich. Pub. Acts 1885, No. 152, is an eleemosynary institution for the purpose of dispensing a charity to a favored but dependent class, intended to furnish a home to honorably discharged veterans, disabled by disease, wounds, etc. from earning their living, and having no ade-

quate means of support, who would otherwise become objects of common charity. Mason v. Board of Managers (Mich.) 1916C-848.

2. Effect of Admission to Soldiers' Home. Mich. Pub. Acts 1885, No. 152, establishing the Michigan Soldiers' Home, by section 2, vested the general government in a board of managers, by section 8, required the board to prepare a system of government, by section 11, declared that all honorably discharged and disabled soldiers and sailors otherwise dependent on charity should be admitted, subject to the regulations of the managers. Pub. Acts 1905, No. 313, provided that money accumulated in the post fund of the home might be used to benefit the home and its inmates, and Pub. Acts 1911, No. 102, that pensions of residents might be taken for disciplinary purposes to be held in trust for them. Held, that one whose pension was adequate for his support was not entitled to admission, and that a regulation imposed as a condition of admission that residents transfer their pensions in excess of \$12 per month, to be permanently retained and ultimately turned over to a general state fund, was beyond the power of the board, and that the amounts so retained were held in trust, to be accounted for according to Act No. 102. Mason v. Board of Managers (Mich.) 1916C-848. (Annotated.)

3. In such accounting the amounts due to discharged or deceased soldiers, as to whom the trust had terminated, were payable, with interest at 5 per cent per annum from the time of death or discharge; but, as to money held by the board under the disciplinary regulation, no interest was recoverable unless the board had received interest thereon. Mason v. Board of Managers (Mich.) 1916C-848. (Annotated.)

# Note.

Effect with respect to pension of pensioner becoming inmate of soldiers' home. 1916C-854.

PER CAPITA OR PER STIRPES.

Construction of bequest, see Wills, 214, 215.

PEREMPTORY CHALLENGES. See Jury, 23, 24.

PEREMPTORY MANDAMUS. See Mandamus, 29, 30.

PERFECTION OF APPEAL.
See Appeal and Error, 46.

PERFORMANCE OF CONTRACTS. See Contracts, 45-53.

# PERJURY.

Charging perjury in instructions, see Instructions, 48.

As ground for vacating award under Workmen's Compensation Act, see Master and Servant, 303.

PERMANENT ALIMONY. See Alimony and Suit Money, 1-8.

PERMANENT INJUNCTIONS. See Injunctions.

PERMISSIVE WASTE.
Defined, see Waste, 1.

PERPETUATING TESTIMONY. See Depositions, 1.

# PERPETUITIES.

See Charities, 18, 19. Covenant for perpetual renewal, see Landlord and Tenant, 50-52.

- 1. Trust for Maintenance of Estate. A will appointing the income of a fund to preserve, maintain, and improve real estate, the fee of which was bequeathed to trustees to hold for the benefit of a minor during her minority, and upon her reaching the age of twenty-one years to convey the same to her in fee, discharged of all trust, and in the event of her prior decease giving the fee to two trustees and the survivor with a gift over to another in case of the decease of both trustees, is an invalid attempt to appoint the fund in perpetuity for the maintenance of a private estate to be used and occupied as such. Thorp v. Lund (Mass.) 1918B-1204.
- 2. Definitions. As commonly understood, though not technically exact, a "perpetuity" is something which may last forever, and the "rule against perpetuities" is a rule that prevents certain existing conditions from continuing for an indefinite time and promotes alienability by destroying future interest. Barton v. Thaw (Pa.) 1916D-570.
- 3. Vested and Contingent Estates. Where the event on which an estate is to arise is an option to purchase, which is so uncertain that it may expire at some time in the future or may not expire at all, the interest created at the option is not "vested," but is "contingent" and within the rule against perpetuities. Barton v. Thaw (Pa.) 1916D-570. (Annotated.)
- 4. Indefinite Option. A covenant in a deed conveying coal underlying land, providing that if the grantee, his heirs or assignees, shall at any time desire to purchase any of the land, the grantors will sell same to them at a certain price, being

a mere option to purchase, which under its terms can be exercised at any time in the future, is void under the rule against perpetuities. Barton v. Thaw (Pa.) 1916D-570. (Annotated.)

- 5. Application of Rule Against Perpetuities. The statute against perpetuities (Iowa Code, § 2901) does not apply to gifts for charitable uses. Wilson v. First National Bank (Iowa) 1916D-481.
- 6. Gift of Remainder to Charity. A will provided that testator's bank stock should be kept in his name, and the dividends paid to his brother and sister during their lives, and on their death "the said stock is to be turned over" to a training school, for the establishment of which testator devised certain funds in trust, and the will elsewhere provided that on the death of the brother and sister, the bank stock should be transferred to the board of directors of the training school. Held that, since the title of the stock was in the trustee or in the corporation from the death of the testator, subject to the charge in favor of his brother and sister, it could not be claimed that the gift to the training school was invalid as against the statute of perpetuities on the ground that it was in the nature of a gift over after the lapse of a prior gift. Wilson v. First National Bank (Iowa) 1916D-481.
- 7. Certainty of Vesting. To prevent a future interest in property from being invalid under the rule against perpetuities, it is not enough merely that it will in all probability vest within the limitations specified, but it must necessarily so vest. Barton v. Thaw (Pa.) 1916D-570.
- 8. Construction of Grant Lives in Being. A deed to one and his heirs and on his death without issue to another is not a violation of the rule against perpetuities, as "dying without issue" means, under the express terms of N. Car. Revisal 1905, § 1581, a dying without having issue living at the time of death of the grantee. Lee v. Oates (N. Car.)) 1917A-514.
- 9. Defeasible Remainder. A provision giving property in trust for a daughter for life, and at her death to pay over the same to her issue, but, if she left none surviving, then to testator's heirs at law, does not violate the statute against perpetuities; the remainders over vesting at testator's death, though defeasible in the contingency named. Allen v. Almy (Conn.) 1917B-112.
- 10. Scope of Rule Against Perpetuities—Gift to Public Charity. N. Y. Personal Property Law (Consol. Laws, c. 41), § 12, providing that no gift or bequest to charitable uses which shall, in other respects, be valid under the laws of the state shall be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiaries, and that if the instrument grant-

ing such a gift names a trustee the legal title shall vest in him, and if no person is named as trustee shall vest in the supreme court, which shall have control over such gifts and power to administer them to effect the purpose of the instrument, sanctions the creation of charitable trusts, and relieves such trusts from the operation of the statutes against perpetuities, and restores the law of charitable trustees as recognized in England prior to the Revolution. Matter of MacDowell (N. Y.) 1917E-853.

# Note.

Option to purchase realty as violating rule against perpetuities. 1916D-577.

#### PERQUISITE,

Meaning, see Judges, 4.

#### PERSON.

Includes corporation, see Limitation of Actions, 5.

#### PERSONS.

See Public Officers, 26.

### PERSONAL INJURY.

Of attorneys, see Attorneys, 69-74.

Measure of damages, see Damages, 6, 1214.

Excessiveness of verdict, see Damages, 29-33.

Of executors and administrators, see Executors and Administrators, 21, 22.

Of governor for official acts, see Governor, 1, 2.

Of guardian, see Guardian and Ward, 15, 16.

To minor, actions for, see Infants, 24, 25. Liability of innkeeper to guest, see Innkeepers 4, 5, 8-10

keepers, 4, 5, 8-10.
Landlord's liability, see Landlord and Tenant, 17-19.

Proceedings under Employers' Liability Act, see Master and Servant, 40-100.

Of servant under Workmen's Compensation Act, see Master and Servant, 101-364.

Of mortgagor on foreclosure, see Mortgages and Deeds of Trust, 2, 28.

Of city officers, see Municipal Corporations, 149, 150.

Of officers, see Public Officers, 61-66.

Of receiver for attorney fees, see Receivers, 6.

For special assessment, see Taxation, 139-141.

#### PERSONAL PROPERTY.

See Property.

PERSONAL REPRESENTATIVES. See Executors and Administrators.

#### PETITIONS.

See Pleading.

Sufficiency on motion for new trial, see New Trial, 31-34.

#### PETROLEUM PRODUCTS.

Power to regulate, see Constitutional Law,

# PETTY OFFENSES.

Right to jury trial, see Jury, 7.

# PHARMACISTS.

See Drugs and Druggists.

# PHOTOGRAPHS.

As evidence, see Evidence, 113.

# PHYSICAL EXAMINATION.

Statute requiring examination of pupils, see Schools, 33-38.

- 1. Impartial Physicians. In an action for malpractice, while the court may require plaintiff to submit to the examina-tion by impartial physicians, she cannot be required to submit to examination by physicians selected by defendant. Just v. Lättlefield (Wash.) 1917D-705.
- 2. Physical Examination of Party-Discretion of Court. Where plaintiff had been examined by two physicians representing defendant company prior to the trial of an action for personal injuries, and there was no evidence that she or her physicians deceived the examining doctor, it is not an abuse of discretion to refuse request by defendant for examination of plaintiff at the time of the trial. Cohen v. Philadelphia Rapid Transit Co. (Pa.) 1917D-350. (Annotated.)

Power of court to compel submission to physical examination. 1917D-351.

# PHYSICIANS AND SURGEONS.

1. Nature of Right to Practice, 666.

2. Validity of Statutes, 666.

- 3. Construction of Statutes, 667.
- 4. What Constitutes Practice of Medicine Without License, 667.

5. Compensation, 668.

6. Contract to Render Medical Service, 668.

7. Liability for Malpractice, 668.

a. In General, 668.b. Degree of Care Required, 668.

c. Actions, 669.

- (1) Pleading, 669. (2) Evidence, 669.
   (3) Instructions, 670.
- (4) Questions for Jury, 671.

Authority to engage physician to attend injured employee, see Agency, 12.

Harmless error in admitting evidence, see Appeal and Error, 235, 236.

Malpractice, excessiveness of verdict, see Damages, 49-52.

Expert testimony of nurse as to illness, see Evidence, 60.

Expert testimony as to possibility of cure, see Evidence, 61.

Medical books as evidence, see Evidence,

94, 95,

Hospital chart as evidence, see Evidence, 105-107.

Liability of hospital for surgeon's malpractice, see Hospitals and Asylums, 1.

Validity of prescription exception, see

Intoxicating Liquors, 25.
Right to sell liquor, see Intoxicating

Liquors, 80. Duties of medical referee under Workmen's Compensation Act, see Master

and Servant, 290, 291. Physical examination of plaintiff in malpractice trial, see Physical Examination, 1, 2.

Compensation for treatment of pauper, see Poor and Poor Laws, 1.

Communications with patient as privileged. see Witnesses, 27-29.

# 1. NATURE OF RIGHT TO PRACTICE.

1. What Constitutes Practice of Medicine — Chiropractic. Under Utah Laws 1911, c. 93, providing that any person shall be regarded as practicing medicine who shall diagnose, treat, operate upon, prescribe, or advise for any physical or mental ailment or any abnormal mental or physical condition of another after having received or with intent to receive any compensation, or who shall hold himself out as a physician or a surgeon, a "chiropractor," one professing a system of manipular one professing a system of manipulations which aims to cure disease by the mechanical restoration of displaced or subluxated bones, especially the vertebrae, to their normal relation, who advertises as a "Graduate Chiropractor. No drugs, or surgery, or osteopathy. Try chiropractic" -and who endeavors not so much to cure ailments as to permit the natural "vital forces of the body," impeded by luxation of vertebrae, to proceed unhindered to any diseased part upon readjusting the displaced vertebrae with his bare hands, for which he receives compensation, is "practicing medicine" within the statute, since he "diagnosed" the symptoms of his patients by recognizing the presence of disease from its signs or symptoms in deciding as to its character, and thereafter treated them for compensation. Board of Medical Examiners v. Freenor (Utah) 1917E-1156. (Annotated.)

# 2. VALIDITY OF STATUTES.

2. Injunction Against Unlawful Practice. Under Utah Comp. Laws 1907, § 1737, providing that any persons practicing medicine, surgery, or obstetrics within the state contrary to law may, at the instance of the board of medical examiners, be enjoined from practicing until lawfully admitted to practice, the district court has equitable jurisdiction, on complaint of the medical examiners, to grant injunction against a chiropractor practicing medicine, as the legislature has power to change, abolish, or enact rules of equity, as in the instant case by authorizing restraint of a public offense. Board of Medical Examiners v. Freenor (Utah) 1917E-1156.

- 3. Requirement of License—Validity.—
  Iowa Code, § 2580, providing that it shall be a misdemeanor for any person to practice medicine, surgery, or obstetrics in the state without having first obtained and filed for record a certificate from the state board of medical examiners, is not repugnant to the bill of rights, the constitution of the United States, or the constitution of the state. State v. McAninch (Iowa) 1918A-559.
- 4. Ophthalmologists. The exemption in favor of duly licensed physicians and surgeons, which is made by Cal. Laws 1913, c. 598, confining to registered optometrists who have passed the prescribed examination the right to employ means other than the use of drugs to measure the range of human vision, and the accommodative and refractive states of the human eye, does not deny the equal protection of the laws guaranteed by U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), to a regularly graduated ophthalmologist who employs drugless means for such purposes. McNaughton v. Johnson (U. S.) 1917B-801. (Annotated.)
- 5. Regulation of Optometrists—Validity. A state may, in the exercise of its police power, confine to registered optometrists who have passed the examination prescribed by Cal. Laws 1913, c. 598, the right to employ means other than drugs to measure the range of human vision, and the accommodative and refractive states of the human eye. McNaughton v. Johnson (U. S.) 1917B-801. (Annotated.)
- 6. Drugless Practitioners. The state's police power extends to requiring, as is done by Cal. Laws 1913, c. 354, as amended by Laws 1915, c. 105, that drugless practitioners employing faith, hope, and the processes of mental suggestion and mental adaptation in the treatment of disease shall have completed a prescribed course of study and passed an examination. Crane v. Johnson (U. S.) 1917B-796.
- 7. The exemption in favor of persons treating the sick by prayer from the application of Cal. Laws 1913, c. 354, as amended by Laws 1915, c. 105, which provides that persons may not practice drugless healing unless holding a "drugless practitioner certificate," obtainable only upon completion of a prescribed course of

study and after an examination, does not render the statute invalid as denying the equal protection of the laws guaranteed by U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), to one who does not employ prayer in his treatment of disease, but does use faith, hope, and the processes of mental suggestions and mental adaptation, a form of treatment in which skill enhanced by practice is to be exercised. Crane v. Johnson (U. S.) 1917B-796. (Annotated.)

- 8. State Regulation of Nurses. The fact that the state association of graduated nurses, to which an appeal may be taken from the decision of the state board of nurse examiners under Mont. Laws 1913, c. 50, § 11, is a voluntary association, does not render that section unconstitutional. State v. District Court (Mont.) 1917C-164. (Annotated.)
- 9. The state can require such qualifications as it deems necessary for the practice of a profession which is potent for harm if practiced by ignorant, incapable, or corrupt persons, and may prescribe the means for determining such qualifications without judicial proceedings, since "due process of law" is not necessarily judicial process. State v. District Court (Mont.) 19170-164. (Annotated.)
- 10. Mont. Laws 1913, c. 50, § 11, providing for an appeal from the rejection of any application for registration as a nurse to the state association of graduated nurses whose decision shall be final, is not unconstitutional as depriving a citizen of the right to follow a lawful profession without a hearing in the courts, since the act expressly provides that it does not apply to gratuitous nursing nor to any person nursing for hire who does not assume or pretend to have special training and does not pretend to be a registered nurse. State v. District Court (Mont.) (Annotated.) 1917C-164. Notes.

State regulation of practice of nursing. 1917C-168.

Special regulation of Christian Science or other drugless treatment of disease. 1917B-798.

Special regulation of persons treating ocular diseases. 1917B-803.

# 3. CONSTRUCTION OF STATUTES.

11. Utah Laws 1911, c. 93, prohibiting practicing medicine without a license, does not concern systems of treatments, but merely prohibits anyone from treating diseases who has not the requisite qualifications. State Board of Medical Examiners v. Terrill (Utah) 1918B-1117.

(Annotated.)

- 4. WHAT CONSTITUTES PRACTICE OF MEDICINE WITHOUT LICENSE.
- 12. What Constitutes Practice of Medicine—Massage Treatment. The evidence

is held to show that defendant practiced medicine without a license, as he undertook to examine, diagnose, and prescribe for all ailments, as well as to do general massaging. State Board of Medical Examiners v. Terrill (Utah) 1918B-1117.

(Annotated.)

13. A decree, enjoining defendant from diagnosing, treating, operating on, prescribing, or advising for any person afflicted with any mental or physical ailment or condition, from which he expects or does receive a pecuniary compensation, or from practicing medicine within the state until he shall have received a certificate permitting him to practice medicine, does not prevent him from doing the business of an ordinary masseur, since it is in the words of Utah Laws 1911, c. 93, prohibiting practicing medicine without a license. State Board of Medical Examiners v. Terrill (Utah) 1918B-1117. (Annotated.)

# 5. COMPENSATION.

14. Making Right Contingent on Success—Agreement Construed. Where a surgeon advised a patient to seek other more celebrated surgeons, but on the patient's objection said that, if she was willing to take a chance with him, he was willing to take a chance with her, such statement does not show that the surgeon agreed to demand compensation only in event of a successful operation. Harvey v. Richardson (Wash.) 1918A-881.

# 6. CONTRACT TO RENDER MEDICAL SERVICE.

- 15. Failure to Attend Patient—Defenses. It is no excuse for a physician, who agreed to treat one person that at the time treatment became necessary he could not leave another patient. Hood v. Moffett (Miss.) 1917E-410.
- 16. Relation Between Physician and Patient—Workman Treated at Company Hospital. Plaintiff's employer had an arrangement with defendants, physicians, who operated a hospital in Cloquet, by which the employer deducted a certain sum each month from the pay of each employee, and turned over the sums so deducted to defendants, who agreed, for such compensation, to care for and treat all injured employees which the employer should send to them. Plaintiff was injured and was taken to defendants' hospital and treated by them under this arrangement. It is held that the relation of patient and physician existed between plaintiff and defendants, and that the latter owed plaintiff the duty to exercise ordinary care and skill in treating him. Viita v. Fleming (Minn.) 1917E-678.
- 17. Necessity of Consent to Operation. Where a patient voluntarily submits to

an operation by making no objection, though she knows it is about to be performed, her consent thereto will be presumed, unless it is made reasonably clear that she was the victim of a false and fraudulent representation. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097. (Annotated.)

18. Degree of Responsibility. Unless so provided by an express contract, a physician or surgeon does not warrant that he will effect a cure, or that he will restore the patient to the same condition as before the necessity for treatment arose, or that the result of the treatment will be successful. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

# Note.

Consent as affecting right to perform surgical operation. 1916C-1105.

#### 7. LIABILITY FOR MALPRACTICE.

#### a. In General.

- 19. What Constitutes. It is not negligence for a physician or surgeon to reduce a fracture by the method generally recognized by surgeons as proper. Craghead v. McCullough (Colo.) 1916C-1075.
- 20. For What Injuries Liable. For malpractice in treating an injury, a surgeon is liable only for results from his negligence, and not for those from the original injury. Cranford v. O'Shea (Wash.) 1916C-1081.
- 21. Erroneous Diagnosis. While a physician is liable for the results of improper treatment administered through negligence, he is not ordinarily liable for damages consequent upon an honest mistake or error of judgment in making a diagnosis, where there is reasonable doubt. Just v. Littlefield (Wash.) 1917D-705.
- (Annotated.)
  22. Failure to Make Test Before Operation. That a surgeon, who was operating for goiter, did not take a blood test of the patient before the operation, will not, though the patient died prevent him from recovering his fee; it not appearing that it was the custom in that locality to take blood tests, or that the failure injured the patient, for a physician or surgeon does not guarantee to cure his patient, or that his treatment will be successful. Harvey v. Richardson (Wash.) 1918A-881.

(Annotated.)

# Notes.

Failure of surgeon to make test before operation as malpractice. 1918A-883.

Liability of physician for malpractice in making wrong diagnosis. 1917D-708.

# b. Degree of Care Required.

23. A physician or surgeon, possessing the requisite qualifications and applying

his skill and judgment with ordinary care and diligence to the diagnosis and treatment of the patient, is not liable for an honest mistake or error of judgment in making a diagnosis or prescribing a mode of treatment, where there is ground for reasonable doubt as to the practice to be pursued. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097. (Annotated.)

24. In the absence of a special contract, the law implies that a surgeon employed to treat an injury contracts to exercise reasonable and ordinary care to accomplish the purpose for which he is employed, but he does not warrant a cure and is not responsible for want of success unless it results from a failure to exercise ordinary care or from want of ordinary skill. Craghead v. McCullough (Colo.) 1916C-1075.

25. Degree of Care and Skill Required. The law requires a physician and surgeon to possess the skill and learning which is ordinarily possessed by the average member of such profession in good standing, and requires him to apply such skill and learning in a given case with ordinary and reasonable care. McAlinden v. St. Maries Hospital Association (Idaho) 1918A-380.

26. Whether errors of judgment will or will not make a physician and surgeon liable for damages in a given case, depends not merely upon the circumstance that he may be ordinarily skilful as such physician and surgeon, but also upon the fact of whether he has exercised in the treatment of such case the degree of reasonable skill and diligence that is ordinarily exercised in his profession. McAlinden v. St. Maries Hospital Association (Idaho) 1918A-380.

27. Whether a physician and surgeon in a given case possessed and exercised that degree of skill and learning possessed by the average member of the medical and surgical professions in good standing in the community, and used that reasonable care and diligence according to his best judgment in the treatment of an injured patient that the average member of such professions would have used, are questions of fact exclusively for the jury to determine. This rule is not changed by the fact that men learned in the sciences of medicine and surgery have given conflicting testimony touching the required and approved treatment of an injury. McAlinden v. St. Maries Hospital Association (Idaho) 1918A-380.

#### c. Actions.

# (1) Pleading.

28. Certainty. A complaint in an action against a physician for malpractice, which merely averred that he did not use the usual test to ascertain plaintiff's pregnancy, is subject to motion to make more definite and certain, as medical men might

differ on what was the usual test. Just v. Littlefield (Wash.) 1917D-705.

# (2) Evidence.

29. Evidence as to Experience. Where a surgeon sued for malpractice testified as an expert, evidence as to his age, the extent of his practice, and his place of residence and other similar matters is admissible, as the jury were entitled to be informed of his opportunities for observation and experience in his line, and to know what manner of man he was, and it was immaterial that testimony as to these matters was given by another witness rather than by defendant. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

30. Necessity of Consent to Operation. If a patient was incapacitated to consent to the amputation of a leg, and if the necessity therefor was extremely urgent to save her life, a surgeon treating her had a right to consult with her mother and to act upon her mother's consent as the implied consent of the patient; and hence, where there was evidence of these facts, it was not error to admit evidence, in an action for malpractice, that the nother consented and stated that the patient had consented. Barfeld v. South Highlands Infirmary (Ala.) 1916C-1097.

(Annotated.)

31. In an action against a surgeon for amputating plaintiff's leg without her consent, evidence that plaintiff's mother and a nurse told defendant that plaintiff was willing to have the leg amputated, though falling in the general class of hearsay, is admissible as bearing upon defendant's good faith. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

(Annotated.)

32. Admissibility of Evidence. In an action for amputating plaintiff's leg without her consent and for so negligently and unskilfully treating it as to make its amputation necessary, where there was no suggestion in the declaration or the evidence that defendant was guilty of any negligence or lack of skill in treating plaintiff after the amputation, evidence as to matters occurring after the amputation is properly excluded. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

33. Amount of Charge. In an action against a surgeon for malpractice, a question asked a witness as to the surgeon's charge for his treatment was properly excluded, the amount of the charge not being in issue, defendant being morally and legally bound to exercise the same degree of care, diligence, and skill whether his charge was large or small, and no inference of wrong or negligence arising from the fact that the charge was unreasonable, especially as his charge was shown by other evidence. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

- 34. Failure of Another to Cure. In an action against a surgeon for amputating plaintiff's leg without her consent, and for so negligently and unskilfully treating it as to make its amputation necessary, the fact that another physician or surgeon had failed in an attempt to treat the leg is proper for the consideration of the jury on the question of defendant's alleged negligence and the alleged wrongful amputation, and an instruction that such fact, if it was a fact, should not be considered is properly refused. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.
- 35. Negligence Established. In an action against a physician and surgeon, evidence held sufficient to support a jury finding of negligence in connection with the treatment of a fractured collar bone. Craghead v. McCullough (Colo.) 1916C-1075.
- 36. Proof of Negligence—Res Ipsa Loquitur. A surgeon's failure to exercise ordinary care in treating a fracture is not established by proof of the result alone, but must be shown by other evidence. Craghead v. McCullough (Colo.) 1916C-1075.
- 37. Leaving Sponge in Surgical Wound. Where an action is brought to recover damages on account of the wrongful, negligent, and careless leaving of a sponge in the abdomen of a patient, and on account of the negligence of defendant in permitting said sponge to remain in said patient's abdomen an intestinal obstruction was created, resulting in a partial closing of a portion of the intestinal canal, and causing a partial paralysis and ob-structions thereof, and by reason of such wrongful and negligent acts, and for no other reason, and as a direct result thereof the patient died, it is incumbent upon the plaintiff to prove said slegations by a preponderance of the evidence, and show that the presence of said sponge in the abdomen of the patient was the direct and proximate cause of the death of the patient. Ruble v. Busby (Idaho) 1917D-(Annotated.)
- 38. It is held that the evidence is sufficient to show that the adhesive condition of the intestines of the patient caused her death, and that such adhesive condition was not caused by the presence of a sponge, and that the evidence is sufficient to support the verdict of the jury. Ruble v. Busby (Idaho) 1917D-665. (Annotated.)
- 39. Sufficiency of Evidence. Assuming that the relation of patient and physician existed between plaintiff and defendants, the evidence was sufficient to justify the jury in finding that the physician failed to exercise towards the patient that degree of care and skill which the law requires. Viita v. Fleming (Minn.) 1917E-678.

# (3) Instructions.

- 40. In an action against a surgeon for amputating plaintiff's leg without her consent, an instruction, justifying the amputation without plaintiff's affirmative consent if an emergency demanding the operation, and "not produced by defendant," existed, sufficiently excludes an emergency superinduced by defendant's own negligence or lack of skill, or voluntarily brought on by him, where plaintiff did not consider the matter of sufficient importance to call the court's attention directly to the supposed deficiency. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097. (Annotated.)
- 41. In an action against a surgeon for amputating plaintiff's leg without her consent, where it was admitted that plaintiff refused for a long time to consent, but defendant's testimony tended to show that she freely consented shortly before the operation, an instruction that, if she was in imminent danger of losing her life, and was advised to have her leg amputated to save her life, it was her right and privilege to refuse to consent, and if she did refuse, and defendant cut off the leg without her consent, it was wrongful, is misleading, and properly refused. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097. (Annotated.)
- 42. Such instruction is also properly refused because it ignored evidence tending to show that she was wholly incapacitated to consent, justifying defendant in acting upon a consent to be implied on considerations of custom, humanity, and reason. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097. (Annotated.)
- 43. Damages—Suffering. It is held that the court correctly instructed the jury to the effect that in awarding plaintiff damages, if any were awarded, it would not be proper to allow him anything for the accident which he sustained, nor for the pain, suffering, and anguish therefrom accruing to him; but that the award of damages must be confined solely to those which had accrued by reason of the negligence of defendant and its agents. McAlinden v. St. Maries Hospital Association (Idaho) 1918A-380.
- 44. As to Care and Skill. The trial court refused to instruct the jury as requested that defendant was bound to possess and exercise only the reasonable degree of care and skill possessed and exercised by physicians and surgeons in similar localities to that in which defendant practiced, and is protected from the charge of negligence if he adopts and uses in performing an operation the methods in use among competent surgeons in the locality in which the operation takes place. In its general charge the court instructed the jury the defendant was required to exer-

cise such reasonable care and skill as an ordinary physician or surgeon in good practice would exercise under like circumstances, and that among the circumstances to be considered was the location of the physician in Cloquet, rather than in Duluth, St. Paul, or some other place. It is held that the court, in refusing to give the requested instructions, and giving, instead, the instructions quoted, committed no reversible error.

While the jury was being selected defendant's attorney testified that a certain company was interested in the defense of the case. Defendant was then sworn and asked if this was true. Held that it was not prejudicial error to overrule an objection to this question, but the conduct of plaintiff's counsel in asking the question is disapproved. Viita v. Fleming (Minn.) 1917E-678.

# (4) Questions for Jury.

45. In an action for malpractice, the question whether defendant physician is negligent in making an incorrect diagnosis of plaintiff's condition and in operating is held to be for the jury. Just v. Little-field (Wash.) 1917D-705. (Annotated.)

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# 1. CONSTRUCTION OF PLEADINGS.

- 1. Pleadings are liberally construed after verdict and judgment to sustain the judgment, and any formal defect is deemed cured. Myers v. Saltry (Ky.) 1916E-1134.
- 2. Construction Against Pleader. language used in equity pleadings is to be given its ordinary meaning, and to be construed when ambiguous against the pleader and hence a bill averring that plaintiffs' land was bounded on the west by lands of named persons, that a river flowed along the westerly portion of plaintiffs' land, and that portions of plaintiffs' land were damaged by logs floating in the river, is insufficient to show that plaintiffs owned any of the bed of the stream. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.
- 3. Statement of Conclusions. The best pleading is that which states facts and not conclusions of law, leaving no room for conjecture as to any fact upon which the right of recovery is based. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

#### 2. COMPLAINT OR DECLARATION.

#### a. In General.

- 4. Averment of Ultimate Facts. A declaration should contain sufficient allegations of all the facts that are necessary to state a cause of action. As a general rule, only ultimate, facts need be alleged. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971.
- 41/2. Averment of Venue Sufficient. Venue laid in the margin, not repeated in the body of the declaration, is sufficient, though the action be local. Henry v. Spitler (Fla.) 1916E-1267.
- 5. Declaration for Personal Injury-Requisites. In judging of the sufficiency of a declaration in a suit for damages for . personal injuries, the essentials of such a declaration set forth in the case of German-American Lumber Co. v. Brock, 55 Fla. 577, 46 South. Rep. 740, are approved and applied. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.
- 6. Negative Pregnant. In an action against a collector of internal revenue to

recover back a part of the excise tax collected from a corporation on the ground that the corporation was not doing business during a part of the year for which the tax was collected, allegations of the petition that there were no earnings of the corporation from March 18th to December 31st, "subject to tax" on account of a lease of the corporation's property, and on account of its property being turned over to the lessee, was a negative pregnant, from which it was to be implied that the corporation did receive an unnamed amount of income, but that in the opinion of the pleader, such amount should be excluded from consideration in computing the amount of the tax. Blalock v. Georgia R., etc. Co. (Fed.) 1917A-679.

(Annotated.)

# b. Joinder of Causes.

- 7. Penalties. Under Ariz. Civ. Code 1901, pars. 1280 and 1291, providing that the complaint may contain several different causes of action, and that only such causes of action may be joined as are capable of the same character of relief, actions ex contractu, not being joinable with actions ex delicto, and actions to recover for injuries to the person, to property, or to character not being joinable, where the state sues to recover the penalty assessed upon any electric light or power company, by Laws 1912, c. 50, that should permit any employee about its plant, to be on duty more than 8 hours in 24, under penalty of \$100 fine for each day's violation of the act, the statute providing that the suit for such penalty may be instituted in any court of the state having competent jurisdiction, the recovery sought being for 15 violations, separately stated in the complaint, the superior court has jurisdiction of the suit, since the several penalties sued for are grounded in the same right, the parties and the causes of action the same, and each capable of the same character of relief. Miami Copper Co. v. State (Ariz.) 1916E-494.
- 8. Joinder of Counts. A declaration may contain any number of counts, providing it does not violate the rule against vexations pleading, and each count presents a separate and distinct cause of action, which is appropriate to the form of action pleaded. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

# c. Ad Damnum Clause.

- 9. Damages—Pleading Special Damage. A paragraph in a complaint for personal injuries which alleges that the plaintiff's expenses for physician and surgeon and medicine were "\(\sigma\)" is defective. Griffin v. Russell (Ga.) 1917D-994.
- 10. Averments Sufficient to Warrant Exemplary Damages. Where the general allegations of a complaint are sufficient to

show that the wrong complained of was inflicted with malice or oppression, or like circumstances, the complaint will be sufficient to authorize the infliction of exemplary damages. Dwyer v. Libert (Idaho) 1918B-973.

# d. Cure of Defects by Answer.

- 11. Omission in Declaration Cured by Plea. Matters of substance omitted from a declaration may be cured by plea. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902.
- 12. Cure of Defect in Contract—Admission in Pleading. In such case the admission in the defendant's answer of the correctness of the description of the property set forth in the complaint, as being the same that was intended by the contract removes the objection as to defective description, and makes the pleadings an agreement supplying any defect of description in the contract. Drennen v. Williams (Colo.) 1917A-664.

### e. Raising Questions of Sufficiency.

- 13. Sufficiency Failure to Object Promptly. Where no objection to the sufficiency of the complaint is made until the introduction of evidence, it is entitled to all the intendments in its favor, which could be invoked after a decision on the merits of the controversy. Cooper v. Hillsboro Garden Tracts (Ore.) 1917E—840.
- 14. Formal Objections—Waiver by Fallure to Demur. If a defendant in an action of replevin conceives that the declaration filed therein is defective in failing to specify the county in which the property which forms the subject-matter of the controversy is detained, he should test the sufficiency of the declaration by demurning thereto. Henry v. Spitler (Fla.) 1916E-1267.
- 15. Insufficiency Time for Objection. While the objection that the petition does not state a cause of action must be considered at any stage of a case and sustained if well taken, it will be received with greater favor and permitted a wider field of operation if raised in due time by motion or answer than when interposed after the labor, expense, and delay of a trial. Carter v. Butler (Mo.) 1917A-483.

#### 3. PLEA OR ANSWER.

#### a. In General.

16. Negative Pregnant. Where it clearly appears from other parts of the answer that the allegations technically admitted by a negative pregnant are in fact denied, the answer will be held good, and, inasmuch as a general denial puts in issue every allegation in the complaint, there

can be no negative pregnant in such case. Drennen v. Williams (Colo.) 1917A-664. (Annotated.)

17. In an action for specific performance of a contract to convey land, wherein the answer sets up and specifies fraudulent representations inducing defendant to enter into the contract, and wherein plaintiff replies, denying that he had set about to defraud the defendant or his wife or son out of their property, as alleged in said amended answer, the denial of plaintiff's motion at the trial to strike out the words "as alleged in said amended answer" is improper, since the defendant could not have been misled by the pleading. Drennen v. Williams (Colo.) 1917A-664.

(Annotated.)

- 18. In a suit for breach of a contract to purchase motor cars, a denial that the minimum profit was and is \$100 per car is a negative pregnant and admits that the profit was \$99.99 per car. Thompson v. Hamilton Motor Co. (Cal.) 1917A-677. (Annotated.)
- 19. Answer Held Insufficient. It is held under the facts of this case that the court did not err in sustaining the demurrer to the answer and entering judgment in favor of the plaintiff. Duvall v. National Ins. Co. (Idaho) 1917E-1112.
- 20. Right to Plead Inconsistent Defenses. Inconsistent defenses may be separately pleaded. Dibble v. Reliance Life Ins. Co. (Cal.) 1917E-34.
- 21. Necessity of Answer. Where a bill seeking a recovery of part of advance premium paid for surety bond on ground of insured's death at expiration of half of period raises questions of estoppel and waiver which the demurrer does not reach, such questions require an answer. Crouch v Southern Surety Co. (Tenn.) 1916C-1220,
- 22. Answer To Separate Counts. The defendant must make separate answer to each count, where the declaration contains several proper counts. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.
- 23. Affidavit of Defense Sufficiency. An affidavit which does not set forth the nature of the defense interposed after the overruling of a demurrer to the declaration, but which refers to the notice of special matter, which sets forth the nature of the defense, sufficiently complies with Miss. Code 1906, § 755, providing that a plea shall not be admitted, unless defendant makes an oath that he has a good defense, setting forth the nature thereof, and the court properly permitted the filing of the plea and notice. Riverside Development Co. v. Hartford Fire Ins. Co. (Miss.) 1916D-1274.
- 24. Necessity of Pleading Justification Specifically. Under Mont. Rev. Codes, § 6540, subd. 2, providing that the answer must contain a statement of any new mat-

- ter constituting a defense or counterclaim, the defense of justification for an illegal act must be specifically pleaded, as at common law. Herlihy v. Donohue (Mont.) 19170-29.
- 25. Inconsistent Defenses. Defenses are not inconsistent when they may all be true, and are only inconsistent when some of them must necessarily be false if others are true, and in such a case they cannot be united. Susznik v. Alger Logging Co. (Ore.) 1917C-700. (Annotated.)
- 26. In an action for injuries based on the theory of the relation of passenger and carrier between plaintiff and defendant, ar answer setting up the Ore. Workmen's Compensation Act as affording the remedies for plaintiff, and alleging that plaintiff was guilty of negligence, does not set forth inconsistent defenses, though allegations in the first defense that plaintiff was riding on the train without the consent or knowledge of defendant, and of plaintiff's negligence, are irrelevant, because under the Workmen's Compensation Act such questions are eliminated. Susznik v. Alger Logging Co. (Ore.) 1917C-700. (Annotated.)
- 27. Inconsistent defenses being allowed by Cal. Code Civ. Proc. § 441, one sued on a guaranty may show that the contract was procured by fraud, and, as a separate defense, that, if valid, no liability had arisen under it by reason of the fact that no indebtedness had been incurred covered by its terms. American National Bank v. Donnellan (Cal.) 1917C-744. (Annotated.)
- 28. Under the law of Iowa inconsistent defenses, as denial of contract, postponement of performance, and mitigation of damages, may be joined. Parsons v. Trowbridge (Fed.) 1917C-750. (Annotated.)
- 29. It is held that it was the duty of the trial court, under the pleadings in this case, either to have granted respondent's motion to strike out all of paragraph 3 on page 3 of appellants' first alleged further answer and defense and all of paragraph 3, beginning at the bottom of page 5 of their second alleged further answer and defense, contained in their amended answer, or to have required them to elect upon which defense they intended to rely, and that the evidence upon the trial should have been confined to the defense upon which they elected to stand. Harshbarger v. Eby (Idaho) 1917C-753.
- (Annotated.)
  30. Under section 4187, Idaho Rev. Codes, a defendant may set forth by answer as many defenses and counterclaims as he may have, and the same may, to a certain extent, be inconsistent with each other, but they must not be so inconsistent that the proof of one defense would necessarily disprove the other; and, where the allegations of an amended answer are inconsistent, the defendant will be bound

by those against him. Harshbarger v. Eby (Idaho) 1917C-753. (Annotated.)

- 31. Striking Out as Sham—General Denial. Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court as to the good faith of the defendants in pleading it, nor can it be stricken out as sham on an application of the plaintiffs. The defendant has the right, by a general denial, to put the plaintiff to the proof of his demand. Kline v. Harris (N. Dak.) 1917D—1176. (Annotated.)
- 32. An answer, by way of a general denial, is the equivalent of and substitute for the general issue under the common-law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common-law system the general issue could not be stricken out as sham, although shown by affidavit to be false. Kline v. Harris (N. Dak.) 1917D-1176. (Annotated.)
- 33. Admission of Sufficiency Replication. By filing a replication plaintiff conceded that the allegations of the answer operated as a bar to the relief sought, unless the new allegations of the replication were sufficient to avoid the legal effect of the answer's allegations as a bar to the cause of action originally stated. People v. Chicago R. Co. (III.) 1917B-821.

#### Notes.

Striking out general denial as sham or frivolous. 1917D-1177.

Inconsistent defenses within rules of pleading. 1917C-704.

Service of new answer to amended bill or complaint. 1918A-205.

Negatives pregnant. 1917A-668.

### b. Pleas in Abatement.

34. Actions — Parties — Nonexistence of Plaintiff as Defense. Upon judgment for defendant on his plea in abatement that there was no such person as the alleged plaintiff in the suit, the proper judgment is to quash the writ. Baldauf v. Nathan Russell (N. J.) 1917D-1191. (Annotated.)

35. The defense that the plaintiff is a fictitious person attacks the capacity of the plaintiff to commence or continue the suit, and is properly the subject of a plea in abatement. Baldauf v. Nathan Russell (N. J.) 1917D-1191. (Annotated.)

36. As there are no formal pleadings in the district courts, a defense that the plaintiff is a fictitious person may, in the absence of statute providing otherwise, be raised ore tenus. Baldauf v. Nathan Russell (N. J.) 1917D-1191. (Annotated.)

37. Plea Puis Darrein Continuance — Waiver of Former Pleas. Ill. Practice Act, § 50 (Hurd's Rev. St. 1913, c. 110, § 50), provides that the pleading of a plea puis darrein continuance shall not waive former pleas, so that the law, as it was prior to the revision of the Practice Act in 1907, that such a plea would supersede an answer theretofore filed and strike the answer from the record by operation of law, confessing the matters set forth in the petition, no longer applies. People v. Chicago R. Co. (Ill.) 1917B-821.

#### Note.

Nonexistence of plaintiff (not corporation) as defense to action. 1917D-1193.

# 4. DEMURRER.

#### a. Requisites.

- 38. Necessity of Memorandum of Objections. Ind. Acts 1911, c. 157 (Burns' Ann. St. 1914, § 344), requiring demurrer to a complaint for want of sufficient facts to be accompanied by a memorandum showing the insufficiency, applies to an affirmative reply. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.
- 39. Specification Sufficient. A specification in a demurrer that a "plea presents no defense to the cause of action," may not be wholly insufficient where the plea is short and contains specific statements. Johnson v. Florida East Coast R. Co. (Fla.) 1916C-1210.

### b. Grounds of Demurrer.

- 40. Scope of Specifications. Specifications in a demurrer that no negligence was shown for which defendant was liable, and that it was not shown how or wherein defendant's servants were negligent, do not raise the point that the complaint failed to show the servants were negligent while acting within the scope of their employment. Best Park etc. Co. v. Rollins (Ala.) 1917D-929.
- 41. Nonjoinder of Parties. Nonjoinder or defense of the want of necessary parties, when apparent upon the face of the bill, can be availed of by demurrer to the bill. Henderson v. Harper (Md.) 1917C-93.

# c. Admissions by Demurrer.

- 42. Scope of Admission by Demurrer—Want of Adequate Legal Remedy. The averment that plaintiffs had no complete and adequate remedy at law is not admitted by demurrer. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.
- 43. Effect—Admission of Allegations. Defendant's demurrer to a replication admits as true new matters alleged in the replication, but challenges its sufficiency to avoid the bar to the originally stated

cause of action presented by the plea. People v. Chicago R. Co. (Ill.) 1917B-821.

- 44. Carrying Demurrer Back. Upon a demurrer to an answer which is carried back to a petition the plaintiff will not be deemed to have admitted allegations in the answer which are inconsistent with and contradictory of those included in his petition. Marney v. Joseph (Kan.) 1917B-225.
- 45. Admission of Averments. General demurrers to the petition and amended petition admit the truth of all material averments therein. Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.) 1918B-560.

# d. Ruling on Demurrer.

- 46. Pleading Taken as True. On demurrer the averments of the petition attacked must be taken as true. Taulbee v. Hargis (Ky.) 1918A-762.
- 47. Truth of Pleading Assumed. For the purposes of ruling on a demurrer, the theory of a complaint must be assumed to be based on fact. Gilchrist v. Hatch (Ind.) 1917E-1030.
- 48. Scope. A demurrer for want of facts does not reach a defect of parties plaintiff. Pittsburgh, etc. R. Co. v. Home Ins. Co. (Ind.) 1918A-828.
- 49. Construction as Against Demurrer. Under the N. Car. Code rule that pleadings are to be liberally construed, a demurrer cannot be sustained to a complaint if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts for that purpose can be fairly gathered from it, however inartificially it may have been drawn or however uncertain, defective, or redundant may be its statements. Hoke v. Glenn (N. Car.) 1916F-250.
- 50. Scope and Effect of Demurrer. A demurrer is addressed to a plea as an entirety, and questions its legal sufficiency as the statement of a defense. Johnson v. Florida East Coast R. Co. (Fla.) 1916C-1210.
- 51. If considered as a whole, a plea does not in substance sufficiently present all of the essential elements of a valid defense to the declaration or to a designated count thereof, to which it is directed, a demurrer thereto should be sustained. Johnson v. Florida East Coast R. Co. (Fla.) 1916C-1210.
- 52. Matters Considered. Allegations of the complaint cannot be considered in passing on a demurrer to a plea to the jurisdiction. Meixell v. American Motor Car Sales Co. (Ind.) 1916D-375.
- 53. Plea to Jurisdiction—Presumptions. On demurrer to a plea to the jurisdiction by a defendant non-resident corporation, nothing could be supplied in a plea by in-

- tendment; and hence. in the absence of a contrary allegation, the presumption was that the cause of action grew out of a transaction of business by defendant in the state, and it could not be assumed that it had no property within the state, though an allegation to such effect was contained in an affidavit filed by it with the Secretary of State, attempting to withdraw from the state and revoke its agency for service of process. Meixell v. American Motor Car Sales Co. (Ind.) 1916D-375.
- 54. Strict Construction. Pleadings are, when attacked on demurrer, strictly construed against the pleader. Myers v. Saltry (Ky.) 1916E-1134.
- 55. Carrying Demurrer Back. Where on demurrer to the replication no motion was made by plaintiff to carry the demurrer back to the plea, the sufficiency of the plea as a defense to the petition was not presented to the court for determination. People v. Chicago R. Co. (III). 1917B-821.
- 56. A demurrer to an answer may be carried back to a petition and the sufficiency of the petition tested upon that challenge, although a previous demurrer to the petition had been considered and overruled. Marney v. Joseph (Kan.) 1917B-225.
- 57. Action Equivalent to Ruling. Four years after the death of plaintiff's intestate additional counts were filed to which defendant pleaded limitations. To this plea plaintiff's demurred, but the record did not disclose any ruling on the demurrer. It is held that where the original declaration was entirely eliminated and the court proceeded with the trial sustaining the cause of action on the additional counts, no complaint that the ruling on the demurrer was not had could be sustained, the action of the court being equivalent to a ruling on the demurrer. Lichtenstein v. L. Fish Furniture Co. (III.) 1918A-1087.
- 58. Supplemental Pleading—Relation to Original. A complaint and supplemental complaint must be considered as a single pleading when tested by demurrer. Cincinnati, etc. R. Co. v. McCullom (Ind.) 1917E-1165.

# e. Waiver of Objections.

- 59. The trial court cannot relieve the defendant from the waiver of his demurrer by giving him permission to replead without prejudice, the remedy, if it was desired to preserve the questions raised for appeal without suffering judgment, being under the statute authorizing the passing of cases to the supreme court before final judgment. Citizens Sav. Bank, etc. Co. v. Northfield Trust Co. (Vt.) 1918A-891.
- 60. Waiver by Pleading to Merits. A demurrer in a civil case at law is waived by pleading to the merits after the demurrer is overruled. Citizens Sav. Bank, etc. Co. v. Northfield Trust Co. (Vt.) 1918A-891.

# f. Standing by Demurrer.

- 61. A party cannot elect to stand by his demurrer, and at the same time be given the benefit he would have received, had he elected to abandon the demurrer and plead over. Wende v. Chicago City R. Co. (Ill.) 1918A-222.
- 62. On plaintiff electing to stand by her demurrer, which had been overruled, to the plea of limitations to an amended count of the declaration, the court should render judgment for defendant as to the entire count as amended. Wende v. Chicago City R. Co. (Ill.) 1918A-222.

#### 5. REPLY.

- 63. In Court Exercising Powers of Justice of Peace. Since the only pleading required in the county court when exercising the jurisdiction of a justice of the peace is a bill of particulars, and the reply in the district court on appeal was to new matter in the answer and was not inconsistent with the petition, it should not have been stricken. Berryman v. Childs (Neb.) 1918B-1029.
- 64. Reply to Counterclaim Waiver. Where a decree for complainants is rendered dismissing the cross-complaint for want of prosecution and is afterwards opened on defendant's motion and testimony heard and the cause tried as if the issues had been made up by the pleadings and tried on the merits, defendant thereby waives complainant's failure to answer the counterclaim. Streudle v. Leroy (Ark.) 1917D-618. (Annotated.)
- 65. New Matter in Reply. Where an employer, in an action by an employee for personal injuries, relies on a release, allegations of the reply that the employer disregarded his promise to employ the employee, forming a part of the consideration of the release, and discharged the employee, are allegations of new matter, and under Ore. L. O. L. § 95, controverted as on direct denial. Vasquez v. Pettit (Ore.) 1917A-439.

#### 6. REJOINDER.

66. Reply-Necessity of Denial. Iowa Code 1897, § 3576, provides there shall be no reply except when new matter is alleged, or some matter is alleged in the answer to which plaintiff claims to have a defense because of a fact avoiding it. Section 3577 declares that an allegation in the reply of new matter in avoidance shall not be treated as a waiver of the denial of the allegations of the answer implied by law. It is held that plaintiff, whose reply avoided some of the allegations of the answer, need not deny the others in order to claim the benefit of the statute. Schworm v. Fraternal Bankers Reserve Soc. (Iowa) 1917B-373.

# 7. AMENDMENT OF PLEADINGS.

#### a. Allowance of Amendment.

- 67. Effect of Standing on Demurrer. Plaintiff, by electing to stand by her demurrer to the plea of limitations to an amended count of the declaration, after the demurrer was overruled, forfeited right to amend the amended count, either by restoring it to its original form, or otherwise changing it so as to remove the objection raised by the plea. Wende v. Chicago City R. Co. (Ill.) 1918A-222.
- 68. Statute Permitting Amendment—Construction. S. Dak. Code Civ. Proc. § 150, providing that "the court may" in furtherance of justice "amend any pleading... by adding or striking out the name of any party," authorizes the court to permit amendments by the parties, and does not merely authorize the judge himself to order amendments. Hardy v. Woods (S. Dak.) 1916C-398.
- 69. Amendment—New Cause of Action. An amended statement, which merely introduces an additional element of damages drawn from the circumstances alleged in the original statement in replevin, does not introduce a new cause of action and may therefore be allowed at any time. Armstrong v. Philadelphia (Pa.) 1917B-1082.
- 70. Amendment Without Terms. In such action the allowance of plaintiffs' amendment without terms is not an abuse of the trial court's discretion. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.
- 71. Amendment Denied. The court did not err in refusing to allow the amendment to the petition, or in excluding the evidence offered in support thereof. Jacob's Pharmacy Co. v. Luckie (Ga.) 1917A-1105.
- 72. Amendment of Pleading—Cause of Action not Changed. In suit on an insurance policy, where the petition alleged that defendant undertook and agreed to and with the plaintiff to insure the latter, etc., an amendment by adding "and did insure," after "undertook and agreed to and with the plaintiff to insure," does not change the cause of action from one for a failure to insure as agreed, to one for the breach of a contract of present insurance, in view of other allegations of the petition pertinent only to a claim for breach of a present contract, while "contract to insure" and "contract of insurance" are used interchangeably. Royal Ins. Co. v. Walker Lumber Co. (Wyo.) 1917E—1174.

#### b. Subject of Amendment.

73. Under S. Dak. Code Civ. Proc. § 150, authorizing the court before or after judgment, in furtherance of justice, to amend any pleading by adding or striking out the name of the party, the court has power to

permit such an amendment to be made. Noziska v. Aten (S. Dak.) 1916C-589. (Annotated.)

- 74. Adding New Parties Plaintiff. Where the attorney for plaintiffs, in support of a motion to amend a complaint in the name of two individuals against an attorney for negligence which resulted in plaintiffs having to pay an attachment bond which they had signed, files an affidavit showing that at the time he drew the complaint he thought the plaintiffs were partners, and that the claim on which the former suit was brought was a partnership claim, but that he afterwards learned that two others were partners of one of the plaintiffs, and that the other plaintiff had assigned his claim to the partnership for collection, the showing is sufficient to warrant the court, in its discretion, to permit the complainant to be amended by adding the other partners as parties plaintiff. Noziska v. partners as parties plaintiff. Aten (S. Dak.) 1916C-589. ( (Annotated.)
- 75. Change from Representative to Personal Capacity. An amendment of the complaint, in an action to quiet title expressly brought as administrator alleging that the property belonged to the estate, by striking out the allegations showing that the suit was brought in a representative capacity and alleging that plaintiff claimed individually as surviving devisee, is not objectionable as setting up a new cause of action and changing the issues. Hardy v. Woods (S. Dak.) 1916C-398. (Annotated.)

76. Change of Names of Parties. A complaint may be amended so as to change the names of the parties if the amendment does not prejudice the parties and is in furtherance of justice. Hardy v. Woods (S. Dak.) 1916C-398.

77. Amendment Changing Cause of Action. Though courts are liberal in allowing amendments, the amendment must not introduce a substantive cause different from that declared on in the original declaration. Irvine v. Barrett (Va.) 1917C-62.

#### Notes.

Right to amend action by adding new parties plaintiff. 1916C-591.

Right of plaintiff to amend so as to change capacity in which he sues from representative to individual one or vice versa. 1916C-401.

# c. Time of Amendment.

78. Power to Permit. Under Const. 1897, art. 4, § 24, and Del. Rev. Code 1852, c. 112, § 11, authorizing the superior court to allow amendments, the court in its discretion may allow an amendment at any time before judgment, whether limitations would have run against the cause stated in the amendment, if made the subject of

a separate action, or not. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

#### d. Effect of Amendment.

- 79. Pleading Anew After Amendment. A count of a declaration being amended in a material respect, defendant may plead do novo to the new count as a whole. Wende v. Chicago City R. Co. (Ill.) 1918A-222. (Annotated.)
- 80. Effect on Original Pleading. A count of a declaration being amended in a material respect, is abandoned, and a new count substituted for it. Wende v. Chicago City R. Co. (Ill.) 1918A-222.
- 81. An answer interposed to the original complaint will stand as an answer to the complaint as thereafter amended, unless defendant elects to answer anew. Van Woert v. New York Life Ins. Co. (N. Dak.) 1918A-203. (Annotated.)
- 82. Amendment of Complaint—Necessity of New Answer. A default judgment rendered in a case at issue upon the amended complaint and the answer to the original complaint may be set aside without an affidavit of merits. Van Woert v. New York Life Ins. Co. (N. Dak.) 1918A-203.

  (Annotated.)
- 83. Section 7445, N. Dak. Comp. Laws, applies only to complaints amended after a demurrer thereto has been sustained, and has no application to an amendment made in the action by order of the court, or by agreement of the parties. Van Woert v. New York Life Ins. Co. (N. Dak.) 1918A-203. (Annotated.)
- 84. Effect on Previous Pleading. An amended answer supersedes the original answer. Dibble v. Reliance Life Ins. Co. (Cal.) 1917E-34.

# e. Trial Amendments.

- 85. Amendment at Trial—Refusal Proper. Where on the third day of the trial plaintiff sought to file an amended petition which did not change the averments of negligence contained in the original petition and, like the original, was extremely general, the denial of leave to file is not an abuse of discretion. Smith's Admx. v. Middlesboro Electric Co. (Ky.) 1917A-1164.
- 86. In an action for the balance due upon a contract for grading, which, after several days of trial and after the close of plaintiff's evidence, was shown to have been made and delivered on Sunday, as previously known to defendant, the allowance of an amendment, so as to proceed on the theory that plaintiff was entitled to recover on a quantum meruit. setting up nothing which could have surprised the defendant, who had had ample time to prepare for trial, is not an abuse of the

trial court's discretion. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.

87. Code Va. 1904, § 3384, authorizing amendments when a variance between pleadings and proof develops during the trial, is to be construed with liberality by the courts. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171.

# 8. ISSUES AND VARIANCE.

- 88. Where a general creditors' bill undertakes, in connection with general statements of fraud, to state in detail why the transaction is attacked, and upon what grounds it is claimed to be fraudulent, the proof will be limited to such allegation. Morgan v. Dayton Coal, etc. Co. (Tenn.) 1917E-42.
- 89. Evidence Held Admissible. Evidence received as to the financial condition of the newspaper plant involved and the worthlessness of the stock of the holding company owning and operating it was admissible under the issues tendered by the pleadings. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.
- 90. Sufficiency of Objection. In view of Va. Code 1904, § 3384, authorizing amendments whenever a variance between pleadings and proof develops during the trial, in a discharged bookkeeper's action for salary, where the declaration contained only the common counts in assumpsit and plaintiff offered in evidence his contract covering his original employment of one year, but defendant at the trial made no objection on the ground of variance between the declaration and proof or upon the insufficiency or the inaptness of the evidence to sustain recovery on the common counts, but his sole objection to the admission of the contract being that it was not then in force, defendant cannot on review successfully contend that plaintiff should have declared especially on his contract and its breach, since parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out. Conrad v. Ellison-Harvey Co. (Va.) 1918B-1171.
- 91. Cause of Action not Pleaded. The allegata and probata must meet and correspond, the issues being made by the pleadings to which the proofs must be confined. There can be no recovery upon a cause of action, however meritorious it may be, that is in substance variant from that which is pleaded by the plaintiff. Ingram-Dekle Lumber Co. v. Geiger (Fla.) 1918A-971.
- 92. As to Express or Implied Contract. Under the rule that a case must be tried on the issues made by the pleadings, a party cannot recover upon an implied con-

- tract, where he pleads and relies upon an express contract. Estate of Oldfield (Iowa) 1917D-1067.
- 93. Waiver by Request for Instructions on Failure to Make Issue. Where a passenger's action for injuries against a street railroad was tried, and evidence offered pro and con, upon the theory that contributory negligence was in issue, both parties asking for instructions on the question, the supreme court will not consider whether it was properly pleaded. Kelly v. Santa Barbara Consol. R. Co. (Cal.) 1917C-67.
- 94. Waiver of Defect—Failure to Object at Trial. An objection that proof of want of authority of the president of the plaintiff membership corporation to contract for it could not be made under defendant's pleadings is waived, where plaintiff not only did not urge it at the trial, but, by the introduction of evidence thereon, assumed the burden of proving such officer's authority. Catholic Foreign Mission Soc. v. Oussani (N. Y.) 1917A—479.
- 95. Pleading Waiver. Even though the complaint does not allege a waiver of proof of notice, where facts constituting the waiver are introduced by the defendant itself, without objection, the defendant will not be permitted to say that since there was no waiver pleaded, such evidence ought not to be considered. Douville v. Pacific Coast Casualty Co. (Idaho) 1917A-112.
- 96. Estoppel Necessity of Pleading. While, as a general rule, estoppel or waiver must be pleaded, failure to do so may be waived by plaintiff by proceeding with the trial of the case without objection, as though the defense relied on had been pleaded. First Bank of Texola v. Terrell (Okla.) 1917A-681.
- 97. Names—Variance in Chain of Title. In an action to quiet title in which plaintiff claimed as devisee from one who acquired title by bidding in the property at mortgage foreclosure sale under the name of "J. A. Hardy," evidence held to sustain a finding that such "J. A. Hardy," was the same person as "Jesse A. Hardy," through whom plaintiff claimed that his title was derived. Hardy v. Woods (S. Dak.) 1916C-398.
- 98. Departure Capacity in Which Instrument Sued on is Held. In an action by plaintiff bank on a check which the complaint alleges it held as unqualified owner, the answer alleges that it is held as collateral, and the reply that it was taken on deposit, defendant's contention that the complaint tenders one issue, the reply another and that the proof, which shows that the check is held as collateral, sustains neither, is not sound, since the real issue made is the quality of the bank's possession, which is determined by the evidence; a "material variance" being only one that actually misleads the adverse

party to his prejudice in maintaining his action or defense on the merits. German American Bank v. Wright (Wash.) 1917D-381.

99. Burden of Showing Prejudice. Under Rem. & Bal. Wash. Code, § 299, providing that no variance between pleadings and proof shall be deemed material unless it has misled the adverse party to his prejudice, and that, whenever it shall be alleged that a party has been so misled, the court may order the pleadings to be amended upon such terms as shall be just, the burden is upon one claiming a variance to show that he was misled thereby to his prejudice. German American Bank v. Wright (Wash.) 1917D-381.

100. Express or Implied Contract. When the plaintiff alleges an express contract as the basis for recovery, he cannot recover on an implied contract or quantum meruit, especially in the absence of any allegations of value. Yancey v. Boyce (N. Dak.) 1916E-258.

101. Date of Contract. An allegation that an oral contract is made in a particular year may be supported by proof that it was made in a different year, where the date is not a material element in the description. Gordon v. Spellman (Ga.) 1918A-852.

102. Averment of Sale and Proof of Incumbrance. In an action for deceit in the sale of a ship and her freight, allegations that defendant had sold the freight to another before selling it to plaintiff are supported by proof that he had assigned the freight as security for a disbursement draft for practically the entire amount of the freight due. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

#### 9. MOTIONS.

103. Repetition — Striking Out. Upon motion, matter which is only repetition of that already pleaded may be stricken out. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

104. Judgment on Pleadings—Admissions by Motion. A motion for judgment upon the pleadings admits the truth of all well-pleaded facts in the pleading of the opposite party. Yancey v. Boyce (N. Dak.) 1916E-258.

# 10. FILING PLEADINGS.

105. Right to Demur After Default. The defendant in an action at law, in which the office judgment has become final, but has not been entered by the court, may demur to the declaration notwithstanding the lapse of the statutory period and the finality of the judgment, and, if the demurrer is sustained, formal judgment on the office judgment cannot be entered. In such case, the office judgment becomes

a nullity, if the declaration is not amended or cannot be cured by amendment. Wilson v. Shrader (W. Va.) 1916D-886.

106. Default — When Final. The office judgment in an action in which a writ of inquiry is necessary does not become final on the last day of the next succeeding term of the court, and the defendant may plead to the declaration at any time before execution of the writ of inquiry. Wilson v. Shrader (W. Va.) 1916D-886.

# 11. VERIFICATION.

107. Time to Object to Failure to Verify. Under Ky. Civ. Code Prac. § 138, providing that no objection shall be taken after commencement of the trial to any pleading for want of verification. want of verification to a petition alleging a mistake in a deed will be treated as waived when not objected to. Hite v. Reynolds (Ky.) 1917B-619.

#### PLEA IN ABATEMENT.

See Pleading, 34-37.

PLEA PUIS DARREIN CONTINUANCE. See Pleading, 37.

PLEA TO JURISDICTION. See Pleading, 52, 53.

#### PLEDGE.

Soldier's pledge of arms, see Army and Navy, 10-12. Broker's right to pledge, see Brokers, 13.

- 1. Liability of Indorser on Pledged Check—Necessity of Exhausting Other Security. Where a bank sues the maker and indorser of a check, pledged to it by such indorser, there was no requirement that the bank shall exhaust other security which it may hold as collateral to the indorser's antecedent debt, for which the check was pledged in part. German American Bank v. Wright (Wash.) 1917D-381.
- 2. Note as Collateral—Right to Enforce—Payment of Debt. A holder of notes received as collateral is not entitled to enforce them after payment of the principal obligation. Estate of Philpott (Iowa) 1917B-839.

#### POISONS.

See Drugs and Druggists,

#### POLICE.

See Civil Service, 1.

Arrests without warrant, see Arrest, 7, 8. Free transport, see Carriers of Passengers,

City police departments, see Municipal Corporations, 157-160. Status, see Public Officers, 3.

#### POLICE POWER.

See Intoxicating Liquors, 7, 8, 17, 21, 24, 26; Labor Laws, 18, 32.

State inspection and control, see Building and Loan Associations, 2.

Generally, see Constitutional Law, 14-44. Defined, see Constitutional Law, 14. Respecting commerce, see Interstate Commerce, 6-10.

Regulation of rates, see Public Service Commissions, 28.

#### POLICE STATION BLOTTER,

As evidence, see Evidence, 89.

#### POLICY.

See Insurance; Public Policy.

POLITICAL CRITICISM.
See Libel and Slander, 33, 37, 149.

POLLING PLACE.

See Elections, 21-25,

POLL TAXES.

See Taxation, 200.

#### POLYGAMY.

See Bigamy, 2.

1. To Show Motive. In a prosecution for polygamy, where the evidence showed that defendant lived with the plural wife for only a few days, evidence that he stole valuable jewelry from her while living with her is admissible to show motive for the crime charged. State v. Von Klein (Ore.) 1916C-1054.

### POOR AND POOR LAWS.

- 1. Medical Services to Pauper—Liability of Municipality. Burns' Ind. Ann. St. 1908, § 9741 et seq., providing for the support of the poor, and requiring the overseer of the poor in each township to care for all poor persons, and in cases of necessity to promptly provide medical attendance for the poor not provided for in public institutions, etc., repeals former laws on the subject, and a township is liable for medical attendance rendered a poor person in an emergency without opportunity to communicate with the overseer, and a surgeon rendering services under an emergency demanding immediate medical attention is entitled to recover the reasonable value thereof. Newcomer v. Jefferson Township (Ind.) 1916D—181.
- 2. The provisions of Ind. Acts 1901, c. 147, embodied in Burns' Ann. St. 1908, § 9741, providing for the support of the poor, are not controlled by County Re-

(Annotated.)

- form Law of 1899, Burns' Ann. St. 1908, \$ 5918 et seq., referring to county expenditures alone, without reference to the mandatory requirements of the act of 1901 as to township expenditures, except that township overseers are limited in such expenditures in certain cases to temporary aid not exceeding \$15, except on authority of the boards of commissioners. Newcomer v. Jefferson Township (Ind.) 1916D—181. (Annotated.)
- 3. Who is "Poor Person." The fact that a person owned a horse and cow did not conclusively show that he was not a "poor person" in need of assistance from a town within the pauper laws. Waitsfield v. Craftsbury (Vt.) 1916C-387. (Annotated.)
- 4. Overseer of Poor—Powers. Since the function of relieving the poor is governmental in its nature, the overseer of the poor is a public officer rather than a general agent of the town, and hence cannot by his conduct relieve a town from liability for relief of the poor under the ordinary rules as to waiver of rights by the conduct of an agent. Waitsfield v. Craftsbury (Vt.) 1916C-387.
- 5. The fact that, after notice was given by plaintiff town to defendant town of the furnishing of supplies to a pauper from defendant town, the overseer of the poor, in refusing to pay for supplies, placed his refusal upon the ground that he did not consider such person a pauper would not prevent defendant from defending an action to recover for such supplies on the ground of the insufficiency of the notice prescribed by Vt. P. S. 3668. Waitsfield v. Craftsbury (Vt.) 1916C-387.
- 6. The fact that the overseer of the poor of a town sought to be charged with supplies furnished a pauper, upon receiving notice from plaintiff town, visited the pauper's family, and ascertained their financial condition, and conferred with the overseer of plaintiff town as to their condition, would not prevent such town from defending an action by plaintiff to recover for assistance furnished the pauper on the ground of the insufficiency of the notice give pursuant to Vt. P. S. 3668. Waitsfield v. Craftsbury (Vt.) 1916C-387.
- 7. The notice required by Vt. P. S. 3668 (Acts 1892, No. 55), providing that no action shall be commenced by a town furnishing assistance to a pauper until the overseer of the poor has given notice of the pauper's condition to the overseer of the town where he last resided for three years, and until such overseer has neglected to provide for such person for 60 days after such notice, must be in writing. Waitsfield v. Craftsbury (Vt.) 1916C-387.
- 8. Reimbursement of Town. The right of a town to be reimbursed by another town for expenditures made in assisting paupers chargeable to such other town must necessarily be governed by arbitrary

1916C-1918B.

regulations. Waitsfield v. Craftsbury (Vt.) 1916C-387.

- 9. Duty to Furnish Aid—Notice to Overseer. Under Vt. P. S. 3665, requiring overseers of the poor to see that indigent persons are suitably supported and relieved at the charge of the town, an overseer of the poor must afford such relief whenever he is informed in any manner that relief is required. Waitsfield v. Craftsbury (Vt.) 1916C-387.
- 10. Mere informalities in the notice given to the town of a pauper's residence by a town furnishing assistance, required to be given before commencement of an action, do not vitiate the notice. Waitsfield v. Craftsbury (Vt.) 1916C-387.
- 11. Paupers Reimbursement of Town Furnishing Aid—Notice. Vt. P. S. 3668, requiring the notice given by a town furnishing aid to a pauper to the town of the pauper's last residence to disclose the condition of the alleged pauper, refers to his pecuniary or financial condition. Waitsfield v. Craftsbury (Vt.) 1916C-387.

#### Notes.

Who is pauper or poor person within poor laws. 1916C-389.

Liability of municipality to individual for medical attendance furnished pauper. 1916D-183.

#### POPULATION.

Classification of counties by, see Counties, 5.

Judicial notice of, see Evidence, 13.

# POSSESSION.

See Adverse Possession.
Rights of tenant, see Landlord and Tenant,
8, 9, 39.

# POSTDATING.

Effect, see Checks, 1.

#### POST-OFFICE.

Letters as evidence, see Evidence, 46, 47, 101, 102.

Presumption as to receipt, see Evidence, 135, 136.

Presumption as to authority to write let-

ter, see Evidence, 145½.

Mailing of notice of claim of lien, see
Mechanics' Liens, 27.

Mail carrier a public officer, see Public Officers, 7.

Espionage Act, see War, 19-25.

1. Burden of Showing Mailable Character of Publication. Complainant, suing to enjoin the postmaster from excluding its magazine from the mail, pursuant to an order of the postmaster general holding it non-mailable, has the burden of overcoming the presumption that the post-

- master general's conclusion was right, or of showing that he had exceeded his power, or exercised it wantonly or maliciously; and this should be done by a preponderance of evidence. Masses Pub. Co. v. Patten (U. S.) 1918B-999.
- 2. What Matter is Non-mailable. The Espionage Act (Fed. St. Ann. Pamph. Supp. No. 11, p. 16) excludes from the mails any publication, the natural and reasonable effect of which is to encourage resistance to a law of the United States, and the words of which are used in an endeavor to persuade to resistance, though the duty to resist is not mentioned directly, and the interest of the persons addressed in resistance is not directly suggested. Masses Pub. Co. v. Patten (U. S.) 1918B-999.
- 3. Indictment. In an indictment, under U. S. Penal Code (Act March 4, 1909, c. 321), § 215, 35 Stat. 1130 (Fed. St. Ann. 1909 Supp. p. 464), for using the mails to promote a scheme to defraud, it is not necessary to use the word "knowingly," in charging the deposit of letters in the mails by defendant, where that is necessarily implied from the other averments. Samuels v. United States (Fed.) 1917A-711.
- 4. Claim of Medical Ability—How Proved. On the trial of a defendant charged with using the mails to promote a scheme to defraud, by sending through the mail letters and circulars containing false representations as to the value of a medicine made and sold by him, and also that he was a great scientist, a book published by him, treating of the eye, was inadmissible to prove the latter claim, which could only be established by witnesses who were competent to testify on the subject. Samuels v. United States (Fed.) 1917A-711.
- 5. Instructions Approved. Instructions given in a prosecution for using the mails to promote a scheme to defraud considered, and held without error. Samuels v. United States (Fed.) 1917A-711.
- 6. Instruction Properly Refused. In a prosecution for using the mails to promote a scheme to defraud, by making representations in letters and circulars sent through the mails as to the curative properties of an article made and sold as a medicine, a vital issue is as to the intent of defendant, to which his knowledge of the truth or falsity of the representations is pertinent; and the testimony of users of the remedy as to its beneficial effect, while admissible, is not determinative of such issue, and a refusal to instruct to that effect is not error. Samuels v. United States (Fed.) 1917A-711.
- 7. Use of Mail to Defraud—Evidence Sufficient. Evidence in a prosecution for using the mails to promote a scheme to defraud held to be sufficient to require the

submission of the case to the jury. Samuels v. United States (Fed.) 1917A-711.

- 8. That a defendant charged with using the mails to defraud by sending out letters and circulars containing false representations as to the virtues of a medicine made and sold by him, as shown by the letters set out in the indictment, merely copied testimonials, obtained from users, containing statements as to benefits derived from such use, does not render the indictment insufficient, where it is alleged that he knew the representations made therein to be felse. Samuels v. United States (Fed.) 1917A-711.
- 9. Evidence Other Offenses. In a prosecution for using the mails to promote a scheme to defraud, evidence of other advertisements by the defendant besides those contained in the letters set out in the indictment, but of a similar nature, as also of other false claims, is admissible on the question of fraudulent intent, especially when committed continuously and for a long period of time. Samuels v. United States (Fed.) 1917A-711.
- 10. Decoy Letters—Admissibility of Answers. In such case the fact that letters sent by defendant through the mails were in response to decoy letters sent by postoffice inspectors does not render them inadmissible. Samuels v. United States (Fed.) 1917A-711.
- 11. Use of Mails to Defraud—Sale of Real Estate. The construction of the Federal Criminal Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130; Fed. St. Ann. 1909, Supp. p. 464), making criminal the use of the mails in the execution of a scheme to defraud, is involved, so as to sustain a writ of error from the federal supreme court, in a decision of a district court by which a demurrer to an indictment charging violations of this section was sustained on the ground that allegations of the employment of false representations in furtherance of a plan to sell real estate did not constitute a scheme to defraud, punishable under that section, if the land to be sold was worth the purchase price asked. United States v. New South Farm, etc. Co. (U. S.) 1917C-455.
- 12. Persons employing, in furtherance of a plan to sell ten-acre farms, false representations as to climate, fertility, crops, advantages, prospective improvements, etc., have engaged in a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," within the meaning of the Federal Criminal Code, § 215 (Fed. St. Ann. 1909 Supp. p. 464), making criminal the use of the mails in the execution of such scheme, although the lands to be sold may be worth as much as the purchase price asked. United States v. New South Farm, etc. Co. (U. S.) 1917C-455. (Annotated.)

POVERTY.

See Poor and Poor Laws.

POWER COMPANIES.

See Electricity.

POWER OF ATTORNEY.

See Powers, 1.

POWER OF TAXATION.

See Taxation, 1-34.

#### POWERS.

Sufficiency of signature, see Landlord and Tenant, 47.

Testamentary powers, construction, see Wills, 222-227.

1. Execution - Necessity That Instrument Refer to Power. Where sons gave their father a power of attorney authorizing him for his own sole use and benefit, to sell, transfer, etc., or dispose of certain realty, and acknowledge or make any deeds, etc., to effectuate such purposes, authorizing him to collect the price and to appropriate the same to his own use, etc., and the father thereafter in conveying the land executed a deed, not as attorne for the sons, but in his own name, such deed passed title, since the father had no interest in the land except that given him under the power, since when an instrument executed under power does not mention it, but can have no operation except as an execution of it, it is treated as intended to have that effect. Bennett v. Laws (Colo.) 1917A-240. (Annotated.)

# POWER TO CONTRACT.

See Corporations, 17, 18.

#### PRACTICE.

See Actions and Proceedings; Motions; Pleading: Trial.

Liberality under Workmen's Compensation Act, see Master and Servant, 288, 296.

#### PRACTICE OF LAW.

Nature of right to practice, see Attorneys, 1.

PRACTICE OF MEDICINE.

See Physicians and Surgeons.

#### PREAMBLE.

As part of ordinance, see Municipal Corporations, 53.

Effect on enacting clause, see Statutes, 21.

Effect on construction of statute, see Statutes, 113, 114.

#### PRECEDENTS.

See Stare Decisis.

#### PRE-EXISTING DEBT.

As consideration, see Bills and Notes, 14, 50.
Sufficiency as consideration, see Chattel Mortgages, 5.

PREFERENCES.
See Bankruptcy, 18-20.
Bight to prefer creditor, see Fraudulent
Sales and Conveyances, 1.

#### PREFERRED STOCK.

See Corporations, 59, 76-78.

#### PREJUDICE.

As disqualification of juror, see Jury, 16-18.

As affecting testamentary capacity, see Wills, 61, 63.

# PREJUDICIAL ERROR.

Essential for reversal, see Appeal and Error, 212-334. Ground for new trial, see New Trial, 17.

PRELIMINARY HEARING. See Criminal Law, 11-15, 18-22.

# PRELIMINARY INJUNCTION.

Restraining order distinguished, see Injunctions, 37, 38.

PREMATURE APPEAL. See Appeal and Error, 50.

# PREMEDITATION.

How proved, see Homicide, 20.

PREMISES OF SCHOOL.
Meaning, see Intoxicating Liquors, 71.

#### PREMIUMS.

See Accident Insurance; Fire Insurance; Insurance; Life Insurance.

# PREROGATIVE WRITS.

See Habeas Corpus; Mandamus; Prohibition; Quo Warranto.

#### PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

Inoperative against grantee when, see Adverse Possession, 29.

Title how acquired, see Adverse Possession, 36.

Effect of interruption of user, see Easements, 2.

Right of fruit stand in street, see Streets and Highways, 22.

Prescriptive easement for poles and wires, see Telegraphs and Telephones, 8-10.

- 1. Essentials of Prescription. An easement can be created by prescription only by an adverse use of the privilege with knowledge of the owner, or by a use so open, notorious, visible, and uninterrupted that knowledge will be presumed, exercised under a claim of right adverse to the owner, and acquiesced in by him for a period equal to that prescribed by statute for the acquisition of adverse title to land. Rollins v. Blackden (Me.) 1917A-
- 2. To acquire an easement by prescription, acquiescence by the owner of the property over which it is sought to be exercised must be shown, but the adverse use of the privilege for twenty years without interruption or denial by the owner raises a conclusive presumption of acquiescence, where it is shown that the owner had knowledge of the use. Rollins v. Blackden (Me.) 1917A-875.
- 3. Permissive Use. Where the use of an easement claimed by prescription is shown to have been permissive, no rights arise. Rollins v. Blackden (Me.) 1917A-875.
- 4. Each of the elements essential to the creation of a prescriptive easement is open to contradiction and liable to be disproved. Rollins v. Blackden (Me.) 1917A-875.
- 5. Private Way Over Railroad Right of Way. If the grantor, after conveying the strip of land to the railroad company, continued to use the private way, including that part which was intersected by the strip conveyed to the railroad company, the fact, that he had made such conveyance would not prevent him from acquiring under the statute a private way by prescription.

(a) If the railroad was constructed and the tracks were made to cross the private way by means of a trestle, the land of the railroad company at such point of intersection was "improved land" within the meaning of the statute, and the period of prescription would be seven years.

(b) If the private way was less than fifteen feet in width, and the prescriber kept it in repair and used it as such continuously for the statutory period, he would acquire a private way by prescription. Carlton v. Seaboard Air-Line Ry. (Ga.) 1917-497.

# PRESENTATION OF CLAIMS.

See Executors and Administrators, 24-26. Against city, see Municipal Corporations, 73, 175-187.

#### PRESENTMENT.

See Checks, 2-7. Defined, see Grand Jury. 2.

PRESENTMENT AND DEMAND. See Bills and Notes, 31, 32,

#### PRESIDENT.

Of corporation, powers, see Corporations, 48-51.

#### PRETENSES.

See False Pretenses.

#### PREVENTION OF CRIME.

Duties of sheriff, see Sheriffs and Constables, 2-7, 16.

#### PRICE

See Inadequacy of Price.

PRINCIPAL AND AGENT. See Agency.

PRINCIPAL AND SURETY. See Suretyship.

#### PRIORITY.

Of liens, see Mechanics' Liens, 39, 40,

#### PRIVATE NUISANCE.

See Nuisances.

PRIVILEGE AGAINST SELF-INCRIMI-NATION.

See Witnesses, 84-88,

#### PRIVILEGED COMMUNICATIONS.

See Libel and Slander, 37-68, 75, 113, 119, 152; Witnesses, 17-47.

PRIVILEGES AND IMMUNITIES. See Constitutional Law, 73-79.

#### PRIZE.

See Admiralty, 2, 3.

#### PRIZE FIGHTS.

Importation of fight films, see Theaters and Amusements, 1.

PROBABLE CAUSE. See Malicious Prosecution, 8-13, 19-24, 27.

# PROBATE COURTS.

See Courts.

#### PROBATE HOMESTEAD.

See Executors and Administrators, 27-31.

#### PROBATE OF WILLS.

See Wills, 114-144.

#### PROBATE SALES.

See Executors and Administrators, 32-46.

#### PROCEEDINGS.

See Actions and Proceedings.

#### PROCESS.

- 1. Necessity and Validity, 685.
- 2. Issuance, 685.
- 3. Service and Return, 686.
  - a. On Whom Served, 686.
    - - Non-resident, 686.
         Exemption from Service, 686.
  - b. Constructive Service, 686.
    - (1) In General, 686.
- (2) By Publication, 686.
  (3) Leaving Copy at Place of Abode, 687.
  4. Service by Fraudulent Means, 687.
- See Abuse of Process; Creditors' Bills; Executions; Habeas Corpus; Quieting Title, 2; Sheriffs and Constables.

Waiver of service by appearance, see Appearances, 4.

Sufficiency of warrant, see Arrest, 2. Evasion of service, see Contempt, 2. Service on convict, see Convicts, 2.

In actions against foreign corporations, see Corporations, 161, 162, 170-177.

In stockholder's suit, see Corporations, 142, 143.

Decree on insufficient service, validity, see Judgments, 4, 6, 8-10.

Service by publication in partition suit. see Partition, 3.

How served on alien enemy, see War, 12.

# 1. NECESSITY AND VALIDITY.

1. Failure to Serve Co-party-Waiver of Objection. The benefit of Ky. Civ. Code Prac. § 102, providing that in an action not on contract, where part only of de-fendants have been served, plaintiff can only demand a trial at any term, as to those served, on discontinuing on the first day of such term as to the others, is waived by a defendant going to trial without seasonable objection. Rosenberg v. Dahl (Ky.) 1916E-1110.

# 2. ISSUANCE.

2. Notaries Public-Power to Issue Warrant. Notaries public, by section 4, chapter 51, serial section 2798, W. Va. Code 1913, constituted conservators of the peace, have no authority as such to issue warrants, returnable before themselves, or before justices of the peace, for violations

of section 16cII, chapter 144, serial section 5174, Code 1913; nor is any one unless the wife or an agent of the West Virginia Humane Society, authorized to make such complaints. Howell v. Wysor (W. Va.) 1916C-519.

# 3. SERVICE AND RETURN.

# a. On Whom Served.

# (1) Non-resident.

3. Service on Non-resident Partnership -Statute Invalid. Civ. Code Prac. Ky. § 51, providing that in an action against a partnership, the members of which reside in another state, engaged in business in the state, the summons may be served on the agent in the county where the business is carried on or where the cause of action occurs, denies due process of law when construed to justify a personal judgment against non-resident partners doing business in the state, where service of summons was had on their agent in the state, since a "partnership" is not a legal entity separate from the partners, and since one may do business in another state by virtue of the federal constitution without subjecting his person to the jurisdiction of the courts of that state. Flexner v. Farson (Ill.) 1916D-810 (Annotated.)

#### Note.

Validity of statute providing for service on agent of non-resident partnership. 1916D-813.

# (2) Exemption from Service.

 Ill. Practice Act (Laws 1907, p. 470), § 126, exempting members of the general assembly from service of civil process during the sessions of the assembly, violates Const. art. 4, § 22, prohibiting the enactment of local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise, as the constitutional inhibition applies, unless there is a sound basis in reason and principle for regarding the beneficiaries of the act as a distinct and separate class for the purpose of the particular legislation, and the statute is not based upon any actual, substantial difference in circumstances or condition between the members of the general assembly and other public officials of the state who in the performance of their official duties are required to spend a portion of their time in counties in which they do not reside, especially in view of Practice Act, § 66, providing for continuances until after the adjournment of the general assembly upon a showing that any party to any civil or criminal suit or proceeding is a member of either house of the general assembly. Phillips v. Browne (Ill.) 1917B-637. (Annotated.)

- 5. Exemption from Service—Member of Legislature. Const. art. 4, § 14, exempting senators and representatives from arrest during the sessions of the general assembly, did not impliedly deprive the assembly of power to enact Practice Act (Laws Ill. 1907, p. 470), § 126, exempting members of the assembly from service of civil process during sessions of the assembly; since the constitution is not a grant of power to the legislature, but a limitation upon its powers. Phillips v. Browne (Ill.) 1917B-637. (Annotated.)
- 6. Ill. Const. art. 4, § 14, exempting members of the general assembly from arrest, except for treason or felony, during sessions of the assembly, does not exempt them from service of civil process during such sessions. Phillips v. Browne (Ill.) 1917B-637. (Annotated.)

#### Note.

Service of civil process upon members of legislature. 1917B-641.

# b. Constructive Service.

# (1) In General.

7. Reading to Defendant Over Telephone. Under N. Car. Revisal 1905, § 439, providing that summons shall be served by the sheriff or other officer reading the same to the party or parties named as defendant and such reading shall be a legal and sufficient service, service cannot be made by the officer reading the summons to the defendant over the telephone, though the officer may recognize defendant's voice and know he is talking to the proper person. S. Lowman & Co. v. Ballard (N. Car.) 1917B-899. (Annotated.)

#### Note.

Validity of service, notice, or other transaction by telephone. 1917B-903.

# (2) By Publication.

- 8. Sufficiency of Publication—Once Each Week for Stated Number of Weeks. The orders for publication required by chapter 4129, Fla. Laws of 1893, to be published once a week for four consecutive weeks if the defendant be stated to be a resident of the United States are required to be published once a week for four weeks of seven days each, or at least twenty-eight days from the date of the first publication to the day fixed in the order for the defendant to appear. Myakka Co. v. Edwards (Fla.) 1917B-201. (Annotated.)
- 9. The word "for," in chapter 4129, Fla. Laws 1893, requiring that publication of process against non-residents shall be had "once a week for four consecutive weeks," means "throughout" or "during the continuance of" such period. Myakka Co. v. Fdwards (Fla.) 1917B-201. (Annotated.)

- 10. Scope of Statute—Citation to Rule Day. The publication provisions of chapter 4129, Fla. Acts of 1893, authorizing constructive service of initial process in chancery, have reference to the appearance day stated in the act, and not to rule days on which defaults for failure to plead or demur may be entered under the statute and chancery rules. Myakka Co. v. Edwards (Fla.) 1917B-201.
- 11. Sufficiency of Publication Once Each Week When Service Complete. Under chapter 4129, Fla. Acts of 1893, authorizing constructive service by publication of initial process to acquire jurisdiction of a non-resident defendant in a chancery case, where the first publication is less than four weeks or twenty-eight days prior to the appearance day fixed in the order of publication, the requirement that such publication shall be "once each week, for four consecutive weeks," is not complied with, and jurisdiction of the person is not acquired. Myakka Co. v. Edwards (Fla.) 1917B-201. (Annotated.)

#### Note.

Construction of requirement of publication once per week for certain number of weeks. 1917B-209.

- (3) Leaving Copy at Place of Abode.
- 12. Leaving at Residence. Service of summons on defendant by leaving a copy "at his usual place of residence," held valid, within the meaning of that term as used in section 69 of the Neb. Code, on a record showing that the sheriff went into defendant's yard; that he handed a copy of the summons to defendant's wife, who was at the time not more than 20 feet from the house in which he resided; that he asked her to give the copy to defendant; that she said she would do so; and that she went into the house with it. Bursow v. Doerr (Neb.) 1916C-248.

# 4. SERVICE BY FRAUDULENT MEANS.

- 13. On a motion to set aside the return of service upon a defendant, evidence held not to show that plaintiffs fraudulently induced defendant to come into the state, so that process could be served upon him. Crandall v. Trowbridge (Iowa) 1916C-608. (Annotated.)
- 14. Unless the facts and circumstances show that a defendant was fraudulently induced to enter the state, so that he could be served, honesty of intent on the part of plaintiffs will be presumed. Crandall v. Trowbridge (Iowa) 1916-608.

  (Annotated.)
- 15. A fraudulent intent to induce a defendant to come into the state, so that process could be served upon him, may be inferred from the acts and representations

- of the parties and the other facts and circumstances. Crandall v. Trowbridge (Iowa) 1916C-608. (Annotated.)
- 16. Where all the plaintiffs were joint makers of the notes, to cancel which the suit was brought, and were investigating the facts together, they are chargeable with the acts of each other, or of their attorney, by which a defendant was fraudulently induced to enter the state, so that he could be served. Crandall v. Trowbridge (Iowa) 1916C-608. (Annotated.)
- 17. Service upon a defendant, whose presence within the state was procured by the fraud or trickery of the plaintiffs or those acting in their behalf, does not give the court jurisdiction. Crandall v. Trowbridge (Iowa) 1916C-608. (Annotated.)

#### Note.

Validity of personal service of process procured by fraud or force. 1916C-612.

PRODUCTION OF DOCUMENTS. See Discovery.

# PROFESSION.

See Attorneys; Licenses; Physicians and Surgeons.

PROHIBITED DEGREES OF RELATIONSHIP.

See Marriage, 3.

#### PROHIBITION.

- 1. Reconsideration of Denial—After Expiration of Term. A writ of prohibition will issue to prevent a trial court from reconsidering its order denying a new trial on a motion or petition for a new trial and rehearing the same after the expiration of the trial term, since such action is an unauthorized application of judicial force and is void. Owen v. District Court (Okla.) 1917C-1147.
- (Annotated.)

  2. Right to Remedy—Remedy by Appeal Inadequate. Under Mont. Rev. Codes, \$7228, authorizing writ of prohibition where there is not a plain, speedy, and adequate remedy at law, the remedy by appeal from a threatened peremptory writ of mandamus to do an act which may be required to be done forthwith, and the respondent therein thereby rendered liable for contempt while the appeal was being perfected and a stay obtained, is neither speedy nor adequate, since a "speedy remedy" is one which, having in mind the subject-matter involved, can be pursued with expedition and without essential detriment to the party aggrieved, and it is neither "speedy nor adequate" if its slowness is likely to produce immediate injury or mischief. State v. District Court (Mont.) 1917C-164.

- 3. Against Unwarranted Injunction. The writ of prohibition is that process by which a superior court prevents an inferior tribunal from exercising jurisdiction with which it has not been vested by law. Hence, where the chancery court attempts to enjoin execution of a judgment in a criminal proceeding, a writ of prohibition will be issued to prevent the court from exceeding its jurisdiction. Ferguson v. Martineau (Ark.) 1916E-421.
- 4. That a chancery court which enjoined the execution of a criminal judgment did not propose to issue any further order is no ground for the denial of a writ of prohibition, for the denial of the writ would leave the injunction in force. Ferguson v. Martineau (Ark.) 1916E-421.
- 5. Courts Subject Probate Court. As the Arkansas supreme court controls inferior courts only through its supervisory jurisdiction over the circuit court, it cannot issue a writ of prohibition against the probate court. Ferguson v. Martineau (Ark.) 1916E-421.

#### PROHIBITION LAWS.

See Intoxicating Liquors; Local Option.

#### PROMISSORY NOTES.

See Bills and Notes.
Bank's payment out of maker's deposit, see Banks and Banking, 65, 66.

#### PROMOTERS.

See Corporations, 28, 29.

#### PROPERTY.

See Lost Property.
Wild animals, see Animals, 20-26.
Defined, see Constitutional Law, 48.
In corpse, see Dead Body, 1, 2, 6.
Inheritable property, see Descent and Dis-

tribution, 3, 4.

Promissory note as property, see False Pretenses, 2.

Joint tenancy in personalty, see Joint Ten-

ants, 7.

Property consumable in use as subject of mortgage, see Mortgages and Deeds of

Trust, 16.
City regulation of use, see Municipal Corporations, 86.

Taxation of intangible property, see Taxation, 25, 33, 45.

Right to dispose of by will, see Wills, 1-3.

1. Rents—Nature as Real or Personal. Unaccrued rents are not personal property. They are incorporeal hereditaments. They are an incident to the reversion and follow the land. Though separable from the land, they are, until such separation, part of the land. State v. Royal Mineral Association (Minn.) 1918A-145. (Annotated.)

#### Note.

Rent as realty or personalty, 1918A-148.

#### PROPERTY RIGHTS.

Police power not to infringe, see Constitutional Law. 28.

#### PROSECUTING ATTORNEYS.

Improper remarks in bill of exceptions, see Appeal and Error, 64.

Expressions as to guilt of accused, see
Argument and Conduct of Counsel, 18.
Expressions as to wealth of accused, see
Argument and Conduct of Counsel, 19.
Abusive language, see Argument and Con-

duct of Counsel, 30.

Right to file disbarment proceedings, see Attorneys, 44, 47.

Authority of report criticising prosecutor, see Grand Jury, 2.

Invalid appointment, effect on indictment, see Indictments and Informations, 2.

Duty to serve school board, see Schools, 15.

- 1. Prosecuting Attorney Fees Taxation as Costs. The county attorney is entitled to have taxed as costs a fee of \$25 on each count covered by the conviction and the direction to the clerk to omit such fee from the taxation of costs was error. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.
- 2. Trial—Misconduct of Counsel—Necessity of Objection. Where complaint is made that the solicitor general, during the trial of the case, indulged in improper remarks to the jury, but no objection was made thereto at the time, and no ruling was invoked, this will not require a new trial. Bird v. State (Ga.) 1916C-205.
- 3. Striking Report from Records. A prosecuting attorney may move the circuit court to expunge from its records a report of a grand jury assailing his official conduct without serving notice of motion on any member of the grand jury. Bennett v. Kalamazoo Circuit Judge (Mich.) 1916E-223.
- 4. A prosecuting attorney, seeking an order of the circuit court expunging from its records a report of a grand jury assailing his official conduct, should, before applying to the supreme court for relief by mandamus, obtain from the circuit court a decision on his application to strike out the report. Bennett v. Kalamazoo Circuit Judge (Mich.) 1916E-223.
- 5. Power to Appoint Substitute. As Const. art. 9, \$ 5, provides that the office of state's attorney shall be filled by the voters at an election, the court may not, as attempted by Acts 1905, c. 90, amending S. Dak. Pol. Code, \$ 934, be authorized to supplant such officer, when there is no real temporary vacancy, merely because "in

the opinion of the court the ends of justice would be promoted thereby," by an appointee to file an information and prosecute the cause. State v. Flavin (S. Dak.) 1918A-713. (Annotated.)

Note.

Validity of appointment of deputy or special prosecuting attorney. 1918A-718.

#### PROSTITUTION.

In General, 689.

- 2. Deriving Support from Prostitute, 690.
- 3. Federal White Slave Traffic Act, 690.

See Disorderly Houses, 3-6. Deportation, see Aliens, 17.

Policy on bawdy house, validity, see Fire

Insurance, 1.

State regulation in cities, see Municipal Corporations, 20.

# 1. IN GENERAL.

- 1. Definition—As Including Act of Man. Though "prostitution," in its broadest sense, means the setting one's self to sale. or devoting to infamous purposes what is in one's power, in its restricted sense, as used in Iowa Code, § 4943, making it a crime to resort to a house of ill fame for the purpose of prostitution, it means' the practice of a female offering herself in indiscriminate intercourse with men, and is not applicable to the conduct of men. State v. Gardner (Iowa) 1917D-239.

  (Annotated.)
- 2. That Iowa Code, § 4943, makes it a crime for "any person" to resort to a house of ill fame for the purpose of prostitution, does not extend the application of the section as to prostitution to men. State v. Gardner (Iowa) 1917D-239.

  (Annotated.)

3. Iowa Code, § 4943, making it a crime to resort to a house of ill fame for the purpose of prostitution or lewdness, does not, by associating the two purposes, extend the application of the section as to the former to men. State v. Gardner (lowa) 1917D-239. (Annotated.)

4. It being settled at the time of adoption of Iowa Code, § 4943, making it a crime to resort to a house of ill fame for the purpose of prostitution, that men could not be guilty of prostitution, that section must be strictly construed. State v. Gardner (Iowa) 1917D-239.

(Annotated.)

5. Frequenting House of Ill Fame—Purpose—Error Held Prejudicial. In a prosecution for resorting to a house of ill fame for the purpose of prostitution or lewdness, forbidden by Iowa Code, § 4943, the error in holding that the statute punishes men for resorting to a house of ill fame for the purpose of prostitution necessitates a reversal. State v. Gardner (Iowa) 1917D-239.

- 6. Visiting House of Ill Fame—Purpose. While on a charge of lewd and lascivious "conduct," that is, customary behavior, or of leading a life of lewdness, there may not be a conviction merely because there was an unlawful indulgence of the animal desires, where the charge is resorting for the purpose of lewdness, it is sufficient that the place was visited for the purpose of committing an act of lewdness, as the term is understood in the accepted usage of the language, that is, a lustful or lascivious act. State v. Gardner (Iowa) 1917D-239.
- 7. Instructions. The refusal of an instruction in a prosecution for resorting to a house of ill fame for the purpose of prostitution or lewdness that defendant might go to a house of ill fame if his purpose was that of friendly visiting was not error, where the court charged that defendant could not be convicted unless he resorted to the house for the purpose of prostitution or lewdness. State v. Gardner (Iowa) 1917D-239.
- 8. Where the evidence showed that, if defendant resorted to a house of ill fame for the purpose of lewdness at all, he did so many times, it was proper to refuse an instruction that an occasional visit for such purpose will not support a conviction. State v. Gardner (Iowa) 1917D-239.
- 9. In a prosecution for resorting to a house of ill fame for the purpose of lewdness, it was not error to refuse an instruction that it would not constitute the house one of ill fame if one woman alone therein had sexual intercourse with various men, where there was no evidence that no other woman practiced such illicit commerce in the house. State v. Gardner (Iowa) 1917D-239.
- 10. Proof of Character of House—General Repute. While evidence of general reputation of a house as one of ill fame is admissible, there can be no conviction of resorting to such a house without other evidence that the house was kept and used as a house of ill fame. State v. Gardner (Iowa) 1917D-239.
- 11. Instructions—Refusal of Request—Matters Covered by General Charge. The refusal of an instruction that, while evidence of general reputation of a house of ill fame is admissible, there can be no conviction unless there is other evidence that the house was used for that purpose, is not error, where the court gave equivalent instructions. State v. Gardner (Iowa) 1917D-239.
- 12. Attempt to Entice Female What Constitutes "Immoral Purpose." The Donlan Act (Laws Mont. 1911, c. 1), § 2, provides that any person who shall entice or attempt to entice any girl to reside with another for "immoral purposes," etc., shall, etc. Defendant, who conducted an employment agency at Butte, attempted to

entice a seventeen-year-old girl to accept a position in a hotel in the state of Wyoming, informing her that the place was a sporting house, and that her duties would be to dance, play cards, drink beer, and entertain men. The evidence tended to show that the place was not one where a girl could stay for any length of time and be respectable. It is held that employment to which defendant tried to entice the girl was an efficient school for special immorality covered by term "immoral purposes." State v. Beed (Mont.) 1917E-783.

13. Enticement for Immoral Purpose—Instruction as to Purpose. In a prosecution for an attempt to entice a girl to enter employment of another for immoral purposes, an instruction defining "immoral" as "anything inconsistent with rectitude, ..." and "that purpose is the object, ..." and that "therefore an immoral purpose is one which is violative of conscience or moral law inconsistent with purity, rectitude, or good morals, or hostile to the welfare of the general public," is insufficient as a definition of the words "immoral purposes," as used in the Donlan Act (Laws Mont. 1911, c. 1). State v. Reed (Mont.) 1917E-783.

#### Note.

Whether man can be "prostitute," or guilty of resorting to house of ill fame for purpose of prostitution. 1917D-248.

# 2. DERIVING SUPPORT FROM PROS-TITUTE.

- 14. What Constitutes Acceptance. Where, pursuant to the directions of a police officer who demanded money for protection, a common prostitute paid money to a person designated, the acceptance of the money by that person is an acceptance by the police officer of the earnings of a common prostitute. State v. Schuman (Wash.) 1918A-633.
- 15. Nature of Offense—Intent. Where a policeman accepts money from a common prostitute, which is paid in consideration of his allowing her to frequent a café and there to solicit men for sexual intercourse, the money is paid and received with intent to aid, assist, or abet the practice of prostitution. State v. Schuman (Wash.) 1918A-633.
- 16. An information charging that accused and another wilfully, unlawfully, and feloniously accepted the earnings of one who was then a common prostitute is sufficient to indicate that defendant knew the moneys were obtained by prostitution. State v. Schuman (Wash.) 1918A-633.
- 17. Accepting Earnings of Prostitute— Sufficiency of Information. An information charging that defendants, and each

- of them, did wilfully, unlawfully, and feloniously accept the earnings of one who was then and there a common prostitute is sufficient under Rem. & Bal. Wash. Code, \$2055, requiring a statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. State v. Schuman (Wash.) 1918A-633.
- 18. Evidence Other Offenses Receiving Earnings of Prostitute. In a prosecution against a police officer for receiving the earnings of a common prostitute, which it was claimed he demanded for his protection, evidence that at the same time he demanded and received money from other prostitutes is admissible. State v. Schuman (Wash.) 1918A-633.

# 3. FEDERAL WHITE SLAVE TRAFFIC ACT.

- 19. Validity of Mann Act. Construing as applicable to transportation, unaccompanied by the expectation of pecuniary gain, the provisions of the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 325, c. 395, Fed. St. Ann. 1912 Supp. p. 419), making criminal the transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, does not render the statute invalid as in excess of the constitutional power of Congress over interstate commerce. Caminetti v. United States (U. S.) 1917B-1168. (Annotated.)
- 20. White Slave Traffic Act—Scope of Act. Transportation of a woman in interstate commerce in order that she may be debauched or become a mistress or concubine, although unaccompanied by the expectation of pecuniary gain, is con-demned by the provisions of the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, c. 395, Fed. St. Ann. 1912, Supp. p. 419), making it an offense knowingly to transport or cause to be transported in interstate commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce such woman or girl to become a prostitute, or to give herself up to debauchery, or engage in any other immoral practice. Caminetti v. United States (U. S.) 1917B-1168. (Annotated.)
- 21. Effect on State Legislation. An attempted transportation, completed before transportation was commenced, of a female to another state for immoral purposes, is intrastate commerce, not within purview of the Mann Act (Act Cong. June 25,

1910, c. 395, 36 Stat. 825 [Fed. St. Ann. 1917 Supp. p. 419]), and therefore punishable by the Donlan Act (Laws 1911, c. 1). State v. Reed (Mont.) 1917E-783.

(Annotated.)

#### PROTEST.

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PROVINCE OF COURT AND JURY.

See Questions of Law and Fact.

127-130.

# PROVOCATION.

Effect on measure of damages, see Assault, 15-17.

# PROXIES.

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#### PUBLIC ACCOUNTS.

See Accounts and Accounting.

#### PUBLIC ADMINISTRATOR.

See Executors and Administrators, 5, 9-11.

#### PUBLICATION.

See Libel and Slander, 5-7. Newspaper, what is, see Newspapers, 1. Of summons, see Process, 8-11. Of ordinance on Sunday, see Sundays and

Holidays, 9.
Of ordinance in german paper insufficient, see Trees and Timber, 2.

Of wills, see Wills, 30.

#### PUBLIC CHARITIES.

See Charities.

#### PUBLIC CONTRACTS.

- 1. Power to Make and Validity, 691.
- 2. Rights and Liabilities on Bonds, 691.
- 3. Actions, 692.

#### 1. POWER TO MAKE AND VALIDITY.

1. Printing—Public Contract — Limitation to Residents—Validity. Miss. Laws 1916, c. 135, § 3, prohibiting the letting by boards of supervisors of counties of contracts to furnish the county with blank books, stationery, etc., to any bidder who is a non-resident of the state, who has not a printing plant in the state or who is not a bona fide resident of the state actually engaged in the printing business is not violative of Const. U. S. art. 1, § 8 (8 Fed. St. Ann. 363), giving Congress the right to regulate commerce among the several

states, since such provision of the constitution is not intended to affect contracts which have an indirect or remote bearing on commerce between the states, and a state in the exercise of its police power may make regulations which indirectly affect interstate commerce; it being only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of federal legislation. State v. Senatobia Blank Book and Stationery Co. (Miss.) 1918B-953.

(Annotated.)

- 2. Miss. Laws 1916, c. 135, § 3, is not violative of Const. § 107, providing that stationery, printing, etc., used by the legislature and other departments of the government shall be furnished under contract subject to the approval of the governor and state treasurer, since a county is not a department of the state but a political subdivision. State v. Senatobia Blank Book and Stationery Co. (Miss.) 1918B-953. (Annotated.)
- 3. Miss. Laws 1916, c. 135, § 3, is not violative of Const. U. S. Amend. 14 (a) (9 Fed. St. Ann. 392, 416, 538), providing that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws. State v. Senatobia Blank Book and Stationery Co. (Miss.) 1918B-953. (Annotated.)
- 4. Miss. Laws 1916, c. 135, § 3, is not violative of Const. U. S. art. 4, § 2 (9 Fed. St. Ann. 158), providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, since counties are mere political subdivisions of the state for the purpose of exercising a part of its powers and may exert only such powers as are expressly granted to them or necessarily implied from those granted, so that regulation of their contracts is a regulation of the contracts of the state, and no person engaged in stationery business is entitled to absolute right to contract with the state. State v. Senatobia Blank Book and Stationery Co. (Miss.) 1918B-953.

(Annotated.)

# 2. RIGHTS AND LIABILITIES ON BONDS.

5. Sufficiency of Performance—Effect of Accepting Work. Where a contractor for street paving, under a contract providing that the improvement was to be made under the supervision and to the satisfaction of the city engineer, gave two bonds, one for faithful performance of the work according to the plans and specifications, and the other guaranteeing the improvement for seven years, in an action on the

guaranty bond, the city, after having accepted the improvement, may attack the performance as not being in conformity with the plans and specifications, though ordinarily it could not be done if only the first bond had been given. Ottumwa v. McCarthy Improvement Co. (Iowa) 1917E-1077.

#### 3. ACTIONS.

6. Failure to Require Bond—Liability of Municipality to Materialman. One furnishing material to a contractor, erecting a schoolhouse for a school district which neglected to exact a bond required by Ore. L. O. L. § 6266, of anyone contracting with any school district for the construction of any building, with the additional obligation that he will promptly pay all materialmen, has a right of action against the district for damages consequent upon the contractor's insolvency leaving a balance due for the materials furnished. Northwest Steel Co. v. School District (Ore.) 1917B-1086. (Annotated.)

#### Note.

Liability of municipality or officer for failure to take from contractor bond for protection of laborers or materialmen. 1917B-1089.

#### PUBLIC DOCK.

Liability of county for injury to child on dock, see Negligence, 6, 7, 9.

#### PUBLIC FUNDS.

Restraining improper payment, see Injunctions, 22.

# PUBLIC HIGHWAYS.

See Streets and Highways.

### PUBLIC INTEREST.

Privileged communications, see Libel and Slander, 63-65.

#### PUBLIC LANDS.

Illegality of public land contract, see Contracts, 29.

Liability of prospector for cattle lost in open shaft, see Mines and Minerals,

Taxation of state land under contract of purchase, see Taxation, 26, 27, 39, 48, 49.

Selection of lieu lands in forest reserves, see Trees and Timber, 21.

Federal grants of riparian lands, see Waters and Watercourses, 3.

- 1. Actions Between Entrymen—Necessity of Joining Government. The United States is not a necessary party to a suit by a prior entryman whose entry has been rejected by the Land Department in favor of a subordinate entryman, to charge the latter with a trust in his ravor, because a patent from the United States is involved. Daniels v. Wagner (U. S.) 1917A-40.
- 2. Grant of Land Under Navigable Waters—Restrictions in Grant. Where a grant of public lands under navigable waters contains an express restriction against interference or obstruction with the free and unrestricted rights of public access and use, the grantee cannot maintain obstructions and devices in the maintenance of an amusement park which interfere with such public use. People v. Steeplechase Park Co. (N. Y.) 1918B-1093.
- 3. Limitations on Unrestricted Grant. A grant of public lands under navigable water containing no restrictions is held to be an unqualified grant of the fee therein, and not subject to any easement in favor of the public. People v. Steeplechase Park Co. (N. Y.) 1918B-1093.
- 4. Fences, barriers, platforms, pavilions, and other structures of a private amusement park, constructed by the grantee on lands under navigable water between high and low water mark, although an interference with the public use of, and access to, such lands cannot be enjoined, where the grant of such lands from the state was unqualified. People v. Steeplechase Park Co. (N. Y.) 1918B-1093.
- 5. Where the state through its land commissioners unqualifiedly granted to defendant lands under navigable water between high and low water marks, the exclusive use and right of possession vested in the grantee, and the use of such lands as an amusement park does not affect the validity of the grant. People v. Steeplechase Park Co. (N. Y.) 1918B-1093.
- 6. Power of State to Make Grant. The commissioners of the land office, under N. Y. Public Lands Law (Consol. Laws, c. 46), § 75, and Const. art. 5, § 5, 6, have authority to make unqualified, unrestricted grants of lands under water between high and low water marks. People v. Steeplechase Park Co. (N. Y.) 1918B-1093.

(Annotated.)

#### Note.

Power of state to grant title to land under navigable water. 1918B-1107.

#### PUBLIC NUISANCE.

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#### PUBLIC OFFICERS.

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# 1. IN GENERAL.

1. Who are State Officers—Officer of Municipality. The general rule, in the absence of special constitutional provision, is that all officers whose duties pertain to the exercise of the police power of the state are in that sense state officers, and under the control of the legislature, even though they may be officers of a municipality and charged with the enforcement of the local police regulations

- of such municipality. State v. Linn (Okla.) 1918B-139.
- 2. Officers Defined. "Officers" are creatures of the law, whose duties are usually provided for by statute. In a way they are agents; but they are never general agents in the sense that they are neither hampered by custom nor law, and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so with full knowledge of the limitations of their agency and of the laws prescribing their duties. They are trustees as to public money which comes to their hands. Lamar Township v. Lamar (Mo.) 1916D-740. (Annotated.)
- 3. Policemen—Status as Public Officers. policeman holds an office within the meaning of section 2, of art. 15, of the Kan. state constitution. Hancy v. Cofran (Kan.) 1917B-660. (Annotated.)
- 4. Construction-"Associates in Office." "Associates in office" are those who are united in action; who have a common purpose; who share the responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform the duties jointly or as a body. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 5. Nature of Contract With Public. public officer is a public servant, and his candidacy for appointment or election, his commission, his oath in connection with the law under which he serves, and the emoluments of his office constitute the contract between him and the public he Cleveland v. Luttner serves. (Ohio) 1917D-1134.
- 6. Notaries Public-Notary as Officer. N. Car. Revisal 1905, § 989, provides that the execution of all deeds may be proved or acknowledged before any of the "officials" therein specified. Section 2347 authorizes the governor to appoint notaries, who shall hold their "office" for two years, and shall qualify by taking an oath of office and the oaths prescribed for officers. Section 2350 gives notaries power to take and certify the acknowledgment of deeds, to administer oaths and affirmations in matter incident to their "offices," etc., and subsequent sections refer to their "office," their "official acts," etc. It is held that the position of notary public is an "office," within Const. art. 6, § 7, providing that every voter, except as in that article disqualified, shall be eligible to office, especially as the probate of a deed is a judicial act, and the judicial function is performed by the notary, and not, as claimed, by the clerk of the court. State v. Knight (N. Car.) 1917D-517.
- Office and Employment Distinguished. U. S. Const. art. 14, § 7, provides that no person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this

state, or any other state, shall hold or exercise any other office or place of trust or profit under the authority of the state. Postal Laws and Regulations of 1913, which provides for the appointment of rural carriers by the Postmaster General, and requires such carriers to take oath to support the Constitution and to give bond for faithful performance of their duties, fixes the terms and duties of such carriers; it also inhibits rural carriers from holding any state, county, municipal, or township office. Const. U. S. art. 2, § 2, authorizes Congress to vest the appointment of inferior officers in the President alone, or in the heads of departments. is held that, while the line between offices or places of trust and profit is not clear, an "office" is a public position to which a portion of the sovereignty of the country attaches for the time being, and which is exercised for the benefit of the public, and within the constitutional provision there is no distinction between "offices" and "places of trust or profit" with respect to the inhibition against double office-holding; hence a rural mail carrier was a "public officer," and his holding of a state office subjected him to the statutory penal-Groves v. Barden (N. Car.) 1917Dties. 316. (Annotated.)

8. Status of Commissioners. That Congress in giving the state permission to build a bridge over a stream required that the state should by legislative enactment provide for adequate compensation to persons suffering injuries, does not make commissioners appointed under Mass. St. 1911, c. 439, providing for assessment of such damages, federal officers, but such commissioners being appointed by the state courts are officers of the state court. Brackett v. Commonwealth (Mass.) 1918B-863.

#### Notes.

Distinction between office and employment. 1917D-319.

Policeman as public officer. 1917B-663.

#### 2. CREATION OF OFFICE.

9. Power of Legislature—Creation and Change of Offices. An office created by the legislature is wholly within that body's power, and it may prescribe the powers and duties of the incumbent, the mode of filling the office, and from time to time change such mode, or impose additional duties upon officers already elected or appointed. Perkins v. Board of County Commissioners (Ill.) 1917A-27.

#### Note.

Power of body having authority to remove public officer to appoint committee to conduct hearing. 1916C-1273.

APPOINTMENT AND ELECTION.
 Veterans' Preference Acts—Discretion of Appointing Power. The action of

the governor in making appointments under S. D. Laws 1913, c. 109, creating the board of public health, and medical examiners, is not ministerial, but involves the exercise of discretion, notwithstanding Pol. Code, §§ 3242, 3243, providing that honorably discharged soldiers and sailors shall be preferred for appointment to public office and making a violation thereof a misdemeanor. Phelps v. Byrne (S. D.) 1918B-996. (Annotated.)

- 11. Anti-nepotism Law—Title. The title to the anti-nepotism bill or act (Laws Idaho 1915, c. 10) is sufficiently broad to include and cover all of the provisions of said act and is not repugnant to the provisions of section 16, art. 3, of the state constitution. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 12. Scope of Act Political Divisions Embraced. Irrigation, drainage, improvement, and school districts do not come within the provisions of said act, since they are not municipal subdivisions of the state and are not specially included in said act. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 13. Appointments Prior to Act. Where appointments of persons related to officers within the prohibited degree have been made prior to the going into effect of said act, such appointees cannot legally be paid out of the public funds any salary or wages for services rendered subsequent to the going into effect of said act, to wit, the 8th day of May, 1915. Barton v. Alexander (Idaho) 1917D-729.

(Annotated.)

- 14. Retroactive Effect. The provisions of said act do not operate retrospectively. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 15. Construction of Act Computation of Relationship. Under the provisions of section 5705, Idaho Rev. Codes, the degrees of kindred are computed according to the rules of the civil law, which rules are applicable to the act in question. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 16. Validity of Anti-nepotism Act. Said act is a police regulation, and its provisions are reasonable and enforceable and not unconstitutional. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 17. Appointments Prior to Act. If a person is legally appointed and eligible to hold the office to which he is appointed, the proper board or officer is not prohibited by said act from passing upon and allowing the claim of such appointee for salary, or wages, although such appointee may be related to such officer or a member of the board which is required under the law to pass upon such claim. Barton v. Alexander (Idaho) 1917D-729.

(Annotated.)

- 18. Effect of Act—Payment of Salary After Illegal Appointment. If a person is illegally appointed under the provisions of said act, the officer of the state, district, county, city, or other municipal subdivision of the state who pays out of any public funds under his control or draws or authorizes the drawing of any warrant or authority for the payment out of any public funds of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and may be punished as provided in the first section of said act. Barton v. Alexander (Idaho) 1917D-729.

  (Annotated.)
- 19. Said act prohibits the omicers therein mentioned from making appointments on agreement or promise with other officers. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 20. Said act prohibits the officers therein named, or boards or councils composed of such officers, from appointing any one to office related to them or to any member of such board or council within the third degree by affinity or consanguinity. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 21. The phrase "associates in office," as used in said act, refers to officers who are required under the law to act together, each having substantially equal authority in matters coming before them as boards or councils under the law. Barton v. Alexander (Idaho) 1917D-729.

(Annotated.)

- 22. The commandant of the Soldiers' Home is not an "associate in office" of the board of trustees of the Soldiers' Home. Barton v. Alexander (Idaho) 1917D-729. (Annotated.)
- 23. "Otherwise" Meaning of Term. Under Ark. Sp. Laws 1911, p. 1026, providing that, when any vacancy in the office of road overseer shall occur from any cause whatever or upon failure to elect by a tie vote or otherwise, the county court or judge thereof in vacation shan appoint an overseer for such district or to fill such vacancy, where a road overseer elected to succeed himself died before the commencement of his second term, the county judge, upon his failure to qualify for the second term, had power to appoint an overseer, since the phrase "or otherwise" should be given its broadest and most comprehensive meaning, "in a different manner, in any other way," it being the intention of the legislature to authorize the county judge to appoint where there is no election or where the person elected for any reason fails to qualify. Townsley v. Hartsfield (Ark.) 1916C-643. (Annotated.)
- 24. Ineligibility of Candidate Receiving Majority Vote—Rights of Minority Candidate. A minority vote for a qualified

candidate does not entitle such candidate to the office, even though the candidate receiving the highest number of votes was disqualified to hold the office and such fact was known to the voters at the time of the election. However, the failure of the qualified candidate to receive a plurality of the votes cast renders the election a nullity. Wall v. Jensen (N. D.) 1918B-982. (Annotated.)

#### Note.

Validity and construction of anti-nepotism law. 1917D-735.

- 4. QUALIFICATIONS AND ELIGIBILITY.
- 25. Eligibility—As of What Time Required. Under the statute providing that, when a contestee is not eligible to the office to which he has been declared elected, etc., the question of a contestor's eligibility was to be considered as of the time when, if elected, he entered upon the duties of the office. Neelley v. Farr (Colo.) 1918A-23.
- 26. Restriction to Voters Women. Under N. Car. Const. art. 6, § 7, providing that every voter, except as in that article disqualified, shall be eligible to office, and section 8, providing that the classes of "persons" therein specified shall be disqualified for office, only a voter is qualified to hold office; the word "persons," in section 8, though comprehensive enough to include women, applies only to voters, as they are the only persons referred to in that article. State v. Knight (N. Car.) 1917D-517.
- 27. Inconsistent Offices—Resignation not Legally Accepted. Under Pa. Act March 31, 1860 (P. L. 382), prohibiting any councilman from being at the same time any other officer who shall receive a salary, a councilman is disqualified from holding the office of water superintendent of a borough, though he had resigned from the council, where he voted for the resolution accepting his resignation; such resolution being ineffective by reason of his illegal vote, and he being still a de jure member of the council. Commonwealth v. Raudenbush (Pa.) 1917C-517.
- 28. Right of Woman to be Notary Public. As the position of notary public is an "office," the legislature cannot change its character by calling it a place of trust and profit, and N. Car. Pub. Laws 1915, c. 12, authorizing the appointment of women as notaries public, and providing that this position shall be deemed a place of trust and profit, and not an office, is invalid. State v. Knight (N. Car.) 1917 D-17.

(Annotated.)

29. Railroad Policemen—Time for Qualifying. Const. § 236, provides that the general assembly shall prescribe a time when the officers authorized by the consti-

tution to be appointed shall enter upon their duties. Ky. St. § 3755, provides that, if the official bond is not given and the oath of office taken within 30 days after notice of appointment, the office shall be considered vacant. Section 779a provides that railroads, on application to the governor, may have certain persons appointed to act as policemen on trains, who shall qualify by executing bond and taking the oath of office, and be paid by the railroad, which, when it no longer requires their services, may file notice to that effect. Held that, where a special railroad policeman appointed and commissioned in June, 1906, did not take the oath and execute bond until July, 1907, the date of his notice of his appointment should have been avowed to render evidence of his powers to act himself or by deputy admissible, and that there was a presumption that he did not execute the bond and take the oath within the prescribed 30 days after notice of his appointment, so that the office was vacant. Cincinnati etc. B. Co. v. Cundiff (Ky.) 1916C-513.

#### Note.

Right of woman to be notary public. 1917D-534.

#### 5. COMPENSATION AND EXPENSES.

#### a. In General.

- 30. Right to Salary—De Facto Officer. The salary and emoluments of a public office attach to the office itself, and not to the office, except as he is an officer de jure. Jones v. Dusman (Pa.) 1916D-472.
- 31. Estoppel of Public Officer—Receipt of Fees Under Statute. Where an officer collected fees under a statute, in force when he was elected and when he qualified, he could not dispute the validity of a provision of the statute prescribing how the fees, when collected, should be disbursed. Greene County v. Lydy (Mo.) 1917C-274. (Annotated.)

# Notes.

Estoppel of public officer to deny validity of statute by accepting compensation thereunder, 1917C-284.

Right to fee or allowance as between officer and deputy. 1918A-840.

Neglect of duty as affecting right of public officer to salary. 1918B-435.

# b. Wrongful Exclusion from Office.

32. Right of De Jure Officer—Salary Paid to De Facto Officer. Where a policeman is wrongfully dismissed from office, he may recover his salary from the city for the period of the wrongful ouster, less the amount otherwise earned by him in the exercise of due diligence during such period, though another has been employed in his place and been paid the salary

thereof. Cleveland v. Luttner (Ohio) 1917D-1134. (Annotated.)

Right of de jure officer to recover from State or municipality salary paid to de facto officer during latter's incumbency. 1917D-1137.

# c. Neglect of Duty.

- 33. Effect of Neglect of Duty. The right of a de jure officer to salary is not affected by the quantity of services rendered by him or even neglect to render them where such failure falls short of actual abandonment of the office. Bartholomew v. Springdale (Wash.) 1918B-432. (Annotated.)
- 34. Effect on Right to Salary. The compensation of a public officer is a matter of statute, incidental to the office, and not of contract; nor does it depend on the amount or value of the services rendered. While such officer holds the office, his right to the salary is in no wise impaired by his absence from office or neglect of duty. Young v. Morris (Okla.) 1918B-450.

  (Annotated.)

#### d. De Facto Officer.

35. Right of de Facto Officer to Compensation. A city's unqualified acceptance of services performed by one as officer estops it to invoke any rule of law to defeat payment of his salary for such period. Thompson v. Denver (Colo.) 1918B-915.

# 6. DURATION OF TERM OF OFFICE.

- 36. An appointment of a policeman during good behavior under civil service regulations violates the constitutional provisions that the legislature shall not create any office the tenure of which shall be longer than four years. Haney v. Cofran (Kan.) 1917B-660.
- 37. Policemen—Tenure of Office. Under chapter 114 of the Kan. Laws of 1907, and amendments thereto, in cities governed by the tommission form of government, the terms of police officers should be definitely fixed by city ordinance, and the terms of such officers should expire with the term of office of the board appointing them. Haney v. Cofran (Kan.) 1917B-660.
- 38. Effect of Expiration of Term. Under Const. § 93, providing that inferior and state officers may be appointed as prescribed by law for a term not more than four years and until their successors are appointed and qualified, the appointment of a special railway police officer under Ky. St. § 779a, on application to the governor to serve during the railroad's pleasure, does not provide for a succession in such office, so that, when the term expires either by operation of law or by the will of the railroad, the office ceases, and an-

other appointee does not take it as successor. Cincinnati etc. R. Co. v. Cundiff (Ky.) 1916C-513.

- 39. Term of Office. Under Const. § 93, providing that inferior and state officers may be appointed for a term not exceeding four years and until their successors are qualified, and Ky. St. § 779a, providing for the appointment of railway police officers, to be paid by the railway and to hold office during its pleasure, it was intended to create the office for the four-year-term permitted by the constitution, and the failure to fix the term as one not longer than four years does not make the statute unconstitutional. Cincinnati etc. R. Co. v. Cundiff (Ky.) 1916C-513.
- 40. The legislative plan for accomplishing the requirement mentioned in the last foregoing paragraph, as embodied in c. 5, Stats., undisturbed by c. 328, Wis. Laws of 1911, inserted in said chapter at sec. 86, does not admit of any change which would, or might probably prevent such accomplishment. State v. Board of State Canvassers (Wis.) 1916D-159.
- 41. Commencement of Term. Under sec. 1, art. 13, of the constitution, the political year of the state commences on the first Monday of January of such year and all constitutional officers elected at the November election in any year are required to be circumstanced to take up their respective offices at such time. State v. Board of State Canvassers (Wis.) 1916D-159.

## 7. TERMINATION OF TERM.

#### a. In General.

- 42. Vacancy—Death Before Commencement of Term. Where an officer elected to succeed himself dies before the commencement of his second term, a vacancy is thereby created for the first term, but not in the second term, and one duly appointed and qualified to fill the vacancy in the first term holds during the unexpired term of the deceased officer and until his successor has been elected or appointed and qualified as provided by law. Townsley v. Hartsfield (Ark.) 1916C-343.
- 43. Neglect of Duty—Effect as Creating Vacancy. The law of this state requires that the incumbent of a public office shall devote his personal attention to the duties of the office to which he is elected or appointed (article 2, § 11, Okla. Const.), but does not contemplate that such officer shall lose his title to office because he may be absent for a short period of time, for any reason, and does not, during such period of time, personally give all his time and attention to the duties of his office. While such failure of duty may furnish grounds of removal, it does not ipso facto create a vacancy. Young v. Morris (Okla.) 1918B-450.

## b. Removal.

## (1) In General.

44. Right to Bring Proceeding. The statute (Comp. Laws N. Dak. 1913, § 1048) authorizing certain persons to bring a proceeding to "contest the right of any person declared duly elected to any office" applies to a proceeding to deprive a person of office for violation of the corrupt practice act. Diehl v. Totten (N. Dak.) 1918A-884.

## (2) Jurisdiction or Authority to Remove.

45. Officer Subject to Removal—Municipal Officer. Though a mayor of a municipality be a civil officer within Const. art. 5, § 5, he may, under Tenn. Pub. Acts 1915, c. 11, be ousted for misconduct in office. State v. Howse (Tenn.) 1917C-1125.

## (3) Grounds.

- 46. Failure to Enforce Law-Fraud on Municipality. Defendant mayor, after being elected on a law enforcement platform in which he announced that he could and would enforce all criminal laws, allowed saloons and disorderly houses to run in open violation of state law. He also participated in a plan to evade the charter whereby a market house costing many thousand dollars was paid for by separate vouchers as if the work was less than \$500, so that bids were rendered unnecessary. Such market house was adjacent to the place of business of the mayor's firm, and it appeared that the mayor and others reaped benefits therefrom. The mayor also allowed subordinates to sign his name to vouchers, and the practice led to the commission of gross frauds on the treasury. It is held that the mayor was guilty of misconduct in office warranting his ouster under Tenn. Pub. Acts 1915, c. 11. State v. Howse (Tenn.) 1917C-1125.
- 47. Removal Intoxication. Where an officer of the kinds enumerated in Ala. Const. 1901, §§ 173, 175, relating to impeachments, is an habitual drinker, he is subject to removal under the provision of section 173 that "intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties," shall authorize his removal from office. State v. Pratt (Ala.) 1917D—990. (Annotated.)
- 48. "Intemperance," as the term is used in Const. Ala. 1901, § 173, providing that such intemperance in the use of intoxicating liquors or narcotics, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, shall be ground for his removal from office, means such immoderate use of intoxicants or narcotics, in view of the dignity of the office and

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of the nature and importance of its duties, as unfits the officer for the discharge of such duties, and hence must vary with the grade of the office and nature and importance of its duties. State v. Pratt (Ala.) 1917D-990. (Annotated.)

49. Proof that a judge of probate has been for many years during his incumbency of the office an almost constant alcoholic drinker, that such indulgence has injuriously affected his mental and moral faculties and normal sensibilities, that his personal conduct evidences a well-nigh reckless disregard of or indifference to his own welfare and the dignity of his position, authorizes his removal from office under Const. Ala. 1901, § 173. State v-Pratt (Ala.) 1917D-990. (Annotated.)

## (4) Proceedings.

- 50. Order for Removal—Directing Election of Successor. In a proceeding to oust a mayor from office, the court cannot decree that the board of commissioners proceed to the election of a successor; that being a matter unnecessary for determination. State v. Howse (Tenn.) 1917C-
- 51. Removal Hearing Right to Appoint Committee. Where charges are filed before a city council against relator to remove him from the position of milk sample collector for cause, the fact that a joint committee is appointed to take the evidence and report findings to the council does not deprive him of a trial before council as a whole; if it meets in joint session after the report and findings of the committee are filed, and gives relator an opportunity for a hearing before it, of which he neglects to avail himself, prior to the adoption of a resolution finding him guilty of the charges in accordance with the findings, and ordering his removal. Chace v. City Council (R. I.) 1916C-1257. (Annotated.)
- 52. Proof of Misconduct Oral Testimony. While Shannon's Tenn. Code, § 6272, declares that in chancery suits testimony shall be taken in writing, oral testimony may, in a proceeding to oust ar unfaithful officer under Pub. Acts 1915, c. 11, declaring that proceedings shall be summary, be received, though the act declared that the ordinary chancery practice should be followed. State v. Howse (Tenn.) 1917C-1125.
- 53. While Tenn. Pub. Acts 1915, c. 11, providing for the ouster of public officers, declares that the suits shall be triable as equitable actions conducted in accordance with procedure of courts of chancery, the defendant officers are not entitled to jury trial because in ordinary chancery cases material issues of fact may be submitted to a jury as a matter of right; the statutes declaring that the proceeding should be

- summary. State v. Howse (Tenn.) 1917C-1125.
- 54. Right to Jury Trial. Const. 1870, art. 1, \$ 6, declares that the right of trial by jury shall remain inviolate. Tenn. Pub. Acts 1915, c. 11, providing for the ouster of unfaithful municipal officers, declares that the proceeding shall be summary. It is held, in view of long-established construction, that the guaranty of jury trial did not preclude summary proceedings which are forms of trial in which the established course of legal proceedings disregarded especially in the matter of trial by jury, and the legislature might validly provide that ouster proceedings should be summary, and so an officer against whom such proceedings were had is not entitled to jury trial. State v. Howse (Tenn.) 1917C-1125.
- 55. Acts During Previous Term of Office. In a proceeding under Tenn. Pub. Acts 1915, c. 11, to oust a municipal officer for misconduct in office, evidence of his acts of malfeasance committed in a term previous to the pending term is admissible, particularly where on his first election he promised to enforce the laws, while on the latter he was supported by the element not desiring law enforcement. State v. Howse (Tenn.) 1917C-1125.
- 56. Evidence—Acts Prior to Statute. In a proceeding to oust a municipal officer brought under Tenn. Pub. Acts 1915, c. 11, evidence of acts of malfeasance done during the officer's term. but before passage of the act, is admissible; the act making nothing illegal which was not illegal before. State v. Howse (Tenn.) 19170—1125.
- 57. Proceedings Against Several—Right to Severance. In a proceeding to oust more than one municipal officer the question of severance rests in the discretion of the trial court. State v. Howse (Tenn.) 1917C-1125.

# 8. DE FACTO OFFICERS.

- 58. The railroad, which has obtained the officer's appointment, has no right to regard him as a de facto officer, since it is incumbent upon it to see or know that he has qualified to act as an officer de jure before he is given employment on its trains. Cincinnati, etc. R. Co. v. Cundiff (Ky.) 1916C-513.
- 59. Status as De Facto Officer. A special railway police officer whose office has become vacant for failure to take the oath and execute his bond within the time prescribed by the constitution is not a "de facto officer." Cincinnati, etc. R. Co. v. Cundiff (Ky.) 1916C-513.
- 60. Responsibility of Railroad for Acts. In view of Ky. St. § 3755, providing that, if an official bond is not given and the oath of office taken within 30 days after

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notice of appointment to a public office, it shall be considered vacant, a railroad employing a special police officer is not in the position of a third person who may claim that the acts of a de facto officer are valid as to him, but is responsible for his claim of right, so that for his acts thereunder it is liable. Cincinnati, etc. R. Co. v. Cundiff (Ky.) 1916C-513.

#### Note.

Right of de jure officer to recover salary from de facto officer during latter's incumbency. 1916D-474.

#### 9. CIVIL LIABILITY GENERALLY.

- 61. A bank commissioner, in the exercise of discretionary duties, is not responsible to any one receiving an injury through a breach of his official duty, unless he acts maliciously and wilfully wrong or clearly abuses his discretion to the extent of acting unfaithfully and in bad faith. State v. American Surety Co. (Idaho) 1916E-209. (Annotated.)
- 62. State Banking Board—Personal Liability of Members. Where such board takes such an action and is justified by the facts in doing so, the motives of its members are immaterial, since no liability can be based upon the performance of a clear and positive public and official duty. Youmans v. Hanna (N. Dak.) 1917E-263.
- 63. Liability Payment Under Invalid Law. The state auditor of public accounts and the state treasurer cannot be compelled to account for and restore moneys paid out, before the institution of a taxpayer's suit, pursuant to appropriations made by the general assembly, since their duties in issuing and paying warrants are purely ministerial, and neither is required to decide the validity of a law apparently enacted for a governmental purpose. Fergus v. Brady (Ill.) 1918B—
- 64. Payment for Purpose not Governmental. A public officer having only ministerial duties may be held personally liable for the payment of an appropriation for a purpose which is not governmental in its nature. Fergus v. Brady (Ill.) 1918B-220.
- 65. Tax Sale Under Void Statute. An officer, who sells property for taxes acting under a void statute, is not liable to the purchaser of such property at the tax sale, since the rule of caveat emptor applies. Fields v. Altman (Ala.) 1918B-189.

(Annotated.)

66. Recovery by De Jure from De Facto Officer. Though a de facto officer may retain the salary of the office as against all the world, including the municipality paying it, except the de jure officer, the latter may recover from the former fees collected by him while he occupied the office to which the latter was entitled. Jones v. Dusman (Pa.) 1916D-472. (Annotated.)

#### Notes.

Personal liability of public officer for injuries caused by defective condition of street or highway. 1917D-939.

Personal liability of officer for sale of property for taxes under void statute. 1918B-190.

#### 10. OFFICIAL BONDS.

## a. In General.

- 67. State Fund for Bonding—Validity. Chapter 62, Laws N. Dak. 1915, is not violative of section 11 of the state constitution, which requires that all laws of a general nature shall have a uniform operation. State v. Taylor (N. Dak.) 1918A—583.

  (Annotated.)
- 68. Said chapter 62 Laws N. Dak. 1915 does not contravene section 186 of the constitution, which provides that no money shall be paid out of the state treasury except upon an appropriation by law, and on warrant drawn by the proper officers. State v. Taylor (N. Dak.) 1918A-583.

(Annotated.)

(Annotated.)

(Annotated.)

- 69. Said chapter 62, Laws N. Dak. 1915, does not contravene sections 175, 176, or 179 of the state constitution relating to taxation and the expenditure of moneys raised by taxation. State v. Taylor (N. Dak.) 1918A-583. (Annotated.)
- 70. Said chapter 62 Laws N. Dak. 1915, does not require taxes to be levied and collected for other than public purposes, or authorize the taking of private property for private use without compensation. State v. Taylor (N. Dak.) 1918A-583.
- 71. The establishment and operation of a fund for the bonding of municipal officers and the collection of premiums from the various municipalities whose officers are bonded for the purpose of creating a fund to secure the payment of losses which may result by reason of the nonfessance, misfeasance, or defalcation of such public officers, is a valid exercise of the police power of the state. State v. Taylor (N.
- 72. Chapter 62, Laws N. Dak. 1915, is not invalid on account of delegating legislative power to the commissioner of insurance and state auditing board. State v. Taylor (N. Dak.) 1918A-583.

Dak.) 1918A-583.

- 73. Chapter 62 of the Laws of N. Dak. 1915, establishing a state bonding fund for the purpose of furnishing official bonds for county, city, village, school district, and township officers is not unconstitutional, as conferring judicial powers on the state examiner and commissioner of insurance. State v. Taylor (N. Dak.) 1918A-583. (Annotated.)
- 74. Said chapter 62 Laws N. Dak. 1915, does not violate any express or implied constitutional guaranty of the right of

local self-government. State v. Taylor (N. Dak.) 1918A-583. (Annotated.)

## Note.

Validity of statute establishing fund for bonding of public officers. 1918A-603.

## b. Actions on Official Bonds.

75. Action on Bond of Examiner—Conditions Precedent. In an action by an injured party against the surety on the bond of the bank commissioner executed under section 191, Idaho Rev. Codes, for failure of said commissioner to faithfully perform his duty, it is not necessary to first proceed and have the damages of the injured party adjudged against the commissioner. State v. American Surety Co. (Idaho) 1916E-209.

### PUBLIC PARKS.

See Parks and Public Squares.

## PUBLIC POLICY.

See Assignments, 18.

Solicited contract with client, see Attorneys, 22.

Division of fee with layman, see Attorneys, 23.

Formulation of public policy, see Constitutional Law, 10.

Agreements contrary to, see Contracts, 33-40.

Covenant void as against, see Deeds, 31.
Policy on bawdy house, validity, see Fire
Insurance, 1.

Prohibition in cities of first class, see Intoxicating Liquors, 4.

Surrender by monk of property rights, see Religious Societies, 3.

- 1. Where a public right is to be disposed of by government officers or agents, public policy forbids that one competing applicant shall contract for the extinguishment of another's competition, and invalidates all contracts made for that purpose. Kuhn v. Buhl (Pa.) 1917D-415.
- 2. The legislature having, by Ala. Code 1907, § 3867, providing that property already devoted to public use shall not be taken for a different character of use unless there is an actual necessity therefor, declared the public policy of the state regarding the condemnation of land already devoted to public use, courts cannot, in determining the right of a telegraph company to condemn an easement along a railroad right of way, be influenced by consideration of the public interest. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696.
- 3. The public welfare is safeguarded not only by constitutions, statutes and judicial decisions, but by sound and substantial public policies underlying all of them. Pittsburgh, etc. R. Co. v. Kinney (Ohio) 1918B-286.

#### PUBLIC RECORDS.

See Records.

#### PUBLIC SERVICE.

Meaning, see Taxation, 2.

# PUBLIC SERVICE COMMISSIONS.

Meaning, see Taxation, 2.

Fixing rates of carriers, see Carriers, 4-14. Regulation of electric companies, see Electricity, 1, 25-31.

Delegation of power to, see Eminent Domain, 57.

Proceedings for condemnation before, see Eminent Domain, 121-130.

Regulation of gas, see Gas and Gas Companies, 5-7.

Control of commission, see Telegraphs and Telephones, 17-21.

- 1. The object of the act creating the public utilities commission is to bring under the public control for the common good property applied to a public use, in which the public has an interest, and the owner of such property must submit to such control to the extent of the public interest so long as the public use is maintained. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (Ill.) 1917B-495.

  (Annotated.)
- 2. While it is not essential to a public use that its benefits should be received by the whole public, or within a large part of it, they must not be confined to specified privileged persons, but must be extended to all persons in common upon the same terms, it being immaterial how few avail themselves of the rights so extended. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (Ill.) 1917B-495.

(Annotated.)

- 3. "Public utility," aside from its statutory definition, implies a public use, carrying with it the duty to serve the public and treat all persons alike without discrimination, and it precludes the idea of service which is private in its nature, whether for the benefit and advantage of a few or of many. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (Ill.) 1917B-495. (Annotated.)
- 4. The words "public use" mean of or belonging to the people at large, open to all the people to the extent that its capacity may admit of the public use. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (III.) 1917B-495. (Annotated.)
- 5. Reasonableness of Order Judicial Review. The question whether an order of the state railroad and warehouse commission is reasonable is a judicial question. State v. Great Northern R. Co. (Minn.) 1917B-1201.
- 6. Under Minn. statute the district court on appeal from an order of the com-

mission does not put himself in the place of the commission and substitute its findings for those of the commission, nor does it set aside such an order on its own conception of its wisdom. The court reviews the order only so far as to determine whether or not it is unlawful and unreasonable. State v. Great Northern R. Co. (Minn.) 1917B-1201.

- 7. Review of Public Service Commission. In the consideration of a petition in error filed in this court to reverse, vacate or modify an order of the public utilities commission on the ground that it is unlawful or unreasonable, the court will examine the entire record to determine whether a finding of facts made by the commission is so involved with and dependent on questions of law as to be in effect a decision of the latter. Hocking Valley R. Co. v. Public Utilities Commission (Ohio) 1917B-1154.
- 8. The Ill. Public Utilities Act is not void because the right to a supersedeas on appeal from an order of the commission is restricted, for while the constitution preserves the right of an appeal or writ of error in all civil cases, the right to have the same made a supersedeas is not guaranteed. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.

(Annotated.)

9. The Ill. Public Utilities Act, declaring that the findings and conclusions of the commission on questions of fact shall be taken as prima facie true on appeal, and that no rule, regulation, or order of the commission shall be set aside, unless it appears that the findings of the commission were against the weight of the evidence, does not invalidate the act on the theory that it deprives public utilities of their property without due process of law; only a rebuttable presumption being created. State Public Utilities Com. v. Chicago etc. R. Co. (Ill.) 1917C-50.

(Annotated.)

- 10. In reviewing on certiorari an order of a public service commission for the extension of gas mains, the court has no power to pass on the wisdom or expediency of the order or of the weight of the evidence on which it is based but can annul it only if it is an unlawful, arbitrary or capricious exercise of power. People v. McCall (N. Y.) 1916E-1042.
- 11. Review of Findings. The findings of the public service commission, having the force and effect of reports of special masters in courts of equity, are conclusive in the supreme court on appeal. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841.
- 12. Judicial Power After Condemnation by Commission. The courts will enforce and protect the rights of the landowner and of the public service corporation con-

- demning land for placing lighting wires, etc., under Acts Vt. 1908, No. 116, § 13, after the public service commission has found in favor of condemnor and awarded compensation. George v. Consolidated Lighting Co. (Vt.) 1916C-416.
- 13. Vt. Acts 1908, No. 116, § 13, providing that if a public service corporation, such as a lighting company, cannot agree with the landowner as to the necessity of taking and for public purposes or as to compensation, it may petition the public service commission, which shall, upon notice, determine the questions of the necessity and compensation and render judgment, is applicable in proceedings by a lighting company, the charter of which as amended by Acts 1902, No. 202, § 3, provided a constitutional method for the exercise of the power of eminent domain granted thereby. George v. Consolidated Lighting Co. (Vt.) 1916C-416.

(Annotated.)

- 14. Judicial Review of Order of Commission—Power of Court of Equity. A court of chancery, not acting as an appellate tribunal, will not interfere with the proceedings and determinations of inferior boards or tribunals of special jurisdiction, while acting within their powers or exercising a discretion conferred upon them by the legislature, except in special cases presenting some acknowledged and well-defined ground of equity jurisdiction. Sayers v. Montpelier etc. R. Co. (Vt.) 1918B-1050.
- 15. The primary interference of the courts with the administrative functions of a public service commission, being incompatible with the proper exercise of governmental powers, although such commissions are exercising special and limited powers, as to which nothing will be presumed in favor of their jurisdiction, within the proper limits of the authority conferred upon them by the legislature, their jurisdiction is exclusive, and can be reviewed only in the manner provided by the statute. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.
- 16. The courts have power to prevent an abuse of discretion by a public service commission, and to require that its powers be exercised according to law and in a manner not to injure property rights unjustly. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.
- 17. Whether the orders of a public service commission deprive a party of a statutory right, whether he has had a fair and adequate hearing or whether, for any reason, the orders are contrary to law, are all justifiable questions, and if they arise in circumstances calling for equitable relief, a court of chancery will afford a remedy. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.

- 18. Regulation of Public Utilities. Power to regulate public utilities presupposes an intelligent regulation, and necessarily carries with it the power to employ the means necessary and proper for such intelligent regulation. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 19. Delegation of Legislative Powers. The legislature may not delegate its purely legislative power to a commission; but, having laid down by law the general rules of action under which a commission may proceed, it may require of that commission the application of such rules to particular situations and conditions, and authorize an investigation of facts by the commission, with a view to making orders in a particular matter within the rules laid down by such law. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 20. Extension of Public Utility—Power of Public Service Commission. The legislature has ample power to give the public utilities commission authority to refuse to give a certificate of convenience and necessity to a public utility, where it seeks to duplicate a plant or system that is amply sufficient to serve properly the inhabitants of a community. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

  (Annotated.)
- 21. Necessity of Regulation. Experience and history clearly show that public utility corporations cannot be safely intrusted to properly serve the public until they are regulated and placed under public control. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 22. Under the provisions of said act, unregulated competition is not needed to protect the public against unreasonable rates or unsatisfactory service; and there can now be no justification for unregulated competition or a duplication of utility plants under the pretense of preventing monopoly. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
  - 23. Held, that the power of regulation as provided by said act is not required to be specifically conferred by the provisions of the state constitution, and that there is no inhibition in the constitution upon the legislature prohibiting the enactment of such a law. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
  - 24. Power to Fix Rates. Under the provisions of said act, the commission has power absolutely to fix the rates, and it is unlawful for the utility to charge more or less than the rates so fixed. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
  - 25. Restricting Competition Between Public Service Companies. Formerly competition was supposed to be the proper means of protecting the public and promoting the general welfare in respect to service of public utility corporations, but

- experience has demonstrated that public convenience and public needs do not require the construction and maintenance of numerous instrumentalities in the same locality, but rather the construction and maintenance only of those necessary to meet the public necessities, when such utilities are properly regulated by law. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 26. Idaho public utilities act provides that competition between public utility corporations of the classes specified shall be allowed only where public convenience and necessity demand or require it. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 27. Section 18, art. 11, of the Idaho state constitution, prohibits combinations for the purpose of fixing prices or regulating production, and requires the legislature to pass annropriate laws to enforce the provisions of that section, and said public utilities act is justified by the provisions of said section, since its ultimate effect will be to prevent unreasonable rates and combinations by public utilities. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.
- 28. Regulation of Rates—Validity. The regulation of rates for the purpose of promoting the public health, comfort, safety, and welfare is an exercise of the police power of the sovereign. Woodburn v. Public Service Commission (Ore.) 1917E-996.
- 29. Liability to Regulation. When an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good. Woodburn v. Public Service Commission (Ore) 1917E-996.
- 30. Waiver of Nonjoinder of Receiver. Under Mo. Laws 1913, p. 640, § 110, providing that no public utility shall urge grounds not set forth in its application for rehearing before the public service commission, defendant railway company waives the point that its receiver was not joined in proceedings before the commission by not raising the point on rehearing. State v. Atkinson (Mo.) 1917E-987.
- 31. Review of Order of Commission—Objection not Made at Hearing. An objection that defendant railway company's receiver was not brought before the commission by proper notice is not saved where raised for the first time on a motion for rehearing in the circuit court. State v. Atkinson (Mo.) 1917E-987.

#### Notes.

Validity of statute conferring on public service commission or other body jurisdiction of eminent domain proceedings. 1916C-420.

Review by public service commission of municipal regulation of public service corporation. 1916E-1083,

Validity of statute conferring on public service commission power to determine necessity for construction or extension of public utility. 1916E-299.

Power of public service commission to make test order. 1917E-794.

#### PUBLIC SERVICE CORPORATIONS.

See Carriers of Goods; Carriers of Live-stock; Carriers of Passengers; Elec-tricity; Gas; Irrigation; Public Service Commission; Railroads; Street Railways; Telegraphs and Telephones; Waterworks and Water Companies.

# PUBLIC SQUARES.

See Parks and Public Squares.

#### PUBLIC TRIAL.

Right of accused, see Criminal Law, 29.

## PUBLIC USE.

Defined, see Public Service Commission, 4. Defined, see Telegraphs and Telephones, 1.

#### PUBLIC UTILITIES ACT.

Sufficiency of title, see Statutes, 10.

#### PUBLIC UTILITIES COMMISSION.

See Public Service Commissions. Control of streets and highways, see Streets and Highways, 48, 49.

#### PUBLIC UTILITY.

Taxicab company, see Carriers of Passengers, 84.

Power to regulate, see Constitutional Law, 8, 40, 41.

Operation of, by cities, see Municipal Corporations, 37-43.

Defined, see Telegraphs and Telephones, 1.

## PUBLIC WAYS.

See Streets and Highways.

#### PUBLIC WORKS.

Employment of aliens, see Aliens, 8-10.

#### PUBLISH.

Meaning, see Trees and Timber, 2.

PUIS DARREIN CONTINUANCE. See Pleading, 37.

#### PULLMAN CARS.

See Railroads, 18.

#### PUNISHMENT.

See Sentence and Punishment. Of convicts, see Convicts, 3.

#### PUNITIVE DAMAGES.

See Damages, 1, 2; False Imprisonment, 10; Libel and Slander, 8, 9, 162; Malicious Prosecution, 32, 34, 35.

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- 1. Right to Maintain Suit.
- 2. Actions.
  - a. Process.
  - b. Limitation of Actions.
  - c. Pleading.
  - d. Evidence.
  - e. Cross Bill, Affirmative Relief.

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## RIGHT TO MAINTAIN SUIT.

1. Title to Property. Where defendants are in adverse possession of certain standing timber claimed by complainant, complainant's right to the timber should be determined in an action at law. W. T. Smith Lumber Co. v. Jernigan (Ala.) 1916C-654.

#### 2. ACTION.

#### a. Process.

2. Jurisdiction — Constructive Service. A court of equity has power to proceed in rem in a suit to quiet title or remove a cloud on title to land in this state, upon the proper publication of an order against a nonresident defendant. Myakka Co. v. Edwards (Fla.) 1917B-201.

#### b. Limitation of Actions.

3. Application of Statute of Limitations. An action to have a judgment and sale and other incidental proceedings ad-judged void for want of jurisdiction over the subject-matter, or to impeach such sale for constructive fraud in the purchase by a trustee of the property sold, is subject to the ten-year limitation and one year's extension, under N. Y. Code Civ. Proc. §§ 388, 396, respectively, providing that an action, the limitation of which is not specially prescribed, must be commenced within ten years, and that, if a person entitled to maintain an action is, at the time of accrual of the right, within the age of twenty-one years, the time of disability is not a part of the time limited, except that the time so limited cannot be extended by such disability more than one year after the disability ceases. Ford v. Clendenin (N. Y.) 1917A-658.

(Annotated.)

4. An owner of land in possession thereof may bring suit at any time to have apparent but unreal incumbrances cleared without his rights being barred by the statute of limitations; but a person claiming to own real property in the possession of another must assert his right within the time prescribed by statute. Ford v. Clendenin (N. Y.) 1917A-658.

(Annotated.)

Note.

Running of statute of limitations against action to quiet title. 1917A-661.

## c. Pleading.

5. Dismissal Proper. Where in a bill to remove a cloud upon the title to land there is no allegation that the complainants were in the possession of the land when the bill was filed, and when the allegations that the lands "have been for several years and are now uncultivated and unimproved" is denied by the answer, and the case is finally heard on bill, answer and replication, there is no error committed in dismissing the bill. Mayfield v. Wernicke Chemical Co. (Fla.) 1917A-1193.

### d. Evidence.

- 6. Admission in Answer. Under Ala. Code 1907, § 5443 et seq., allowing persons in possession of and claiming title to land to file a bill to quiet title, an answer admitting peaceable possession of the land at the filing of the bill, and that there were no pending suits to test the validity of the title, makes out a prima facie case, entitling complainant to the relief sought. Vidmer v. Lloyd (Ala.) 1917A-576.
- 7. Submission of Controversy—Presumption as to Facts not Stipulated. In an action to quiet title against a sale by the guardian of an insane person, where all the facts were stipulated, it will be presumed that the proceedings which were not contained in the stipulation were lawful and regular, even if ordinarily, the burden would be upon the purchaser to establish such regularity. Richelson v. Mariette (S. Dak.) 1917A-883.
- 8. Burden of Proof—Effect of Admission in Answer. Where a paragraph of the answer of the bill to quiet title made out a prima facie case for complainant, the burden is on the defendant to establish his claim to the land under another paragraph of the answer. Vidmer v. Lloyd (Ala.) 1917A-576.
- 9. Sufficiency of Evidence. In a suit to establish ownership to a tract of land claimed to be embraced in a patent and to have been conveyed to plaintiff by the devisees under the patentee's will, the evidence is held to sustain the jury's finding in favor of the plaintiff as to certain tracts. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.

## e. Cross Bill, Affirmative Relief.

10. In a suit to quiet title, though defendant filed a cross complaint asking that his title be adjudged good, the suit may be dismissed under Cal. Code Civ. Proc. § 583, for plaintiff's failure to bring it to trial within five years after answer, for the filing of the cross complaint does not make defendant an actor, as it gives defendant no greater rights than he would have had under an answer denying plaintiff's title, but merely precludes plaintiff

from dismissing without his consent. Larkin v. Superior Court (Cal.) 1917D-670. (Annotated.)

a suit to quiet title, judgment in defendant's favor protects him against any of plaintiff's claims, so a cross complaint praying that title be adjudged in defendant is effective merely to prevent plaintiff from dismissing it before trial without the consent of defendant. Larkin v. Superior Court (Cal.) 1917D-670. (Annotated.)

## Note.

Right to affirmative relief on cross bill in suit to quiet title. 1917D-674.

# f. Judgment.

- 12. What Constitutes Collateral Attack. An action to quiet title, brought by one who had been insane but had been restored to reason, against a purchaser at a sale by the plaintiff's guardian for the purpose of annulling the guardian's sale, is a direct and not a collateral attack upon the order confirming the sale. Richelson v. Mariette (S. Dak.) 1917A-83.
- 13. Under such statute, a judgment, in a suit to quiet title in the federal court putting the title to and ownership of land in issue between plaintiff's vendors and the claimants of the surface under whom defendants herein claimed mineral rights by a purchase pending that suit, conclusive between the parties, and determining that the claimants of the surface were not the owners, and forbidding them to claim ownership, and enjoining them from using or trespassing upon the land, concludes their right to hold adversely, and is a break in the continuity, conclusive against the purchaser. Tennis Coal Co. v. Sackett (Ky.) 1917E-629. (Annotated.)

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QUITCLAIM DEED.

See Deeds.

QUORUM.

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QUOTIENT VERDICT.

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# QUO WARRANTO.

1. Section 679 of the code abolishes the writ of quo warranto and substitutes therefor a civil action governed by the same rules of procedure as other actions. Presumptions as rules of evidence may be invoked against the state in such an action as readily as against an individual in or-

(Annotated.)

dinary civil actions. State v. Harper (Kan.) 1917B-464. (Annotated.)

- 2. Burden of Proof. In a proceeding by the state in courts of general jurisdiction to inquire by what authority a municipality exercises governmental functions the doctrine that the burden of proof is upon the defendant and that the state is not required to show anything rests upon the common-law theory as to the nature and character of information in quo warranto and has no application in this state. State v. Harper (Kan.) 1917B-464.
- 3. Motion for Judgment on Pleadings-Conclusiveness of Return. In quo warranto proceedings, the facts in the return, where facts are in dispute as between the petition and the return, must, on general demurrer and motion for judgment on the pleadings, be taken as the facts in the case. State v. Merchants Exchange (Mo.) 1917E-871.
- 4. Demurrer—Effect as Admission. demurrer to an information in quo warranto proceeding admits all the allegations contained in the information, and it is the duty of the appellate court in reviewing the case to assume that the allegations are true as stated. State Senatobia Blank-Book and Stationery Co. (Miss.) 1918B-
- 5. Violation of Charter by Corporation. Quo warranto is the proper remedy for the attorney general of the state to pursue, where a corporation practiced fraud in obtaining its charter and the acts of the alleged corporation under the charter have been all in violation of law. State v. Senatobia Blank-Book and Stationery Co. (Miss.) 1918B-953.
- 6. Mode of Entitling Papers. Under Mo. Rev. St. 1909, §§ 2631, 2632, providing that in case any person shall usurp any office the attorney general shall exhibit to the court an information in the nature of a quo warranto at the relation of any person desiring to prosecute the same, etc., in original informations in the nature of quo warranto it is the better practice to style the complaining party as relator and the party called to answer respondent; for the word "relator" is defined as an informer, a person in whose behalf certain writs are issued, such as informations in the nature of quo warranto, while the word "respondent" is defined as referring to a party answering. State v. Duncan (Mo.) 1916D-1.

## Note.

Burden of proof in quo warranto proceeding or action in nature thereof. 1917B-467.

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# 1. CONSTRUCTION OF CHARTER.

1. Implied Powers. The omission of a particular power from those enumerated in the charter of a railroad is a prohibition against its exercise, unless there is an imperative implication to the contrary. Connellsville, etc. R. Co. v. Markleton Hotel Co. (Pa.) 1916E-1213.

#### 2. RAILROAD COMMISSIONS.

- u. Nature, Powers and Proceedings.
- 2. Power to Regulate Rates—Validity of Grant. The Ill. Public Utilities Act, providing for the hearing of rate cases by the public utilities commission, is not invalid as depriving public utilities of their property without due process of law; the persons affected by the hearings being given notice and opportunity to be heard. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50. (Annotated.)
- 3. The state may regulate the fares and rates which may be charged by railroads and other carriers, and such power may be lawfully delegated by the legislature to an administrative commission, as the public utilities commission. State Public Utilities Com. v. Chicago, etc. R. Co. (III.) 1917C-50. (Annotated.)
- 4. Section 86 declares the Ill. act shall not take effect until January 1, 1914, while section 72 provides that when complaint has been made to the commission concerning any rate, and the commissioners found after hearing that a public utility has charged an excessive amount, the commission may order reparation to be made. By schedules filed December 31, 1913, the defendant street railway and interurban railway companies increased the rates which were charged on July 1st of that year. These rates were put into effect December 31, 1913, and filed subsequently with the

- public utilities commission. It is held that on complaint against the rates the commission could not, pending determination of the question, prohibit defendant from charging rates in excess of those charged July 1, 1913, for the statute did not intend public utilities to continue such rates and a remedy for unjust rates was rurnished. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.
- 5. Regulatory Power in General. The franchises, rights and privileges of a rail-road company are granted because of the public nature of the business carried on by it; the resulting benefits to the public constitute the consideration of the grant, and the company while exercising such rights and franchises is subject as to its state business to state regulation, either by direct statutory provision or by an administrative body authorized to act. Hocking Vallev R. Co. v. Public Utilities Commission (Ohio) 1917B-1154.
- 6. Requiring Particular Class of Service. An order of the public utilities commission requiring a railroad company to continue an interurban service on a portion of its road, under the circumstances of this case, is not unlawful or unreasonable and is not a denial of due process of law or the equal protection of the laws or a taking of property without compensation. Hocking Valley R. Co. v. Public Utilities Commission (Ohio) 1917B-1154.

(Annotated.)

7. Compelling Continuance of Service. In a proceeding before the public utilities commission to compel a railroad company to continue, on a portion of its road, an interurban service which it has voluntarily established and maintained for many years, during which the personal and business relations of the people of the communities served, relying on the continuance of such service, have become adjusted thereto, the burden of showing a state of facts which justify the discontinuance of the service is on the company. Hocking Valley R. Co. v. Public Utilities Commission (Ohio) 1917B-1154.

(Annotated.)

8. Regulation of Railroad by Commission—Extent of Train Service. In determining whether such relief shall be granted, the earnings and cost of operation of branch line service must be determined as near as possible, and where it plainly appears that the cost of operating the branch line with separate daily passenger service installed greatly exceeds the railroad's earnings and revenues derivable from the operation of such branch line, the carrier is prima facie within the statutory exception, and prima facie is entitled to be permitted to operate a daily mixed passenger and freight train. In re-Minneapolis, etc. R. Co. (N. Dak.) 1917B-1205. (Annotated.)

- 9. The statute granting such relief has particular application to branch lines, and the revenues from service and cost of branch line service only must be considered. The petitioner cannot be compelled to operate a separate daily passenger service on this branch line at a great loss, and be compelled to make up such loss from its main line revenues. The intent of the statute is that the revenues from branch lines shall justify a daily passenger service independent of whether the railroad as a whole within the state is returning a fair dividend on its investment. In re Minneapolis, etc. R. Co. (N. Dak.) 1917B-1205. (Annotated.)
- 10. That the right of the railroad to apply to the commission to be relieved from maintaining a separate daily passenger service (by installation of a daily mixed passenger and freight service on branch lines) is permissive in language, and not a positive direction to the board, and vests in it a discretion, does not negative a right of appeal. In re Minneapolis, etc. R. Co. (N. Dak.) 1917B-1205.
- 11. The proof discloses that the G. N. Crosby-Berthold line furnishes ample passenger service for four-fifths of the length of this Soo branch line. A separate passenger service should not be forced for the convenience alone of the town of Ambrose and vicinity, when to do so will cause an additional annual expenditure of \$14,000, added to a loss already sustained under mixed train service, the revenues being inadequate to meet even the expenses of a mixed train service. In re Minneapolis, etc. R. Co. (N. Dak.) 1917B-1205.
- (Annotated.) 12. Order Requiring Sunday Train Service Validity. The order of the commission reviewed in this case is an order compelling the operation of a Sunday local day passenger train. The trial court declined to pass upon the question of pecuniary loss or profit. The order of the commission being by statute prima facie reasonable, and the burden being on the appellant upon all issues raised by the appeal, we are obliged to assume that the order did not impose a financial burden, but, the compulsion of Sunday labor and of the operation of Sunday local passenger trains is contrary to the legislative policy of the state, and while under some circumstances the operation of Sunday trains may be made compulsory, under the facts of this case the judgment of the trial court holding this order to be unreason-able and void must be sustained. State v. Great Northern R. Co. (Minn.) 1917B-1201. (Annotated.)
- 13. Pecuniary loss or profit to the carrier is important, but not the only criterion. The question of reasonableness is to be determined by a consideration of the interests both of the carrier and of the

- public. State v. Great Northern R. Co. (Minn.) 1917B-1201.
- 14. Jurisdiction Failure to Exercise Consistently. The jurisdiction of the public utilities commission of the District of Columbia over a public utility under the act of March 4, 1913 (37 Stat. at L. 938, c. 150), § 8, cannot be defeated because such jurisdiction has net been assumed over other similar concerns, where the excuse offered by the commission is that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act, and there is nothing to impeach the good faith of the commissions, or to give the concern included just cause for complaint. Terminal Taxicab Co. v. Kutz (U. S.) 1916D—765.
- 15. Power of Commission Regulating Running Time of Trains. An order of the public service commission, forbidding a railroad company to delay local trains to permit the passage of delayed through trains, is unreasonable, where the evidence shows that the local trains are never delayed more than 10 minutes and, unless they are so delayed, the through trains are delayed more than half an hour. Northern Central R. Co. v. Laird (Md.) 1916D—1030. (Annotated.)
- 16. Regulation of Railroad Requiring Sleeping Car Service. Under Laws Mo. 1913, p. 556, empowering the public service commission to require equipment and service for the comfort and convenience of passenger transportation, the commission may require a railroad to operate sleeping cars. State v. Atkinson (Mo.) 1917E-987. (Annotated.)
- 17. Under Laws Mo. 1913, p. 556, authorizing the public service commission to require service for the comfort and convenience of passengers, testimony that defendant railway company operated its sleeping car service for thirty years through territory increasing in population sustains an order requiring its restoration for a year, where defendant did not disclose its entire earnings from the abandoned service. State v. Atkinson (Mo.) 1917E-987. (Annotated.)
- 18. An order of the public service commission requiring Pullman car service on a branch line is not necessarily unreasonable because entailing an operating loss on the branch line when considered alone, and not as a feeder to main line traffic. State v. Atkinson (Mo.) 1917E-987.

(Annotated.)

19. Effect of Order—Liability of Corporation Obeying Order. Under Vt. P. S. 4544, making it the duty of the public service commission to determine by whom its orders shall be executed, the defendant railroad, in carrying out the commission's plans for the elimination of grade cross-

ings on its tracks and in constituting farm crossings for the use of plaintiff, was acting as the agent selected by the commission; and if the order was a valid exercise of the powers of the commission, it relieves the defendant from liability. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.

- 20. Jurisdiction of Commission-Abolition of Grade Crossing—Incidental Powers. Under Vt. P. S. 4611, giving the public service commission jurisdiction in all matters respecting highway grade crossings, and P. S. 4544, as amended by Acts 1908, No. 108, providing that on petition of the selectmen of a town, within which a public highway crosses a railroad, or the general manager or attorney of such railroad alleging that public safety requires an alteration in such crossing, and praying that the same may be ordered, the commission is required to determine what changes if any, shall be made and by whom, the primary object of the statute being to provide an effectual means to secure the elimination of dangerous highway crossings, the incidental power to change the location of an existing highway is exressly conferred upon the commission, but is to be exercised as a mere incident of the real purpose of the statute. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050. (Annotated.)
- 21. The authority of the public service commission to change the location of highways goes no further than to order such changes as are necessary and fairly incident to the purpose of adapting railroads and public highways to each other in such a manner as best to promote the safety and convenience of the traveling public. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050. (Annotated.)
- 22. The power of the public service commission to change the location of highways, by necessary implication, carries with it the power to discontinue the portion that occupied the old location and to close the crossing to public travel. Savers v. Montpelier, etc. R. Co. (Vt.) 1918B—1050. (Annotated.)
- 23. When the change in the location of a grade crossing deprives one of the benefits of a public highway, the public service commission has the right to order a farm crossing for the benefit of such individual, to the end that their power in that regard may be effectual, since whatever is reasonably necessary in order to abolish grade crossings, or fairly may be regarded as incidental thereto, is within the jurisdiction of the commission. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.

  (Annotated.)

24. Vt. P. S. 4549, as amended by Acts 1908, No. 108, § 3, expressly confers full authority upon the public service commission to condemn lands and award damages

in a proceeding for the abolition of a grade crossing. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050. (Annotated.)

25. Powers of Public Service Commission. In amending the statute with a view to conferring full authority upon the public service commission to condemn lands and award damages, proceedings for the abolition of grade crossings, it was not necessary to change the section relating to general jurisdiction, since the provision that the commission shall determine what alterations, changes, or removals shall be made is broad enough to cover the location of new highways. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.

(Annotated.)

- 26. Requiring Station at Particular Place—Reasonableness of Order. In proceedings for injunction against enforcement of railroad commission's orders requiring erection of station, it is held that there was evidence to sustain chancellor's decree disapproving orders of the commission. Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.) 1918B-828. (Annotated.)
- Regulation of Railroad Rates ---Power to Require Reduction Pending Appeal. Ill. Public Utilities Act (Hurd's Rev. St. 1915-16, c. 111a), § 32, provides that all rates and charges made, demanded, or received by any public utility, or by any two or more public utilities, shall be just and reasonable, while section 33 provides that every public utility to file with the public utilities commission and keep open to public inspection, schedules showing all rates, charges and classifications which are in force for any service performed by it or them, and that such rates, charges, and classifications shall not without consent of the commission exceed those in effect on July 1, 1913, but that the commission may approve or fix rates and charges in excess or less than those shown by the schedules. Section 35 declares that no service shall be rendered until such schedules are filed, save in case of emergency, and section 36, that no change shall be made by any public utility, in any rate mentioned in such schedule, unless the commission so orders, and that no change shall be made without good cause shown and a finding that an increase is justified, while section 37 requires public utilities to make their charges according to the schedules unless altered. Sections 68 and 69 provide for appeals from orders of the commission. It is held that the commission cannot, where rates filed with it are attacked, require a public utility to charge a less rate, pending its determination, whether the rates attacked are unjust and unreason-Public Utilities Com. able. State Chicago, etc. R. Co. (Ill.) 1917C-50.
- 28. Regulation of Rates—Determination of Reasonableness. Whether rates estab-

lished by street or interurban railway companies before the public utilities act went into effect were just and reasonable is a question for determination of the commission. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.

- 29. Effect of Maximum Fare Law. The III. Maximum Fare Law of 1907 (Laws 1907-08, p. 476), fixing the reasonable miximum passenger fare of railroad companies at two cents per mile, enacted under Const. art. 11, § 12, authorizing an enactment of laws establishing reasonable maximum rates or charges for transportation by railroad companies which was expressly saved from repeal by public utilities act, § 41, does not deprive the public utilities commission of power to fix a less passenger rate for a company organized under the railroad act, the constitution and the maximum fare law merely prescribing the greatest rate which might be charged. State Public Utilities Com. v. Chicago, etc. B. Co. (III.) 1917C-50.
- 30. Review of Findings. In proceedings before the public service commission by a telegraph company to compel a traction company to remove its high-tension power line from dangerous proximity to the telegraph company's wires, the findings of the commission, that both parties were corporations subject to its supervision, under Vt. Acts 1908, No. 116, and that their lines were used in service to the public in and about their business carried on in the state, are determinations of mixed questions of law and fact, and conclusive on appeal as showing that the traction company fell within the provisions of section 3 of the act. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841.
- 31. Requiring Separation of Electric Wires. Where a traction company constructed its high-tension power line on its right of way in dangérous proximity to the wires of a telegraph company, though the telegraph company's lines needed some repair by way of new poles, the order of the public service commission, made on petition of the telegraph company remove its high-tension power line to a minimum distance of 30 feet, is not an unreasonable exercise of the commission's authority. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841. (Annotated.)
- 32. Vt. Acts 1908, No. 116, § 9, giving the public service commission jurisdiction to enter judgment and make orders or decrees in all matters respecting the manner of operating and conducting any business, subject to its supervision under the act, so as to be reasonable and expedient and to promote the safety, convenience, and accommodation of the public, and respecting the sufficiency and maintenance of proper systems, plants, conduits, appliances, wires, and exchanges, and, when the public

- safety and welfare require, respecting the location of such wires or any portion thereof underground, confers jurisdiction on the commission to hear and determine proceedings by a telegraph company against a traction company to compel removal of power wires from dangerous proximity to telegraph wires. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841. (Annotated.)
- 33. In proceedings before the public service commission by a telegraph company to compel a traction company to remove its power wires from dangerous proximity to telegraph wires, where the traction company sought to base any claim upon the intention of the legislature to take away by its charter the private rights of individuals or the telegraph company, another public service corporation, the burden is with the traction company to show that such an intention appeared by express words or necessary implication in its charter. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841.

(Annotated.)

34. Where the public service commission determined the necessity of an elimination of the danger in the close proximity of a traction company's high-tension power wires and a telegraph company's wires, it is within the province of the commission to determine the manner in which the elimination could best be accomplished, with a view to the operation of both lines and to the public safety. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841.

(Annotated.)

35. An order of the public service commission, made on petition of a telegraph company, requiring a traction company, owning its right of way, to remove its high-tension power wires from dangerous proximity to telegraph wires, does not exceed the constitutional powers of the commission as being confiscatory of the trac-tion company's property and a taking without "due process of law," in violation of Federal Const. Amends. 5 and 14; private ownership of its right of way not giving the traction company the right to erect its high-tension line thereon without regard to the rule restricting every man against using his property to the prejudice of others. Western Union Tel. Co. v. Burlington Traction Co. (Vt.) 1918B-841. (Annotated.) Notes.

Power of public service commission to regulate running time of trains. 1916D-1034.

Validity of order of public service commission requiring running of Sunday train. 1917B-1205.

Validity of regulation of extent of train service to be furnished by railroad. 1917B-1217.

Validity of statute conferring on commission power to fix rates for public service corporations, 1917C-57.

- b. Collateral Attack on Proceedings.
- 36. Collateral Attack on Order. Within certain limitations, one may attack an order of the public service commission abolishing a grade crossing, collaterally, notwithstanding he was a party and could have had an appeal. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.

#### c. Review of Acts.

- 37. Review of Statute Creating. A court authorized to hear an appeal from a public service commissioner "upon any question involving the jurisdiction of the commission" cannot on such an appeal determine whether the act creating the commission is valid. Winnipeg Electric R. Co. v. Winnipeg (Man.) 1916E-181.
- 38. Review of Public Service Commission. Upon application to the court to restrain the execution of an order of the public service commission fixing railroad rates, the power of the court is limited to the determination of the question whether the rates fixed are unreasonable or unlawful, which must be clearly made to appear before the court may restrain the execution of the order, since a court under the guise of exerting judicial power may not usurp administrative functions by setting aside an administrative order upon its own ideas as to whether the administrative power was wisely exercised. Pennsylvania R. Co. v. Towers (Md.) 1917B-1144.
- 39. Order of Commission Reversed. The order and judgment appealed from are reversed. Since trial, this line has been extended into Montana, and questions of interstate commerce may now be involved, which conditions will be taken into consideration in future proceedings had herein. In re Minneapolis, etc. R. Co. (N. Dak.) 1917B-1205.
- 40. That the subject-matter is legislative or administrative does not render a statute unconstitutional authorizing a review of the action of the board in the courts on an appeal to them. In re Minneapolis, etc. R. Co. (N. Dak.) 1917B—1205.
- 41. Appeal from Order. The board of commissioners of railroads of this state ordered a separate daily passenger service to be installed on the Ambrose-Flaxton branch of the appellant railway company, which appealed to the district court where the board's decision was affirmed, and it appeals to this court, alleging that the findings are insufficient to support the judgment of the district court. The board's order was a denial of the railroad's application to be relieved under

- c. 200, N. Dak. Sess. Laws 1907, Comp. Laws 1913, §§ 4789-4795, from running a daily passenger service, which had been ordered by the board. The board denies the right of the railroad to appeal, asserting that its order is final and that a statute granting a right of appeal would be unconstitutional because administrative, instead of judicial, functions are con-cerned. Since the decision below was made, this branch line has been extended into Montana. Both parties request a decision on the merits and that the case not be treated as moot. Held:—Though c. 200, Sess. Laws 1907, Comp. Laws 1913, §§ 4789-4795, did not expressly grant an appeal to the courts, yet as it is in pari materia with similar earlier statutes in themselves granting and contemplating generally a right of appeal from decisions of the board to the courts, a right of appeal exists as to the matters embraced in the statute in question. In re Minneapolis, etc. R. Co. (N. Dak.) 1917B-1205.
- 42. Review of Order. Under Md. Laws 1910, c. 180, §§ 11, 43, providing that a railroad company aggrieved by an order of the public service commission may institute proceedings to set aside such order on the ground that it is unreasonable or unlawful, an unreasonable order is an unlawful one, and it is the duty of the court to consider its reasonableness. Northern Central R. Co. v. Laird (Md.) 1916D-1030.
- 43. Judicial Review. Where the plaintiff, who was a party to proceedings before the public service commission for the abolition of grade crossings, acquiesced therein to the extent of accepting the commissioners' award of land damages and agreeing to accept the old highway crossing as a farm crossing for the exclusive use of his premises, primary jurisdiction over his petition to have the farm crossing changed is in the public service commission, and not a court of chancery, which has no power to eliminate grade crossings or locate highways. Sayers v. Montpelier, etc. R. Co. (Vt.) 1918B-1050.
- 44. Under Vt. Acts 1908, No. 108, § 4, providing that any person aggrieved by an order of the public service commission in proceedings for the abolition of grade crossings, who was a party to such proceedings, may appeal to the supreme court in the same manner as provided in P. S. \$4599, an appeal by the petitioner, if dissatisfied with the action of the commission on his petition to determine the location of a farm crossing and substituting an overpass, will preserve all his rights. Sayers v. Montpelier, etc. R. Co (Vt.) 1918B-1050.
- 45. Remedy for Review—Injunction. Injunction by railroad company objecting to reasonableness of railroad commission's orders, requiring erection of a new depot, is a proper remedy, since the commission in making such order was acting in its

legislative or administrative capacity, and not in a judicial or quasi judicial capacity. Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.) 1918B-828.

- 46. Presumption in Favor of Order. In view of Miss. Code 1906, § 4836, providing that the railroad commission's findings shall be prima facie evidence that their determination was right and proper, one who attacks such order has the burden of proving its unreasonableness "by clear and satisfactory evidence." Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.) 1918B-828.
- 47. Decree Disapproving Order—Review by Appellate Court. A chancellor's decree, disapproving railroad commission's orders, requiring erection of railroad depot, will be conclusive on appeal, where there is evidence to support it, such decree being considered of the same force and effect as other chancery decrees, and the appellate court in such cases will not retry the case. Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.) 1918B-828.

## 3. STATUTORY REGULATIONS.

#### a. As to Stations.

- 48. "Depot"—Meaning of Term. Under Miss. Code 1906, § 4047, making it unlawful to back a train into or along a passenger depot, or within fifty feet thereof, at more than three miles an hour, without warning, and providing for damages for every injury inflicted, etc., the words "passenger depot" include not only the building at the station, but also all passage-ways, walkways, or platforms prepared for passengers in boarding and leaving trains, so that, where a backing engine killed one opposite a platform extending from the depot building along the track for more than 181 feet, the railroad company is liable. Illinois Central R. Co. v. Causey (Miss.) 1917A-1281. (Annotated.)
- 49. Backing Train into Depot Construction of Statute. Miss. Code 1906, § 4047, forbidding a railroad to back a train or engine into or along a passenger depot, and within fifty feet thereof, at more than three miles an hour, without warning, was intended to preserve and protect human life, and should be given full scope in accordance with its plain meaning, not restricted by strained interpretation. Illinois Central R. Co. v. Causey (Miss.) 1917A-1281.

## Note.

Legal meaning of "depot." 1917A-1283.

#### b. Crossings.

50. Regulation—Effect of Open Gates at Crossing—Scope of Act. N. J. P. L. 1909, p. 54, provides that, whenever any railroad company maintains safety gates at

a crossing and a person is struck by a locomotive while attempting to cross the tracks when the gates are not down, the question whether he was guilty of contributory negligence shall be determined by the jury in all actions to recover damages therefor. It is held that the act is not limited to crossings in cities, but applies as well to injuries at crossings partly in a township and partly in a borough, where the railroad company had established crossing gates. Brown v. Erie R. Co. (N. J.) 1917C-496.

51. Crossing Gates—Hours of Operation of Gates—Posting Notice. N. J. P. L. 1909, p. 137, provides that whenever a railroad has installed safety gates at a crossing any person approaching the crossing shall, during such hours as posted notice at the crossing shall specify, be entitled to assume that such gates are in proper order and duly operated, unless a written notice bearing the inscription "out of order" be posted, and in any action brought for injuries to a person at such crossing plaintiff shall not be barred because of a failure to stop, look, and listen before crossing. It is held that, where a railroad company had provided gates at a grade crossing, that it had not posted any notice specifying at what hours the gates would be operated did not render the section inapplicable, and the company, not having posted such notice, was estopped to complain that a person passing over the tracks when the gates were up was not entitled to assume that they were in good order and would be properly operated. Brown v. Erie R. Co. (N. J.) 1917C-496.

# c. Lookout Law.

- 52. Lookout for Trespassers. Under the lookout law requiring train operatives to keep a lookout for trespassers, they, discovering a light ahead on the track, should use care in approaching it. Chicago, etc. R. Co. v. Gunn (Ark.) 1916E-648.
- 53. Operation of Hand Car—Liability. Kirby's Ark. Dig. \$ 6607, providing that all persons running trains in the state shall keep a constant lookout for persons and property on the track and that railroad companies shall be liable for any damage done to any person or property by reason of failure to keep such lookout, and imposing on such companies the burden of showing that the duty was performed, is limited to the operation of trains as such, and does not apply to the operation on the track of a hand car belonging to the railroad company. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317. (Annotated.)

#### 4. RIGHTS, POWERS AND DUTIES.

# a. Station Grounds.

54. Grant of Exclusive Privileges on Depot Grounds—Validity. A railway com-

pany is not prohibited by sections 7, 8, and 9, chapter 9, W. Va. Acts 1913, or by any rule or principle of the common law from granting to a local transfer company, in good faith and for public convenience, the exclusive privilege of occupying a portion of its station platform and ground for the purpose of soliciting patronage in the business of transferring through passengers and baggage, arriving on its trains, to the station of another railway company. The rights of a competing transfer company are not thereby violated. Rose v. Public Service Commission (W. Va.) 1918A-700. (Annotated.)

#### Notes.

Right of railroad company to grant exclusive privileges on depot grounds. 1918A-702.

Duty of railroad company to block frogs, switches and guard rails. 1916E-642.

# b. Permission to Maintain Telegraph Wires.

55. A railroad might properly empower a telegraph company to construct and maintain a line over its right of way for the joint use of the railroad and company, preference being given to the railroad's use in the moving of trains, as the exercise of such right was in furtherance of the duty to move its trains. Cobb v. Western Union Tel. Co. (Vt.) 1918B-1156.

# c. Spur Tracks.

56. Power of Employer to Remove Danger. A railroad, from which a switch track ran into the yard of a manufacturing plant so near a post that the operation of trains was dangerous to the road's employees, could require the owners of the plant to remove the post, or refuse, until the change, to do switching. Devine v. Delano (Ill.) 1918A-689.

#### d. Duty to Operate and Maintain Road.

57. Abandonment of Functions. A "railroad" is a public service transportation corporation, all of whose operating property is devoted to the public service of transportation over lines and terminals having a fixed location, as other real property, and whose operating personal property is fixed in location and use in the sense that it must be used in connection with and upon its lines and terminals; it cannot abandon its duty to serve the publie, nor dispose of its real or personal property so as to cause a discontinuance of such service, but is bound to maintain it, and incidentally to maintain an organized entity necessarily consisting of equipment and operating property such as will make such public service possible. Northern Pacific R. Co. v. State (Wash.) 1916E-1166.

## 5. RIGHT OF WAY.

- 58. That by Mo. Const. art. 12, § 14, railroads are made "public highways" does not nullify the provisions of Const. art. 2, § 21, which forbids the taking of private property for public use without just compensation. State v. Missouri, etc. R. Co. (Mo.) 1916E-949.
- 59. Abandonment of Right of Way. An easement so held may be lost by abandonment, and the evidence is held to support the findings of the trial court that there was an intentional abandonment of the right of way involved in this action. Norton v. Duluth Transfer R. Co. (Minn.) 1916E-760.
- 60. Purchase of Land for Right of Way—Interest Acquired. The conveyance of a strip of land to a railroad company for a right of way, "to have and to hold the same, . . . for and so long as the same is used for railroad purposes," held to convey an easement only, and not the absolute fee-simple title. Norton v. Duluth Transfer R. Co. (Minn.) 1916E-760.

(Annotated.)

Note.

Estate or interest acquired by railroad in land purchased for right of way. 1916E-763.

#### 6. LIABILITY FOR FIRES.

- 61. Construction Meaning of "Company." Burns' Ind. Ann. St. 1914, §§ 5525a and 5525b, imposing liability for fire upon all railroad corporations and providing that term "railroad corporations" shall be deemed to mean all railroad companies, and individuals, owning or operating railroads, do not exclude railroads operated by partnerships, since the word "companies" is broad enough to include all incorporated associations, and partnerships, having no separate legal entity, would also be included under the term "individuals." Pittsburgh, etc. R. Co. v. Chappell (Ind.) 1918A-627.
- 62. Validity of Statute. That statute does not violate the provisions of Const. U. S. Amend. 14, § 1, or Const. Ind. art. 1, § 23, guaranteeing the privileges and immunities of citizens and the equal protection of the laws, because it does not impose the same liabilities upon factory owners and other users of steam powers, since the separate classification of railroads for the immosition of such liability is within the police power of the state. Pittsburgh, etc. R. Co. v. Chappell (Ind.) 1918A-627. (Annotated.)
- 63. The application of Burns' Ind. Ann. St. 1914, § 5525a, imposing a liability upon railroad companies for fires caused by their locomotives regardless of negligence, to a corporation formed under Burns' Ann. St. 1914, § 5195, cl. 8, authorizing it to use locomotives propelled by the power of

steam generated by fire, at the time when the law made such corporation liable only for fires caused by negligence, does not deprive the railroad of its property without due process of law contrary to Const. U. S. Amend. 14, § 1, or Bill of Right, § 21, or impair the obligation of a contract contrary to Const. U. S. art. 1, § 10, or Const. Ind. art. 1, § 24, since the enactment of that statute was the exercise of police power and the legislature cannot contract away its police power. Pittsburgh, etc. R. Co. v. Chappell (Ind.) 1918A-627.

(Annotated.)

## Note.

Validity of statute making railroad absolutely liable for damage by fire. 1918A-632.

# 7. LIABILITY FOR INJURIES TO PERSONS.

- a. Persons at Crossings.
  - (1) Duties in General.
- 64. Crossing Accident—Degree of Care. The duty of railroads to persons crossing its right of way for a pathway in cities and towns, where the population is congested, and the public have been accustomed to use the tracks, is higher than in sparsely settled country districts. Imler v. Northern Pacific B. Co. (Wash.) 1917A—933
- 65. The duty of a railroad to persons crossing its tracks at points established by the company or by an implied license under long user by the public is that of strict accountability, since it is necessary for men and traffic to cross railway tracks in the pursuit of their legitimate undertakings and conveniences by reason whereof a legal right to so cross arises. Imler v. Northern Pacific B. Co. (Wash.) 1917A-933.
- (2) Warning of Approaching of Trains and Lookout.
- 66. Accident at Crossing Failure to Give Signals. Where a fast train, not sounding its bell or whistle, collided with intestate in a wagon on a misty morning before the sun had risen, the crossing being unprotected except for an automatic signal bell which was out of order and was ringing continuously, and a passing freight train made considerable noise, the railroad company was negligent. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.

## Note.

Running train without headlight as negligence towards person on track at place other than crossing. 1918A-1181.

- (3) Condition of Crossing and Gates.
- 67. Obstruction in Street—Statutory Authority. A railroad company which by ex-

press statutory authority maintains a gate post at a particular place in a public street is not bound to take any precautions to prevent persons coming in collision therewith, and is not liable to one injured by running into the post in the dark. Great Central R. Co. v. Hewlett (Eng.) 1917A-997. (Annotated.)

## (4) Operating Hand Car.

68. Where employees of a railroad company operate a hand car along the track and over crossings, they are bound to exercise reasonable care in so doing, whether commanded to do so by statute or not. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317. (Annotated.)

#### Note.

Liability of railroad company for injuries caused by operation of hand car. 1916E-321.

- (5) Contributory Negligence.
- (a) Duty to Stop, Look and Listen.
- 69. In an action for injuries to plaintiff at a railroad crossing by being struck by a railroad hand car it is proper to charge that the operatives of the car were required to keep a lookout for persons crossing the track, and if their failure to use reasonable care in stopping the car constituted negligence plaintiff could recover unless he himself was negligent in failing to stop, look, and listen to see if a car or train was coming, under the rule that a railroad track is a warning of danger and that a person approaching it in the exercise of ordinary care must stop, look, and listen. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317. (Annotated.)
- (b) Crossing in Front of Approaching Train.
- 70. Crossing Accident — Contributory Negligence of Driver. The driver of a private conveyance who collides with a train while attempting to cross a railroad track at a public crossing known by him to be a very dangerous one on account of complete obstructions to his view of the defendant's train, and who, knowing that a train was about due, concededly did not stop and listen or exercise any precaution to ascertain whether a train was approaching, except to look around as he was driv-ing, when he knew his vision of the track was completely obstructed, is guilty of contributory negligence as a matter of law. Christopherson v. Minneapolis, etc. R. Co. (N. Dak.) 1916E-683.
  - (6) Actions.
  - (a) Evidence.
  - (aa) Weight and Sufficiency.
- 71. Railroad Records Weight. In an action for injuries at a railroad crossing,

a request to charge that if the jury found that the original record of the movement of the railroad's trains had been proven they must accept it as they would any other written evidence made at the time of the transaction, and unless they had reason to believe that the record had been changed or tampered with they should find it to give the correct movement of the trains, is properly refused, since such record did not import verity and was entitled to no greater weight than other similar records. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317.

- 72. Evidence Sufficient to Authorize Recovery. In view of the lookout law, evidence in an action for the killing by a train, running 35 miles an hour, with a lantern in place of a headlight, the headlight having been broken, of a trespasser riding on a speeder held to authorize a recovery; the light on the speeder having been seen, though not recognized as such, when the train was a quarter of a mile distant, only a crossing signal having been given, and no effort to stop the train having been made till it was nearly on the speeder. Chicago, etc. R. Co. v. Gunn (Ark.) 1916E-648.
- 73. Injury to Person Near Track—Object Falling from Train. Plaintiff's affirmative showing that he stood 30 or 40 feet away from the track in a public road while defendant's fast mail train passed, and that a flying piece of coal from the tender struck him on the foot and knocked him down, makes a case to which the doctrine of res ipsa loquitur applies. St. Louis, etc. R. Co. v. Armbrust (Ark.) 1917D-537. (Annotated.)

74. In such case, defendant's evidence that the tender was properly loaded and that the coal had settled since it had been loaded is not sufficient to overcome plainitf's prima facie proof of negligence, under the statute making railroads responsible for damages caused by the running of their trains, and the question of defendant's negligence is for the jury. St. Louis, etc. R. Co. v. Armbrust (Ark.) 1917D-537. (Annotated.)

75. In such case, plaintiff's prima facie showing of negligence entitles him to a recovery, unless defendant shows by a preponderance of the evidence that it was not guilty of negligence. St. Louis, etc. R. Co. v. Armbrust (Ark.) 1917D-537.

(Annotated.)

## (b) Questions for Jury.

76. In an action for injuries to plaintiff by being struck by a railroad hand car at a crossing at night, the car following a train and approaching without lights, whether plaintiff was negligent in failing to observe the car before going on the

track is for the jury. St. Louis Southwestern R. Co. v. Mitchell (Ark.) 1916E-317.
(Annotated.)

## (c) Questions for Court.

77. Where the facts respecting the failure to exercise care by the driver of a team about to cross a railroad track are conceded or uncontradicted, and it can be said that reasonable men could not draw different conclusions or inferences therefrom, the question of the contributory negligence of such driver is one of law for the court. Christopherson v. Minneapolis, etc. R. Co. (N. Dak.) 1916E-683.

#### Note.

Liability of railroad company to person wrongfully riding on train by permission or direction of railroad employee. 1917C-358.

 Licensees and Trespassers on Right of Way.

## (1) Liability.

- 78. Duty to Licensee on Track. Where plaintiff's decedent is walking on defendant railroad's right of way where a license has been established by customary and frequent use, it is defendant's duty to keep a reasonable lookout in anticipation of the presence of such licensees on the right of way and to use reasonable care to avoid injury after discovering decedent's presence thereon. Imler v. Northern Pacific R. Co. (Wash.) 1917A-933.
- 79. Running Train on Unusual Track. A railroad company owes no duty to licensees using its right of way as a pathway to run its trains traveling in one direction on one of its double tracks and trains in the opposite direction on the other track, though customarily so operated, since, under both its duty to the public and its rights as owner of the right of way, it may run its trains in any direction on either track as it may see fit. Imler v. Northern Pacific R. Co. (Wash.) 19174-933. (Annotated.)
- 80. Suction of Passing Train. Plaintiff's injury, if occurring as the result of suction created by the rapidly moving train, is an unusual occurrence such as the engineer could not have reasonably expected would result from the rapid movement of the train; and hence such movement is not negligence. Davis v. Southern R. Co. (N. Car.) 1918A-861. (Annotated.)
- 81. Injury to Person Near Track—Negligence—Speed of Train. Defendant railroad, whose heavy freight train, drawn by two engines on an upgrade and a partial curve, overtook plaintiff, walking on a parallel track used by another road and upon the ends of the cross-ties next to defendant's track, about 5½ feet from the

- ends of the cross-ties on defendant's tracks, when about 485 feet from a tank at which the train had stopped for water, while running from 3 to 25 or 30 miles an hour, is held to have been guilty of no negligence proximately causing injury to plaintiff, who was drawn under the train and had his foot cut off. Davis v. Southern R. Co. (N. Car.) 19184-861.
- 82. Trespasser on Trestle. One struck by a train while crossing a trestle of a railroad company is a "trespasser" for whose death no recovery can be had, where the servants in charge of the train did not discover his position of peril and the public were warned not to use the trestle, this being so despite frequent use of the trestle by persons in the vicinity. Curd's Adm'x. v. Cincinnati, etc. R. Co. (Ky.) 1916E-614. (Annotated.)
- 83. Trespassers on Track Implied License. The mere use of a railroad track by the public does not convert the users from trespassers into licensees, unless the use be at a public crossing or in a city or populous community where large numbers of people use the track, thereby putting the company upon the duty of anticipating their presence. Curd's Adm'x. v. Cincinnati, etc. R. Co. (Ky.) 1916E-614.
- 84. Duty to Trespasser—Keeping Lookout. While a railroad company is bound to maintain a lookout to avoid injuring licensees on its tracks, it is under no duty to look out for trespassers. Curd's Adm'x. v. Cincinnati, etc. R. Co. (Ky.) 1916E-614.

## Notes.

Running train on wrong or unusual track as negligence. 1917A-936.

Liability of railroad to person on or near right of way injured by suction from passing train. 1918A-872.

Liability of railroad company for personal injuries caused by objects thrown or falling from train. 1917D-540.

## (2) Actions.

- 85. Injury to Person Near Station Platform—Contributory Negligence. Plaintiff, an elderly woman, knowing that defendant's car was late, that the night was dark, that the platform was not lighted, and that there were no means of signaling the car, who went on defendant's right of way some distance from the platform and tried to signal the car, and was struck by the moving car and injured, was guilty of contributory negligence and entitled defendant to a directed verdict. Wells v. Ann Arbor R. Co. (Mich.) 1917A-1093.
- 86. Failure to Discover Peril—Person on Railroad Track. In an action to recover for the death of a licensee walking on a right of way of defendant railroad, where it did not appear that decedent was on the

- track, the fact that the engineer had an unobstructed view for more than a mile does not establish negligence in failing to discover decedent's peril, since the engineer was not bound to anticipate that a man walking along the right of way would step in front of the train. Imler v. Northern Pacific R. Co. (Wash.) 1917A-933.
- 87. Injury to Employee of Another Company. Where, in an action for the death of a Pullman car employee engaged in repairing cars, from a car being shifted without warning to him by the defendant railread company, plaintiff's evidence, taken alone, showed that the accident was due to the defendant's negligence while deceased was exercising proper care, the trial court properly refused to direct a verdict for defendant, or to set aside a verdict for plaintiff, though defendant's evidence on the determining issue whether the deceased was warned conflicted with plaintiff's evidence and was of a more positive character. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

## RAPE.

- 1. Nature and Elements of Offense.
- 2. Prosecution and Punishment.
  - a. Indictment.
  - b. Evidence, Admissibility.
  - c. Instructions.
  - d. Defenses.
- 3. Civil Liability and Actions to Enforce.

Civil action, excessiveness of damages, see Damages, 48.

Death sentence for attempt, see Sentence and Punishment, 15. Competency of prosecutrix, see Witnesses.

Competency of prosecutrix, see Witnesses, 10.

# 1. NATURE AND ELEMENTS OF OFFENSE.

1. What Constitutes—Failure to Make Complaint. Though the female makes no outcry or immediate complaint, it is a rape if intercourse is procured by force and without her consent. Jensen v. Lawrence (Wash.) 1917E-133.

#### 2. PROSECUTION AND PUNISHMENT.

#### a. Indictment.

2. Averment That Prosecutrix was Human Being. An indictment charging rape on a female under the age of consent and that she was not then and there the wife of accused is not erroneous in failing to charge an assault or aver that prosecutrix was a human being. State v. Keeler (Mont.) 1917E-619.

## b. Evidence, Admissibility.

3. Age — Testimony as to Age of Another. In a prosecution for statutory rape, testimony of defendant's adoptive parents

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as to her age and the date of her birth, made upon information by her aunt, who was dead at the time of the trial, and her appearance when they first knew her at the age of three, is admissible. State v. Tetrault (N. H.) 1918B-425.

- 4. Conduct of Prosecutrix With Others. In a prosecution for rape, where the state did not claim that the defendant had exclusive opportunity, evidence that the prosecutrix was seen away from her home with other men at about the time in question is inadmissible. State v. Tetrault (N. H.) 1918B-425.
- 5. Evidence Subsequent Familiarities. In a prosecution for rape, evidence as to advances made to the prosecutrix by the defendant, when they met at a time subsequent to the date of the alleged offense, is admissible, as it is such as to indicate that they had probably had improper relations before, and tends to corroborate the state's theory of the defendant's guilt. State v. Tetrault (N. H.) 1918B-425.
- 6. Age—Testimony by Persons as to His Own Age. In a prosecution for rape, the testimony of prosecutrix as to her age, while founded on hearsay, is admissible. State v. Tetrault (N. H.) 1918B-425.

(Annotated.)

- 7. Denial by Accused. In a prosecution for rape, it was error to exclude the defendant's denial of the use of any force after having admitted the prosecuting witness' testimony that she never gave him any occasion for anything out of the way. State v. Asbury (Iowa) 1918A-856.
- 8. Opinions Possibility of Committing Rape. Testimony of witnesses that, in their opinion, rape could not be committed upon an adult female under the circumstances disclosed by the record, is inadmissible, as an invasion of the province of the jury. State v. Asbury (Iowa) 1918A-856.
- 9. Flight of Accused—Proof by Indirection. While evidence of accused's flight is admissible in a prosecution for rape, it may not be shown except by proper evidence, and it is improper to ask a witness on cross-examination whether she saw the defendant after he broke jail, where the witness had merely testified that she knew the defendant and was acquainted with his reputation for moral character and virtue, that it was good, and that the witness never heard it questioned. State v. Asbury (Iowa) 1918A-856.
- 10. Church Membership of Prosecutrix—Prejudice. While there may be doubt whether testimony of the prosecutrix that she was a church member was prejudicial to accused, error in receiving it must be presumed to be prejudicial, in the absence of any showing to the contrary, especially where defendant was not allowed to show his membership in secret

societies. State v. Asbury (Iowa) 1918A-

11. Subsequent Acts. In a statutory rape case, evidence of acts of intercourse after the one relied on for conviction is admissible. State v. Keeler (Mont.) 1917E-619.

#### c. Instructions.

12. As to Possibility of Unjust Prosecution. An instruction that rape cases are prosecutions attended with great danger, and afford an opportunity for the display of malice and private vengeance, such charges being easily invented and maintained, and that the jury should hesitate to convict solely on the testimony of the prosecutrix, is properly refused, where there is nothing in the record to indicate that the prosecution for statutory rape was instituted through malice or for private vengeance. State v. Keeler (Mont.) 1917E-619.

#### d. Defenses.

13. Assault With Intent to Commit—Impotency as Defense. In a prosecution for assault with intent to rape, the fact that accused was 74 years of age and had no further desire or capacity to perform the sexual act is no defense. Hunt v. State (Ark.) 1916D-533. (Annotated.)

#### Note.

Impotency as defense to charge of rape or assault with intent to rape. 1916D-535

# 3. CIVIL LIABILITY AND ACTIONS TO ENFORCE.

- 14. Evidence—Corroboration of Plaintiff. In a civil action for rape, in the absence of specific statute requiring it, plaintiff's testimony need not be corroborated. Jensen v. Lawrence (Wash.) 1917E-133.
- 15. Instruction Approved. In a civil action for rape, an instruction defining rape and charging as to evidence necessary is held to have properly submitted the issues to the jury. Jensen v. Lawrence (Wash.) 1917E-133.
- 16. Failure to Make Outcry—Effect. In a civil action for rape, plaintiff's failure to make complaint is merely an important circumstance to go to the jury, and is not conclusive on plaintiff's right to recover as a matter of law. Jensen v. Lawrence (Wash.) 1917E-133.
- 17. The court instructed that if at the time or within a reasonable time plaintiff did not make outery, and did not do so thereafter as soon as opportunity offered, unless she was prevented by fear and threats, she was not entitled to recover, and that if plaintiff failed to disclose the alleged outrage within a reasonable time after she had opportunity, it was a cir-

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cumstance which the jury could consider as tending to impeach the truth of her story. It is held that the instruction was as favorable to defendant as could be desired. Jensen v. Lawrence (Wash.) 1917E-133.

#### Note.

Inadequacy or excessiveness of verdict in civil action for rape. 1917E-135.

Rates, see Gas and Gas Companies, 1, 6, 7; Municipal Corporations, 43, 44; Telegraphs and Telephones, 13-15.

## RATIFICATION.

See Agency, 27-30.

Of alteration, see Alteration of Instruments, 13, 14.

Of acts of officers, see Corporations, 35, 36.

Of minor's contract, see Infants, 15-17. Of Sunday contract, see Sundays and Holidays, 2.

#### RAZOR.

As deadly weapon, see Weapons, 2.

## REAL ESTATE.

See Adjoining Landowners; Adverse Possession: Boundaries: Deed: Estates: Fixtures; Homestead; License; Prop-

REAL ESTATE AGENCY.

See Agency; Brokers.

## REALTY.

Meaning, see Trademarks and Tradenames, 6.

#### REASONABLE TIME.

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#### RECEIVERS.

Definition, 718.

Appointment, 718.

a. Jurisdiction, 718.

b. Who may Apply, 718.
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See Corporations, 148, 149.

Bonds to indemnify bankrupt, see Bankruptcy, 27-29.

Of insolvent bank, see Banks and Banking. 72.

To wind up business, see Building and Loan Associations, 6, 8, 9. Attachment of receivership funds, see Garnishment, 3.

# 1. DEFINITION.

1. Nature of Office. A receiver is a ministerial officer of the court of equity which appoints him, presumed to be indifferent to the parties of the suit, and holding the property for all parties interested; his title and possession being that of the court. Northern Brewery Co. v. Princess Hotel (Ore.) 1917C-621.

## 2. APPOINTMENT.

### Jurisdiction.

2. Orders to Third Persons. The plaintiff's lessee bored producing gas wells on the plaintiffs' land and on the lessee's land, and connected the wells by pipes converged in a building erected by the lessee on the plaintiffs' land, where a meter, a pressure gauge, and other gas appliances were installed. From this point the gas produced was conducted to a pipe line location in a highway alongside the plaintiffs' land. The pipe line belonged to a corporation for which a receive was corporation for which a receiver was appointed by the district court. The re-ceiver was authorized by the court to purchase gas from the plaintiffs' lessee, which the receiver distributed to consumers. The plaintiffs took possession of the building, pipes, and appliances on their own land and stopped the flow of gas into the pipe line under a claim of right predicated upon their contract with the lessee. Upon application made in the receivership suit, the receiver procured an order directing a person designated by the court to remove the obstructions preventing the flow of gas into the pipe line and enjoining the plaintiffs from maintaining such obstruction or interfering with the order. Neither the plaintiffs nor their lessee were parties to the receivership suit, and the order was procured without notice to them. The order having been executed, the plaintiffs moved to set it aside because it had been made without jurisdiction. The court modified the order but did not vacate it. Held, the court had no jurisdiction over the parties or over the property affected by the order, the order was void, and the court may be required by writ of mandamus issuing from this court to set aside the order. Bishop v. Fisher (Kan.) 1917B-450.

## b. Who may Apply.

3. Bankruptcy — Receiver — Application for Appointment—Persons Entitled to Apply. Under Bankr. Act of July 1, 1898, c. 541, \$59b, 30 Stat. 561 (1 Fed. St. Ann. 2d ed. 990), providing that three or more creditors may file a petition to have a debtor adjudged a bankrupt, and section 2, cl. 3 (1 Fed. St. Ann. 2d ed. 552), authorizing courts of bankruptcy to appoint receivers upon the application of parties in interest, if necessary for the preservation of the estate, to take charge of the property of the bankrupt after the filing of the petition and until it is dismissed, or trustee has qualified, an application for the appointment of a receiver is separate and distinct from, and ancillary to, the proceedings in bankruptcy, and may be made by any creditor having a provable debt against the bankrupt that would be affected by his discharge, whether he be one of the petitioning creditors or not. T. E. Hill Co. v. United States Fidelity, etc. Co. (III.) 1917E-78.

## c. Nature of Proceeding.

4. The appointment of a receiver without bond from the petitioners, to take possession of the property of a person charged with bankruptey, is a conservatory proceeding, instituted for the benefit of the debtor and his creditors, and cannot be likened to the issuance of a writ of atachment by the state courts. Harvey v. Gartner (La.) 1916D-900. (Annotated.)

# 3. CONTINUING RECEIVERSHIP PENDING APPEAL.

5. Where, in an involuntary bankruptcy proceeding, the court on application of one of the petitioning creditors appointed a receiver and thereafter dismissed the bankrupt's petition, it is within the discretion of the bankruptcy court to continue the receivership pending an appeal to the circuit court of appeals. T. E. Hill Co. v. United States Fidelity, etc. Co. (Ill.) 1917E-78.

## 4. RIGHTS, DUTIES AND LIABILI-TIES OF RECEIVERS.

## a. Liability for Attorney's Fees.

6. Where attorneys were employed by a receiver of an insolvent corporation under an order of the court authorizing such employment, and where the receiver, the attorneys participating, in good faith endeavored to procure a proper allowance of attorneys' fees from the court, and paid over to the attorneys the entire amount allowed by the court, such attorneys cannot hold the receiver personally liable for the value of their services. Willett v. Janecke (Wash.) 1917B-351. (Annotated.)

## Note.

Personal liability of receiver for attorney's fees. 1917B-354.

# b. Actions by Receivers.

7. Set-off Against Receiver—Claims Maturing After Receivership. That a corporation for which receivers were ap-

pointed was not definitely known to be insolvent at the time of the appointment, and that the receivers were empowered to conduct the business as a going concern and apply the money coming into their hands from the sale of property, does not entitle creditors of the corporation to set off deposits of the corporation held by them at the date of the appointment against notes of the corporation held by them, where such notes, though discounted before the appointment, did not mature until afterwards. Blum Bros. v. Girard National Bank (Pa.) 1916D-609.

(Annotated.)

- 8. Set-off of Receiver's Certificates. Also held that the defendants should not be allowed to offset in such action receiver's certificates held by them. Ten Brock v. Caldwell (Neb.) 1916D-613. (Annotated.)
- 9. Right to Sue in Foreign Jurisdiction. A court of competent jurisdiction in the state of Missouri appointed a receiver of hotel property in the city of St. Louis, and ordered the receiver to sell the property. These defendants made an offer in writing to purchase the property and pay \$9,000 in cash therefor and \$10,000 in receiver's certificates which they held. The court approved the offer, and directed the receiver to accept the same, which he did. Thereupon the defendants took the property and gave the receiver the \$10,000 in receiver's certificates and \$8,000 in cash, but refused to pay the remaining \$1,000. The court then ordered the receiver to begin proceedings against the defendants to recover the remainder of the purchase price. Held, that the receiver could maintain such action in this state; these defendants being found here. Ten Brock V. Caldwell (Neb.) 1916D-613.
- 10. Set-off Against Receiver. The rule that a receiver of an insolvent is merely an assignee, possessing only the rights of the insolvent, so that choses in action pass subject to any right of set-off existing at the time of the appointment, applies to the receiver of an insolvent commercial bank, and the rights of those indebted to the bank must be determined by their relations to it, as they existed at the time of the appointment of the receiver, who must allow the right of set-off when it exists as it would have existed if the bank itself had sought to enforce the collection of claims. Williams v. Johnson (Mont.) 1916D-595. (Annotated.)

#### Note.

Set-off against receiver. 1916D-599.

# 5. ALLOWANCE OF CLAIMS AGAINST ASSETS.

11. Insolvency of Company—Premiums as Trust Fund. Premiums on policies of insurance, collected by the receiver of an insolvent soliciting agent, constitute a

trust fund for the use and benefit of the insurers as cestuis que trustent, to the ex-clusion of general creditors, except as to the surplus remaining after payment of claims primarily chargeable against it. Williams v. S. M. Smith Ins. Agency (W. Va.) 1917A-813.

#### 6. RECEIVER'S SALES.

12. Sale-Necessity of Confirmation. receiver being a ministerial officer, his sale of mortgaged personalty must be confirmed by the court in order to be valid. Northern Brewery Co. v. Princess Hotel (Ore.) 1917C-621.

#### 7. DISCHARGE OF RECEIVER.

13. Grounds -- Change in Management. This suit was commenced by a preferred stockholder for a dividend, for the appro-priation of the property of the corporation to the payment of such dividend, for the redemption of her stock, and for the appointment of a receiver to accomplish the purposes of the suit. A receiver was appointed at the commencement of the suit on the allegations of the verified petition, which contained numerous specifications of misconduct on the part of the board of directors, and charged imminence of insolvency. A referee was appointed to hear the cause, who returned findings of fact and conclusions of law which the court adopted, except a recommendation that the receiver be discharged. Before the reference was made a new and enlarged board of directors was chosen at a regular stockholders' meeting, which new board the referee found to be harmonious, and against which no objection of any kind was lodged: The charge of threatened insolvency was not sustained. Held, the retention of the receiver after the election of the new board of directors constituted an abuse of judicial discretion. Held, further, the findings of fact disclose that the original appointment of the re-ceiver was not justified. Inscho v. Mid-Continent Development Co. (Kan.) 1917B-546.

## RECEIPT IN FULL.

Effect of receipt in full, see Accord and Satisfaction, 3.

## RECEIVING.

Receipt without notice, see Conversion, 2.

RECEIVING DEPOSIT WHILE INSOL-VENT.

See Banks and Banking, 13-22.

#### RECENT.

Meaning, see Larceny, 9.

RECOGNIZANCE.

See Bail.

#### RECONVERSION.

See Conversion and Reconversion.

#### RECORD.

What constitutes, see Certiorari, 2,

## RECORDING ACTS.

- 1. Construction.
- 2. Purpose.
- 3. Fees for Recording.
- 4. Record as Notice. 5. Effect of Recording.
- Unrecorded Instruments.

See Chattel Mortgages, 6-14.

Liability for recording broker's contract, see Brokers, 12.

Withholding from record as ground for cancellation, see Fraudulent Sales and Conveyances, 8.

Failure to record fine lien, effect, see Liens,

Record notice of fraud, see Limitation of Actions, 17.

Record notice of mortgagee's divorce, effect on mortgage, see Mortgages and Deeds of Trust, 18.

#### 1. CONSTRUCTION.

- 1. Mistake in Record—Effect. To entitle a party to the benefit of the recording act it is sufficient if he properly file his instrument for record. Neas v. Whitener-London Realty Co. (Ark.) 1917B-780.
- 2. Persons Protected-Purchaser at Execution Sale. Under S. Car. Civ. Code, 1912, § 3542, providing that all deeds, etc., shall be valid so as to affect from the time of delivery or execution the rights of subsequent creditors whether lien creditors or simple contract creditors, or purchasers for a valuable consideration without notice only when recorded within 10 days from the time of such delivery or execution, where a creditor had no notice of a conveyance when he extended credit to the grantor, a purchaser of the land conveyed under an execution on a judgment obtained by the creditor acquired a good title notwithstanding actual notice to him, at the time of the sale, of the conveyance, as the rights of the purchaser under an execution are the same as those of the creditor upon whose suit the property is sold. Blackwell v. Harrelson (S. Car.) 1916E-1263.

## 2. PURPOSE.

3. Purpose of Recording Acts. The object of the recording acts is to enable the owner of property in possession of a third person, or a lienholder, to protect himself against the world, on the theory that he cannot know what particular persons might

acquire rights from the person in possession. Allis-Chalmers Co. v. Atlantic (Iowa) 1916D-910.

#### 3. FEES FOR RECORDING.

- 4. Validity of Exemption from Recording Fees. The provision of the Mont. Farm Loan Act (Laws 1915, c. 28) exempting the mortgages to be given thereunder from taxation and recording fees, while, as respects taxation, it creates no real distinction between such mortgages and others, and, while the state may exempt its officer and commissioner of farm loans from paying such fees, yet it furthers the interest of the lender by discriminating between him and all other mortgagees in a way not justified by any relation to the encouragement of agriculture, and is a denial of the equal protection of the laws. Hill v. Rae (Mont.) 1917E-210.
- 5. By Whom Payable. It is the contemplation of the law that recording fees are to be paid by those whose interests are protected by recordation, in case of mortgages by the mortgages, and such fees are never a charge against the mortgagor. Hill v. Rae (Mont.) 1917E-210.

## 4. RECORD AS NOTICE.

- 6. Scope of Notice from Record—Instrument Outside Chain of Title. The word "purchasers," in section 53 of the act respecting conveyances (N. J. Comp. Stat. p. 1552), means purchasers of the same land and not purchasers from the same grantor. A purchaser of other lands from the same grantor is not charged with notice of building restrictions contained in an earlier deed not in his chain of title. Glorieux v. Lighthipe (N. J.) 1917E-484. (Annotated.)
- 7. Constructive Notice—Instrument Defectively Describing Property. A deed executed in May, 1909, conveying ten acres from a body of surrounding land described ar lying in sections 16 and 22, to be laid off so as to include a certain shoal on a creek, and to be surveyed and platted, and a certified plat to be a part of the deed to perfect the description, on record before the plat was filed, sufficiently described the lands to put a purchaser on inquiry, and hence was such constructive notice as to defeat his rights as a bona fide purchaser. Nolen v. Henry (Ala.) 1917B-792. (Annotated.)
- 8. Kirby's Ark. Dig. § 762, declares that every instrument in writing affecting the title of realty shall be constructive notice from the time it is filed for record. Section 763 declares that no instrument for the conveyance of land shall be good against a subsequent purchaser for value without actual notice, unless after due acknowledgment and execution it shall be filed for record in the office of the clerk

- and ex officio recorder. Section 5396 declares that every mortgage shall be a lien on the property mortgaged from the time it is filed in the office of the recorder. A mortgage which included several parcels of land correctly described some of the parcels, but did not give the range number of two sections which were attempted to be included. After recordation of the mortgage the mortgagor disposed of the land to bona fide purchasers for value without notice. It is held that, as the doctrine of constructive notice is harsh. and such statutes are strictly construed, the purchaser, not having actual notice of the mortgage, will not be charged with constructive notice thereof on the theory that an inspection of the mortgage might have led to inquiry by which he would have discovered that the land he afterwards purchased was included. Neas v. Whitener-London Realty Co. (Ark.) 1917B-(Annotated.)
- 9. Deed Ineffective When Made. Under S. Car. Civ. Code 1912, § 3542, where a grantor had no title to land when his deed was executed or recorded, but subsequently acquired title, the record of the deed is not constructive notice to creditors subsequently extending credit to him, and as against such creditors the deed is not effective. Blackwell v. Harrelson (S. Car.) 1916E-1263.
- 10. Record as Constructive Notice of Fraud. The record of a deed fair and regular on its face, executed for the purpose of hindering, delaying, and defrauding creditors in the collection of their debts, does not impart notice of the fraud of the parties to the deed in executing it for the purpose named. Underwood v. Fosha (Kan.) 1917A-265. (Annotated.)

#### Notes.

Record of instrument out of line of title as constructive notice. 1917E-486.

Constructive notice from record of instrument containing defective description of real property. 1917B-785.

## 5. EFFECT OF RECORDING.

11. Deeds—Recording — Effect. The recording of the deed by the grantor made it effective as to all persons benefited by it who did not dissent. Miller v. Miller (Kan.) 1917A-918.

#### 6. UNRECORDED INSTRUMENTS.

12. Unrecorded Mortgage — Valid Between Parties. Under Kirby's Ark. Dig. § 5396, providing that every mortgage of real or personal property shall be a lien thereon from the time it is filed in the recorder's office for record, an unrecorded mortgage is valid between the parties and as against persons holding the property

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under a voluntary conveyance. Western Tie, etc. Co. v. Campbell (Ark.) 1916C-943.

13. Unrecorded Deed Invalid. An unrecorded deed for a railroad right of way is void as to a subsequent purchaser of the servient land, without notice thereof. Dulin v. Ohio Biver R. Co. (W. Va.) 1916D-1183.

#### RECORD ON APPEAL

See Appeal and Error, 52-58.

## RECORDS.

See Courts, 37.

Of corporation, inspection, see Corporations, 104-114.

As evidence, see Evidence, 83-89.

Destroyed record, parol proof, see Evidence, 126.

Entry of judgment, see Judgments, 14.
Of municipal corporations, see Municipal
Corporations, 155, 156.

## RECRIMINATION.

See Divorce, 23-26.

## REDEMPTION.

See Equity of Redemption.

## RE-ENTRY.

Effect on rent, see Landlord and Tenant, 33, 34, 41.

#### REFEREES.

- 1. Appointment of Referes-
- 2. Powers of Referee.
- 3. Mode of Procedure.
- 4. Findings and Report.
  - a. In General.
  - b. Review by Court.
- c. Exceptions to Findings. 5. Compensation of Referee.

Sufficiency of objection for review, see Appeal and Error, 429.

Duties of medical referee under Workmen's Compensation Act, see Master and Servant, 290, 291.

# 1. APPOINTMENT OF REFEREE.

1. Reference — In Action at Law—Erroneous Designation of Referee. It is competent for a federal court to refer an action at law by consent of the parties, and the fact that the referee is designated a "special master" does not impair the validity of the reference. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.

## 2. POWERS OF REFEREE.

2. Powers — Reporting Conclusions. A master in chancery derives his authority from the order of reference, and where

such an order only authorizes him to take and report the evidence, he exceeds his authority in reporting his conclusions. Houlihan v. Morrissey (III.) 1917A-364.

#### 3. MODE OF PROCEDURE.

3. Variance of Report from Pleadings—Effect. Where a cause of action is referred and tried by a referee, judgment must be rendered according to the facts reported, regardless of the form of action, if the court could allow an amendment to the declaration which would adapt it to the facts; hence a party cannot complain that a general assumpsit was brought for a breach of contract instead of special assumpsit. Camp v. Barber (Vt.) 1917A-451.

#### 4. FINDINGS AND REPORT.

## a. In General.

4. Form of Findings. Special findings of fact by a court or referee should consist of a concise and specific statement of the ultimate facts found, without recitals cf the evidence or conclusions of law. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.

## b. Review by Court.

- 5. Recommitting Report. The denial of a motion to recommit rests within the sound discretion of the presiding judge. Ball v. Allen (Mass.) 1917A-1248.
- 6. Adoption of Referee's Findings. By overruling all exceptions of both parties to the report of a referee, and rendering judgment for the exact sum found by him to be due, the court evidences its intention to adopt the findings of the referee as its own. Philadelphia Casualty Co. v. Fechheimer (Fed.) 1917D-64.

## c. Exceptions to Findings.

7. Hearing on Report — Scope. In the absence of a special order of court, exceptions to a master's report are confined to objections presented to and disallowed by him, as shown by his report. Ball v. Allen (Mass.) 1917A-1248.

## 5. COMPENSATION OF REFEREE.

8. Master in Chancery—Allowance of Fees—Excessiveness. Allowance of \$35 per day for eight and one-half days to master in chancery for reporting case with record of only 453 pages of evidence, is excessive, because too long a time is charged, and because the per diem equals that of the chancellor who is the superior of the master, who is entitled only to reasonable compensation. Klekamp v. Klekamp (Ill.) 1918A-663.

## REFORMATION.

See Rescission, Cancellation and Reformation, 1-10.

#### REGISTRATION.

Of automobiles, see Automobiles, 10, 27, 37, Of motorcycles, see Automobiles, 14. Of voters, see Elections, 7-10.

#### REGULATION OF RATES.

By railroad commission, see Railroads, 2, 3, 27-29.

#### REHEARING.

See Appeal and Error, 487.

#### REJOINDER.

See Pleading, 66.

## RELATIONSHIP.

See Descent and Distribution.

## RELATOR.

Defined, see Quo Warranto, 6.

## RELEASE.

Of dower, see Dower, 2-13.

## RELEASE AND DISCHARGE.

- 1. Validity in General.
- 2. Avoidance.
- 3. Actions.

Of attachment, see Attachment, 14.

Authority of attorney, see Attorneys, 10. Of stock subscription, see Corporations, 66 - 72

Guardian's release of ward's damage claim, see Guardian and Ward, 19.

Settlement under Workmen's Compensation Act as affecting third party's liability, see Master and Servant, 306.

Of mortgages, see Mortgages and Deeds of

Trust; 21, 22. Discharge of one partner no release of the other, see Partnership, 29.

Of tortfeasor by insured, effect on insurer, see Subrogation, 3.

Conclusiveness of receipt in full, see Warehouses, 5.

#### 1. VALIDITY IN GENERAL.

1. Consideration-Re-employment of Releasor. The contract of defendant lumber company with plaintiff, in settlement of his claim for injuries, to give him a job for life, or so long as it remained in business, is uncertain and indefinite, and so will not support an action for its breach; it not specifying the position to be filled or the compensation to be paid. Ingram-Day Lumber Co. v. Rodgers (Miss.) 1916E-174. (Annotated.) Note.

Validity of release given in consideration of re-employment of releasor by releasee. 1916E-175.

#### 2. AVOIDANCE.

- 2. Avoidance for Misrepresentations -Statement not Intentionally False. A settlement and release of a cause of action, induced and procured by false representations of material facts, the falsity of which was unknown to the person making them, may be rescinded and avoided, though there was no fraudulent or other wrongful intent to deceive or defraud. Jacobson v. Chicago, etc. R. Co. (Minn.) 1918A-355.
- 3. Misstatement by Releasee's Physician. Plaintiff was injured while a passenger on one of defendant's trains. Soon thereafter defendant's physician made a physical examination of plaintiff's person, and, to induce or cause him to act thereon, represented that he had suffered no serious injury, had no broken bones, and would recover in the course of two or three weeks. It is held that the representations were material, plaintiff had the right to rely thereon in effecting a settlement with defendant, and since the representations were untrue in fact, though the falsity was not known to the physician at the time, and were not made with intent to deceive, plaintiff had the right to rescind the settlement. Such facts constitute fraud in law. Jacobson v. Chicago, etc. R. Co. (Minn.) 1918A-355. (Annotated.)
- 4. False Representation to Secure-Materiality of Representation. A representation by an employer, inducing an employee to release his claim for a personal injury, that medical and hospital bills will be paid by an insurance company, is not a representation of a material fact, and the employee cannot complain so long as the bills are in fact paid. Vasquez v. Pettit (Ore.) 1917A-439.
- 5. Fraud in Procuring-Evidence Sufficient. In an action for death of an employee, evidence held to warrant a finding that a release of liability for the injuries resulting in decedent's death had been procured by fraud or undue influence. Causey v. Seaboard Air Line R. Co. (N. Car.) 1916C-707.

Note.

Avoidance of release of claim for personal injuries on account of misstatements by physician as to nature of injuries. 1918A-358.

## 3. ACTIONS.

6. Failure of Consideration for Release-Remedies. Where an employer, in an action for injury by an employee, relies on a release from liability, the employee alleging and proving that the promise by the employer to employ the employee, forming a part of the consideration for the release, had been broken, is not confined to an action for the breach, but can sue for the injury. Vasquez v. Pettit (Ore.) 1917A-439.

## RELEVANCY OF EVIDENCE.

See Evidence, 20-36.

#### RELIEF.

Form of, see Equity, 4.

## RELIGIOUS INSTITUTIONS.

Exemption of church property, see Taxation, 71-75.

Testamentary gift subversive of religion, see Wills, 237, 238.

- 1. Monastic Order—Termination of Membership. Membership in a monastic brotherhood is not terminated by absence from the Abbey while engaged in pastoral work, where such absence was with the consent of the Abbot, and the absent member was subject to recall at any time. Order of St. Benedict v. Steinhauser (U. S.) 1917A-463.
- 2. Property Held by Member—Charging With Trust. The equitable ownership of the copyrights obtained by a member of a monastic brotherhood, and of the proceeds of his literary labors, vested in the Order under an agreement in the constitution that the gains and acquisitions of members shall belong to the Order, and as to both the member stood in the position of a trustee. Order of St. Benedict v Steinhauser (U. S.) 1917A-463.
- 3. Surrender of Property Rights—Validity. The agreement expressed in the constitution of a monastic brotherhood incorporated by special act, that the gains and acquisitions of members shall belong to the Order, is not opposed to public policy, where the constitution expressly recognizes the privilege of withdrawal; and the Order is therefore entitled to all the personal property left by a deceased member, including that derived from his literary labors. Order of St. Benedict v. Steinhauser (U. S.) 1917A-463. (Annotated.)
- 4. Property Rights of Members Release from Rules. A special permission granted by the Abbot of a monastic brotherhood to enable a member to retain and use for charitable purposes the proceeds of his literary labors did not, and could not, release him from the agreement expressed in the constitution of the brotherhood, that the gains and acquisitions of members shall belong to the Order, although its rule recognize the right of a member to keep whatever the Abbot permits him to have. Order of St. Benedict v. Steinhauser (U. S.) 1917A-463.

#### Note.

Communistic society or corporation as contrary to public policy. 1917A-468.

RELIGIOUS LIBERTY. See Labor Laws, 31.

#### REMAINDERS AND REVERSIONS.

See Life Estates.

Merger of life estate and remainder, see Estates. 5.

Sale of reversion for debts, see Executors and Administrators, 33.

As subject to lien, see Mechanics' Liens, 16.

Defeasible remainder, see Perpetuities, 8. Contingent remainder as devisable, see Wills, 4.

Devise of remainder, see Wills, 211, 212.

- Partition of Remainder Validating Sale in Subsequent Suit. A testator devised interests in lands to his children, devising a life estate to his daughters, with remainder to their issue, and remainders over in default of issue. In a suit to which the daughters were parties, though the remaindermen in being were not, the lands were ordered sold for partition. After the sale, the executor, who bought in the lands and resold them at a profit, brought a suit against the children. life tenants and contingent remaindermen, setting forth the existence of the fund, his desire to distribute it among the heirs, and praying a construction of the will. Held, that as the fund had taken the place of the land, and as the remaindermen in being were made parties, and the court might bind contingent remaindermen by its decree, it could in such proceeding ratify the original sale and vest the title in fee in the executor, though his original purchase gave him only a life estate. Glover v. Bradley (Fed.) 1917A-921.
- 2. Remainder to Unborn Person—Destruction—Partition Sale. A sale of land by order of court in a suit to which the remaindermen in being were parties is binding on all contingent remaindermen including those unborn. Glover v. Bradley (Fed.) 1917A-921. (Annotated.)
- 3. Effect of Partition Sale. Where contingent remaindermen were not made parties to a partition suit, though the life tenants were, a sale of the land for partition disposes only of the life estates, and does not carry the fee. Glover v. Bradley (Fed.) 1917A-921.
- 4. Remainder to Unborn Person—Destruction—Merger of Estates. Where both the life estate preceding a contingent remainder to several including unborn heirs if any and also the reversion are conveyed to the same person, they merge and contingent remainders to the unborn heirs are defeated. Smith v. Chester (III.) 1917A—925. (Annotated.)
- 5. Remainder Held Contingent. A devise for life, remainder in fee to life tenant's children "or the survivor or survivors of them," but in case he dies without surviving issue then to his wife and the nephews and niece of testator equally, and in case of death of either of last named without issue the share of the one dying

- to the survivor or survivors of them, but if the one so dying leave children they to receive the parent's share, with residuary devise to nephews and niece, held to be a devise of a life estate with a contingent remainder with a double aspect, with reversion in the heirs at law, who were the nephews and nieces named as residuary devisees. Smith v. Chester (III.) 1917A-925.
- 6. Presumption in Favor of Vesting. The rule that in cases of doubt or ambiguity in the language used in creating a remainder a construction is favored that will make the remainder a vested one must give way to the intention of the testator expressed in the will. Smith v. Chester (Ill.) 1917A-925.
- 7. Where a devise by its terms is to a person for life, remainder to his children, with the provision that should any of said children die without issue the children surviving the death of the testator shall take the share of such deceased children, the remainder is vested. Smith v. Chester (III.) 1917A-925.
- 8. Contingent or Vested. Where a devise by its terms is to a person for life, with a remainder to such of the children of that person as survive at his death, the remainder is contingent. Smith v. Chester (Ill.) 1917A-925.
- 9. Conveyance of Contingent Remainder. One having a contingent remainder may convey it. Love v. Lindstedt (Ore.) 1917A-898.
- 10. Contingent. Where a testator devised property to one for life, remainder to his issue, and in case of his death without issue remainders over, the issue of the devisee have a contingent remainder, because the fee could only vest in them if they survived him. Love v. Lindstedt (Ore.) 1917A-898.
- 11. Remainder to Unborn Person—Destruction—Termination of Particular Estate. Where a testator devised land to his son for life, remainder to the son's issue, with contingent remainders over, and the issue of the son, who were living, as well as other contingent remaindermen, conveyed their interest to the devisee, the devisee acquired the estate in fee, contingent remainders to unborn persons being defeated because the life estate upon which they were based was destroyed. Love v. Lindstedt (Ore.) 1917A-898.

(Annotated.)

12. Presumption in Favor of Vesting. Unless it clearly appears from the context of a will or the circumstances of the case that a contingent interest was intended, the remainder will be regarded as vesting at testator's death, and not at the expiration of the life tenancy. Tatham's Estate (Pa.) 1917A-855.

- 13. Remainder to Heirs as Vested or Contingent. A devise of realty for life, with remainder to testator's heirs, vests the remainder in those answering such description at the time of his death, unless the will affords unequivocal evidence to the contrary, though the life tenant is one of the class who will take the remainder. Tatham's Estate (Pa.) 1917A-855.

  (Annotated.)
- 14. Mere Contingent Interest. The persons who were to take on the contingency of J. dying without heirs of his body cannot be determined until J.'s death, and hence such interest is a mere contingent interest which is not devisable prior to that event. Tevis v. Tevis (Mo.) 1917A-865. (Annotated.)
- 15. Conveyance Between Remaindermen. A contingent remainderman may convey his estate to another remainderman. Lee v. Oates (N. Car.) 1917A-514. (Annotated.)
- 16. Vested Estate in Remainder. An estate given after a life estate to a person, his heirs and assigns forever, and in the event of his death without issue to another, is a "vested estate in remainder." Lee v. Oates (N. Car.) 1917A-514.
- 17. Remainder to Unborn Person-Destruction — Failure of Particular Estate. A grantor executed a voluntary convey-ance of land to his son for life, remainder to the son's wife for life, should she survive her husband, or so long as she remains his widow, remainder in fee to the heirs of his son's body, and, in default of such heirs, reversion to the grantor. The grantor filed the deed for record and afterwards offered it to his son, who refused to accept it. At that time the wife and two children of the son were living. Held, the common-law restrictions on the creation of future estates were abolished by section 3 of chapter 22 of the Kan. General Statutes of 1868, providing that conveyances of land or of any other estate or interest therein may be made by deed, and the remainders to the son's wife and to the heirs of his body are valid although the particular estate for life to him did not come into existence. Miller v. Miller (Kan.) 1917A-918. (Annotated.)
- 18. Acceleration—Refusal of Life Tenant to Accept Conveyance. The remainders are not accelerated by the refusal of the son to accept the conveyance of the life estate to him. Miller v. Miller (Kan.) 1917A-918.
- 19. Right of Remainderman to Purchase Tax Title. A remainderman not in possession and having no right to the occupancy or use of the land may purchase and hold a tax title thereon under a sale for delinquent taxes which the life tenant ought to have paid. Jinkiaway v. Ford (Kan.) 1916D-321. (Annotated.)

- 20. Joint Remainderman—Rights Inter Se—Tax Title. One of several remaindermen who does not have the possession, or right of possession, or right to rents and profits, who purchases the property at a sale for taxes which the life tenant ought to have paid, to whom a tax deed valid on its face is issued, may hold the tax title for his own use and benefit as against other remaindermen. Jinkiaway v. Ford (Kan.) 1916D-321. (Annotated.)
- 21. Contingent Remainder Created. A deed conveying a life estate to a grantee with remainder to the heirs of his body, executed when the grantee had no child, created a contingent remainder, and a reversion remained in the grantor expectant on failure of issue. Duffield v. Duffield (Ill.) 1916D-859.
- 22. Nature of Estate Remainder or Executory Devise. A future estate will be construed as a contingent remainder rather than as executory devise. Love v. Lindstedt (Ore.) 1917A-898.

#### Notes.

Validity of conveyance of interest of one remainderman to another. 1917A-520.

Remainder to heirs of testator as vested or contingent. 1917A-859.

Destruction of contingent remainder to unborn person. 1917A-902.

## REMAND.

Remand for new trial, see Appeal and Error. 462-469.

Remand for new findings, see Appeal and Error, 470.

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## REMOVAL.

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## REMOVAL FROM OFFICE.

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#### REMOVAL OF CAUSES.

1. Right of Removal.

2. Effect of Attempt to Remove.

3. Effect of Removal.

4. Appealability of Order.

What constitutes appearance, see Appearances, 1.

Motion to remove as extending time to plead, see Judgments, 50.

Effect of defect in proceedings, see Justices of the Peace. 1.

Verification of petition for removal, see Justices of the Peace, 2.

#### 1. RIGHT OF REMOVAL.

1. Action Under Federal Employers' Liability Act. An action brought under the U. S. Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), as amended by the Act of April 5, 1910 (36 Stat. L. 291, c. 143, Fed. St. Ann. 1912 Supp. p. 335), cannot be removed from a state to a federal court upon the ground of diverse citizenship. Southern R. Co. v. Puckett (U. S.) 1918B-69.

## 2. EFFECT OF ATTEMPT TO REMOVE.

2. Invalid Attempt to Remove Cause—Power of State Court to Proceed. When a defendant attempts to remove an action which he is not entitled to remove, and the state court refuses to surrender its jurisdiction, the state court may proceed with the cause, and its subsequent proceedings are valid. State v. American Surety Co. (Idaho) 1916E—209.

## 3. EFFECT OF REMOVAL.

3. Striking Case from Calendar. There being no cause pending in the state district court after the transfer or removal, an order striking it from the calendar of the court was right and is affirmed. Ewert v. Minneapolis, etc. R. Co. (Minn.) 1916D-1047.

# 4. APPEALABILITY OF ORDER.

4. Appealability of Order for Removal. An order of the district court, transferring a cause to the federal district court upon petition made and bond filed by a foreign corporation, is not appealable. The appeal is dismissed. Ewert v. Minneapolis, etc. R. Co. (Minn.) 1916D-1047. (Annotated.)

#### Note.

Appealability of order transferring cause from state to federal court. 1916D-1049.

## REMOVAL OF CLOUD.

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RENDITION OF JUDGMENT. See Judgments, 12-14.

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#### RENTS.

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#### RENTS AND PROFITS.

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#### REPAIR MAN.

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#### REPAIRS.

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#### REPEAL.

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#### REPEAL OF REPEALING LAW.

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- When Cause of action Accrues, 727.
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- 5. Damages, 727.
- 6. Pleading, 728.
- 7. Evidence, 728.
- 8. Judgment, 728.

Amendment of complaint, see Pleading, 69.

# NATURE OF REMEDY.

1. Lawful Act Induced by Improper Motion. Where a plaintiff has a legal right to replevin property, it is immaterial what motives induce him to assert such right. Vitagraph Co. v. Swaab (Pa.) 1916C-311.

## WHEN CAUSE OF ACTION AC-CRUES.

2. Moving Pictures - Lease of Film. Where a license contract for the use of motion picture films provided that the contract could be terminated by the licensor on 14 days' notice, and that the right to possession of all films should revert 20 days after notice of such termination to the licensor, replevin issued one day be-fore the time thus fixed is premature. Vitagraph Co. v. Swaab (Pa.) 1916C-311. (Annotated.)

#### 3. REPLEVIN OR DETINUE BOND.

3. Detinue—Action on Bond—Recovery of Attorney's Fees. Under Rev. St. § 915 (4 Fed. St. Ann. p. 577), declaring that in common-law causes in the federal courts the plaintiff shall be entitled to similar remedies against the property of the de-fendant as are provided by the laws of the state wherein the court is held, upon furnishing the security required by the state laws, the federal court, in issuing a writ of detinue in accord with the state practice, does so by the authority of the federal statutes, the proviso that similar security as is required by state laws shall be given relating to the form and substance of the detinue bond, and not to the elements of damage which may be recognized by the state courts as part of their general jurisprudence; and therefore, in an action on a detinue bond given in the federal court, the defendant, though successful, cannot recover attorney's fees, as such fees are not allowed in federal courts. National Surety Co. v. Fletcher (Ala.) 1915D-872. (Annotated.) Note.

Right to recover attorney's fees in action on replevin or detinue bond. 1916D-874.

#### 4. FORTHCOMING BOND.

4. Failure to Give Forthcoming Bond-Effect. Where defendant, the mortgagee of an automobile, prosecutes replevin in another state, under which the machine is properly taken into the officer's possession, and delivered to the mortgagee's attorney, the officer's failure to secure a bond from the mortgagee before such delivery, although he might be liable for consequent loss, does not make the action wrongful or entitle the mortgagor to maintain re-plevin therefor. Allis-Chalmers Co. v. Atlantic (Iowa) 1916D-910.

## 5. DAMAGES.

5. Damages for Detention of Property. Where plaintiff in replevin has secured possession of property, he may ordinarily recover damages for the detention measured by interest and depreciation in value. Armstrong v. Philadelphia (Pa.) 1917B-1082.

- 6. Exemplary Damages for Detention. Exemplary damages may be recovered in replevin only where there have been particular circumstances of fraud, oppression, or wrong in the taking or detention of the property. Armstrong v. Philadelphia (Pa.) 1917B-1082.
- 7. Value of Use of Property Detained. Where property replevied is capable of such physical use and enjoyment as cannot be compensated for by allowing interest, the damages recoverable by plaintiff must be determined by considering the value of such use, but in determining such value, care should be taken not to permit the fixing of an amount out of proportion to the value of the thing itself. Armstrong v. Philadelphia (Pa.) 1917B-1082. (Annotated.)
- 8. The measure of damages for the detention of rentable property is the rental value, unless the property be not used, in which case the value of depreciation by use must be deducted from the rental value. Armstrong v. Philadelphia (Pa.) 1917B-1082. (Annotated.)
- 9. Liability for Unfounded Suit—Exemplary Damages. That the sheriff in executing a writ of replevin necessarily went to defendant's place of business, and thereby caused him some inconvenience, does not entitle defendant to exemplary damages. Vitagraph Co. v. Swaab (Pa.) 1916C-311.
- 10. In view of the fact that, though defendant in such case could have held possession of the films on hand even after expiration of the 20 days, he had no right to use them, he is entitled only to nominal damages by reason of the premature issuance of the replevin. Vitagraph Co. v. Swaab (Pa.) 1916C-311. (Annotated.)
- 11. Giving Redelivery Bond as Evidence of Malice. In replevin for wearing apparel, trunks, etc., of the alleged value of \$1,751, held on a claim for \$241, with a claim of damages for wrongful taking and detention, where defendant gave the redelivery bond required by the code and had the goods returned to him, the redelivery was not admissible as evidence of the defendant's malice or animus, since he had a clear statutory right to the redelivery. Scanlan v. La Coste (Colo.) 1917A-254.

# 6. PLEADING.

12. A claim for damages for delay in payment for the detention of property cannot be first introduced by an amendment made to plaintiff's statement in replevin more than six years after the original

- statement was filed. Armstrong v. Philadelphia (Pa.) 1917B-1082.
- 13. Plaintiff's Ownership not Denied. Since an issue is a disputed point, and the Pa. Replevin Act of April 19, 1901 (P. L. 88), intends that only the disputed averments of ract in the declaration and affidavit of defense shall constitute the issues, plaintiff's ownership of the property in controversy is not in issue, where it is not denied by the affidavit of defense. Vitagraph Co. v. Swaab (Pa.) 1916C-311.

## 7. EVIDENCE.

- 14. Moving Pictures Lease of Film. Evidence in an action to replevin motion picture films, held to show not only that defendant had received the films from plaintiff under a lease, but that plaintiff owned same. Vitagraph Co. v. Swaab (Pa.) 1916C-311. (Annotated.)
- 15. Evidence in an action by the lessor to replevin motion picture films leased to defendant under a lease canceled by plaintiff by reason of a breach thereof by defendant held insufficient to show that the cancellation of the lease and taking of the films was pursuant to a special conspiracy between the lessor and other lessees such as entitled defendant to exemplary damages. Vitagraph Co. v. Swaab (Pa.) 1916C-311. (Annotated.)

#### 8. JUDGMENT.

16. Value of Property. Section 7833, Neb. Rev. St. 1913, provides that, when the finding is for the defendant in an action of replevin, the judgment shall be "for a return of the property or the value thereof in case a return cannot be had." The "value thereof" is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of the trial. Wallace v. Cox (Neb.) 1917D-699.

#### REPLICATION.

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#### REPLY.

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#### REPUDIATION.

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Chastity of defendant, see Bastardy, 5. Of accused, evidence, see Criminal Law, 49, 50, 96, 97.

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#### RESCISSION. CANCELLATION AND REFORMATION.

1. Reformation, 729.

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Rescission of contract to sell land, see Vendor and Purchaser, 9-13.

Suit to cancel living person's will, see Wills, 116.

#### 1. REFORMATION.

# a. Instruments Subject.

1. Wills. Strictly speaking, courts of equity have no power to reform a will, as that term is used with respect to other instruments, and it is only where the mistake in a will is apparent on its face, and the court is able to ascertain the means of correcting a mistake, that a court of equity will correct a mistake in a will. Lewis v. Reed's Executor (Ky.) 1917D-(Annotated.)

- 2. Note Containing Blank. Where a note recited that it was payable in "four ---," the instrument may be reformed so as to supply the omission and give effect to the parties' intention. Estate of Philpott (Iowa) 1917B-839.
- 3. Deed. Although a deed may be void on its face for want of a definite description of the land, a court of chancery will reform it upon proper allegation and proof of extrinsic facts. Nolen v. Henry (Ala.) 1917B-792.

#### Notes.

Jurisdiction of equity to reform will. 1917D-1157.

Right to reformation of conveyance of homestead. 1916E-1131.

## b. Conditions Precedent.

4. Right to Sue for Reformation-Person Out of Possession. To maintain a bill to correct a mistake in the description of land conveyed by a deed, it is not necessary that the complainant should be in possession of the land. Nolen v. Henry (Ala.) 1917B-792.

#### c. Defenses.

5. Laches. Where land was conveyed to a power company in May, 1909, and conveyed by it to complainant in March, 1913, after the death of the original grantors, complainant's bill, thereafter filed, for re-formation of the description in the deed, is not too long delayed. Nolen v. Henry (Ala.) 1917B-792.

# d. Evidence.

- 6. Evidence of Mistake Sufficient. Evidence examined and held sufficient to sustain a finding that both husband and wife agreed to grant the right of way in controversy, and that it was omitted from the deed by mutual mistake. Lindell v. Peters (Minn.) 1916E-1130.
- 7. Proof of Mistake—Parol Evidence. Parol evidence of mistake in a written contract is admissible for purpose of reformation. Archer v. McClure (N. Car.) 1916C-180.
- 8. Sufficiency of Evidence for Jury. Whether the evidence of mistake, warranting reformation of an instrument, is of the necessary clear, strong, and convincing character is a question for the jury. Archer v. McClure (N. Car.) 1916C-180.

## e. Extent of Relief.

- 9. Reformation of Bond Changing Name of Obligee. It being intended that a bond should be to the plaintiffs in an action, with whom a contract therefor was made, and by mutual mistake it being made to one who was their active agent in prosecuting the action, it will be reformed, though the loss has occurred, and the surety's principals have become bankrupt. Archer v. McClure (N. Car.) 1916C—180. (Annotated.)
- 10. Conveyance of Homestead. A conveyance of the homestead, or a portion thereof, executed by both husband and wife, as required by statute, may be reformed by correcting a misdescription of the property intended to be conveyed thereby. Lindell v. Peters (Minn.) 1916E—1130. (Annotated.)

## Note.

Right to reform bond by changing name of obligee. 1916C-184.

## 2. RESCISSION AND CANCELLATION.

#### a. Grounds.

- 11. Promise as Fraud. On an exchange of real property by plaintiff for a rooming house, the promise of the defendants to stand by or behind the plaintiff in the rooming house business cannot be made the basis for rescission of the exchange. Haney v. Parkison (Ore.) 1916D-1035.
- 12. Fraud Insufficient. Where complainant conveyed land and other property to H. in trust for herself, in order that she might prevent the property being taken under judgment which she expected might be rendered against her, but which trust H, denied, his failure to disclose the same to complainant's attorneys at the time a subsequent settlement was entered into between them, in which complainant executed to H. and wife the deed in controversy, was not such fraud on his part, on the theory that he was under a fiduciary relation to complainant as entitled her to have the settlement and deed set aside. Grant v. Harris (Va.) 1916D-1081.
- 13. Illegal Contract—Relief to Parties in Pari Delicto—Exception to Rule. Where a contract, illegal as being against common honesty and therefore against public policy, has been wholly or partially executed, the law will extend no relief, but will treat the parties as in pari delicto, and leave them where they have placed themselves; such rule having its basis in public policy, and being enforced, not for the benefit of the parties, but of the public. There are exceptions to the rule, and, although the parties are in pari delicto, yet, where it appears that the public interests will be better promoted by granting relief to the plaintiff than by denying it, the court, in its discretion, and

- acting with proper caution, may intervene and grant relief; the inquirv being whether plaintiff, if innocent, would be entitled to relief, and whether the public interest requires that relief be afforded, notwithstanding his guilt. Gilchrist v. Hatch (Ind.) 1917E-1030. (Annotated.)
- 14. A transaction whereby plaintiff agreed with one of the defendants, the manager of an oil company, and the holder of the majority of the stock, to purchase certain stock to be paid for by conveyance of realty and a note, in consideration that the directors of the company would elect plaintiff as its secretary and attorney at an annual salary, and whereby another defendant, to whom the manager was indebted, was to receive the plaintiff's conveyance and note, and himself give the manager credit in such amount, which purchase by plaintiff was induced by the false and fraudulent representations of the manager as to the value of the company's property and as to the production of its wells, and where the defendants conspired to perpetrate the fraud, and actually participated therein, even if illegal as a contract looking to the control of the company, was entered into by plaintiff under such circumstances that equity will, in view of public policy requiring fraud-ulent promoting schemes be thwarted, award him relief by ordering a reconveyance of title. Gilchrist v. Hatch (Ind.) 1917E-1030. (Annotated.)
- 15. Illegal Contract—Relief—Parties not in Pari Delicto. Although the parties to a transaction have concurred in an illegal act, they are regarded as not equally guilty, where one party has been induced into the contract through fraud, oppression, or imposition on the part of the other, and under such circumstances equity will intervene to relieve against the fraud, etc., whenever the public good requires it. Gilchrist v. Hatch (Ind.) 1917E-1030.
- 16. Fraud—False Representation to Procure Deed—Evidence Insufficient. On a bill to set aside a deed on the ground that complainants' signature thereto had been obtained upon fraudulent representations that it was necessary to enable the grantee to administer an estate in which the parties were interested, upon which representations complainants had relied, held insufficient to show the invalidity of the deed on the grounds alleged. Houlihan v. Morrissey (III.) 1917A-364.
- 17. Duress—What Constitutes—Threat to Prosecute Parent. Where defendant threatened to have plaintiff's father sent to the penitentiary for fraud in the sale of lands unless plaintiff conveyed at an inadequate price lands which he owned, a court of equity will cancel the conveyance. Embry v. Adams (Ala.) 1917C—1024. (Annotated.)

#### Note.

Statement of opinion as to future profits of business as ground for action for fraud or for rescission of contract. 1916D-1040.

#### b. Defenses.

18. Waiver of Right to Rescind—Delay. Where plaintiff, after discovering the falsity of the representations by which he was induced to purchase land, remained in possession for a number of months and then leased the premises before beginning suit, his delay was an affirmance of the contract precluding rescission. Cooper v. Hillsboro Garden Tracts (Ore.) 1917E-840.

## c. Time for Rescission.

- 19. Contract for Future Support—Rescission after Part Performance. After a partial performance by the grantee of his obligation to support the grantor, the grantor may not abandon the same or prevent further performance upon the part of the grantee and take advantage of such failure to secure equitable aid to cancel or rescind the deed. Soper v. Cisco (N. J.) 1918B-452.
- 20. A grantor, having made a convey-ance of her property to her daughter in consideration of \$300 and "support during her natural life" therein expressed, and having at the time the undoubted mental capacity to make it, and who delays challenging its validity for sixteen years and until the lawyer who transacted the business is dead, and the memory of other witnesses respecting important facts is dim, and the mental faculties and memory of the grantor herself have been so impaired as to render her testimony valueless, will not be permitted to set aside such conveyance when it appears that during all such time she had been supported by her daughter satisfactorily, and the grantor for eleven years after the conveyance was well aware that she had made it and was under no physical or mental disability nor prevented by coercion or poverty from filing a bill to set it aside if she had desired to do so. Soper v. Cisco (N. J.) 1918B-452.

## d. Conditions Precedent.

- 21. Necessity of Restoration of Consideration. A party seeking to rescind a contract, as authorized by Mont. Rev. Codes, \$5063, must restore or offer to restore to the adverse party everything of value received under the contract, on condition that the adverse party will do likewise. Suburban Homes Co. v. North (Mont.) 1917C-81.
- 22. Vendor and Purchaser—Rescission of Contract—Restoration of Payments. A vendor, suing for the cancellation of a contract of sale to clear his title, by asserting his right under the contract for the

- failure of the purchaser to pay instalments called for, need not restore or offer to restore payments made. Suburban Homes Co. v. North (Mont.) 1917C-81.
- 23. Reimbursement of Purchaser for Improvements—Contract Canceled for Purchaser's Default. A vendor suing to rescind the contract of sale for the failure of the purchaser to pay required instalments need not pay or offer to pay for improvements made on the property by the purchaser, in the absence of a showing that the improvements were within the contemplation of the parties at the making of the contract and the performance has not been prevented by his breach of contract. Suburban Homes Co. v. North (Mont.) 1917C-81. (Annotated.)
- 24. Breach of Condition—Rescission of Deed. Where a condition subsequent in a deed for the benefit of the granter and its other grantees that the grantee shall not sell to a negro is broken by a sale on consideration, the grantee under La. Rev. Civ. Code, arts. 2046, 2047, will be given time to cancel the sale to the negro before a rescission of the grantee's deed is had. Queensborough Land Co. v. Cazeaux (La.) 1916D-1248.
- 25. Putting Purchaser on Default—Tender of Deed. Where the complaint in an action by a vendor to cancel the contract for the purchaser's breach in failing to pay required instalments did not allege that a demand on the purchaser to pay the price was accompanied by a tender of a deed, but a deed was tendered on the trial, and the purchaser failed to respond to the demand of the vendor, and failed to tender payment at the trial and demand a deed, the vendor is entitled to relief. Suburban Homes Co. v. North (Mont.) 1917C-81.
- 26. Ultra Vires Contract—Annulment—Return of Consideration. Where the contract was fully executed on both sides, a court of equity will not set aside, as ultravires, a mortgage given by the directors of a manufacturing corporation, which received and enjoyed the proceeds of the lean, without first ordering a return of the consideration. Dillon v. Myers (Colo.) 1916C-1032.

## e. Pleading.

- 27. General Denial. Where plaintiff, alleging that she was, by fraudulent representations of an agent of defendant, induced to apply for its home purchasing investment contracts and led to pay it money, and that on the discovery of the fraud she seasonably elected to end the agreement and demanded a recovery of the money paid, the issues can be presented by a plea of the general issue. Capital Securities Co. v. Gilmer (Ala.) 1917A-888.
- 28. Sufficiency of Allegation of Fraud. In a suit to rescind a contract for the pur-

chase of land on the ground of misrepresentations, the complaint, which in addition to a detailed specification of the statements made by defendant averred that they were false and known to be false at the time made, that they were made for the purpose of inducing the plaintiff to purchase the land, and that plaintiff entered into the agreement relying on the representations, and would not have done so had he known their falsity, is sufficient, when not attacked until the introduction of evidence, though not specifically pointing out wherein the representations were untrue. Cooper v. Hillsboro Garden Tracts (Ore.) 1917E-840.

29. Allegations Showing Plaintiff Free from Fault. A purchaser, making partial payments under the contract and then voluntarily breaching it by failing to make further payments, cannot recover the payments made, without alleging and proving that his default was not the result of his grossly negligent, wilful, or fraudulent breach of duty, and then only on full compensation to the vendor, as provided by Mont. Rev. Codes, § 6039. Suburban Homes Co. v. North (Mont.) 1917C-81.

## f. Evidence.

- 30. Lost Instrument—Sufficiency of Evidence to Show Execution. In a suit to set aside a deed from a father to his son, evidence held insufficient to show that a contract making the conveyance subject to a trust was executed contemporaneously with the deed or with reference to the deed. Queen v. Queen (Ark.) 1917A-1101.
- 31. Fraud—Evidence Insufficient. In a suit to rescind an exchange of real property for a rooming house business, evidence held not to show that the defendants made any representation as to the value of the furniture and location of the rooming house. Haney v. Parkison (Ore.) 1916D—1035.
- 32. Fraud or Duress—Evidence Insufficient. In a suit to set aside a settlement, and a deed executed, by complainant pursuant thereto, evidence held insufficient to show that the settlement was obtained by fraud or duress, or that complainant was overreached or induced to execute the same without knowledge of its effect. Grant v. Harris (Va.) 1916D-1081.

## g. Decree.

33. Where a grantor under a deed is entitled to support, and, at the age of ninety-three, when her mental faculties are so impaired as to render it unjust to hold her to a strict accountability for her attitude, declines to be supported at the place where she has been satisfactorily supported for sixteen years, and makes no demand for support elsewhere but files a bill for cancellation of the deed, which relief must be

denied by the court, equity requires that at the option of the complainant provision for prompt and adequate support shall be secured to her in that proceeding. Soper v. Cisco (N. J.) 1918B-452.

- 34. Where in an action by a vendor for the cancellation of the contract of sale for the purchaser's failure to pay instalments, the answer set forth merely defensive matter, the purchaser cannot object to a decree granting relief on the ground that the vendor did not pay or tender payment for improvements made on the property. Suburban Homes Co. v. North (Mont.) 1917C-81. (Annotated.)
- 35. A decree in a suit by a vendor to cancel the contract of sale as a menace to his title, by asserting his right to declare the contract no longer binding for the failure of the purchaser to pay instalments, which merely declares that the vendor is entitled to be restored to his rights as they existed prior to the contract and that the contract be delivered up for cancellation, leaves the question whether the purchaser may recover payments made by him, or any part of them. Suburban Homes Co. v. North (Mont.) 1917C-81.

## RESERVATIONS.

See Indians.
In deeds, see Deeds, 54, 60.
Reservation of minerals in conveyance, see
Mines and Minerals, 1.

#### RESERVED.

Meaning, see Dedication, 20.

## RES GESTAE.

See Admissions and Declarations, 15-20.

# RESIDENCE.

See Domicil.
Effect on insurance, see Beneficial Associations, 4.
Meaning, see Deeds, 51.
As affecting jurisdiction, see Divorce, 1, 2, 5, 6.
Of voters, see Elections, 4-6.

Meaning, see Limitation of Actions, 37. Distinguished from place of business, see Venue, 2.

#### RESIDENT.

Meaning, see Fish and Game, 3.

#### RESIDUARY CLAUSE.

Construction, see Wills, 201-207.

#### RESIDUE.

Meaning, see Wills, 31.

## RES IPSA LOQUITUR.

See Negligence, 37-40.

In action for injury to passenger, see Carriers of Passengers, 60-62,

Meaning, see Independent Contractors, 10. In malpractice action, see Physicians and Surgeons, 36.

## RESISTING OFFICER.

See Assault. 6.

#### RESOLUTION OF INTENTION.

In special assessment proceedings, see Taxation, 137.

#### RESPONDENT.

Defined, see Quo Warranto, 6.

#### RESTAURANTS.

See Innkeepers.

Derogatory publication concerning, see Libel and Slander, 29, 63, 137.

## RESTAURANT KEEPER.

Distinguished from innkeeper, see Innkeep-

#### RESTORATION.

Effect of, see Embezzlement, 11-13.

## RESTORATION OF PROPERTY.

When cause accrues, see Limitation of Actions, 21.

## RESTRAINING ORDER.

Temporary injunction distinguished, see Injunctions, 37, 38.

#### RESTRAINT.

See False Imprisonment.

RESTRAINT OF PRINCES. See Marine Insurance, 2.

RESTRAINT OF TRADE. See Monopolies.

RESTRAINTS ON ALIENATION. See Deeds, 30.

RESTRAINTS ON USE. See Deeds, 32-36.

RESULTING TRUSTS. See Trusts and Trustees, 13-21.

RETAINING LIEN. Of attorneys, see Attorneys, 36, 37.

#### RETIRING PARTNER.

Liability for firm debts, see Partnership,

#### RETRAXIT.

General powers do not authorize, see Attorneys, 8.

### RETURN.

See Habeas Corpus, 11.

#### REVENUE.

See Taxation. Defined, see Schools, 17, 18.

## REVERSIBLE ERROR.

See Appeal and Error, 203-456.

## REVERSIONS.

See Remainders and Reversions.

Of condemned land, see Eminent Domain. 118-120.

Transfer, right to accrued rents, see Landlord and Tenant, 311/2.

Mortgage of reversion, right to rent, see Landlord and Tenant, 37.

## REVERT.

Meaning, see Wills, 193.

## REVIEW.

Of decision of health board, see Health, 1. Of proceedings under Employers' Liability Act, see Master and Servant, 98-100.

Of proceedings under Workmen's Compensation Act, see Master and Servant, 309-327.

Of assessments, see Taxation, 64-66. Proceedings for special assessment, see Taxation, 142, 143.

# REVIVAL.

Of will, see Wills, 111-113.

#### REVOCATION.

Of bailment, see Bailment, 3.

Of dedication, see Dedication, 22. Of trusts, see Trusts and Trustees, 4.

Of will, see Wills, 104-110.

## RHEUMATISM.

As accident under Workmen's Compensation Act, see Master and Servant, 200.

#### RIDICULE AND CONTEMPT.

Holding up to as libelous, see Libel and Slander, 26, 27.

RIGHT HEIRS AND DISTRIBUTEES.

Meaning, see Wills, 190.

RIGHT OF APPEAL.

See Appeal and Error, 1-7.

# RIGHT OF TRIAL BY JURY.

Not denied by granting new trial on single issue, see New Trial, 11.

#### RIGHTS OF WAY.

See Easements, 3, 13-18; Railroads, 58-60.

RIGHT TO OPEN AND CLOSE.

See Argument and Conduct of Counsel, 1, 3.

RIOTS.

See Mobs.

### RIPARIAN RIGHTS.

See Waters and Watercourses, 4-26.

RIVERS.

See Waters and Watercourses.

#### ROBBERY.

- 1. Elements of Offense.
- 2. Persons Liable.
- 3. Instructions.
- 4. Evidence.

#### 1. ELEMENTS OF OFFENSE.

- 1. Assault With Intent to Rob—Elements of Offense. As used in the statute regarding assault with intent to rob, making malice aforethought an element of the crime, "malice aforethought" is the voluntary and intentional doing of an unlawful act, with the purpose, means, and ability to accomplish the reasonable and probable, consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, by one of sound mind and discretion, the evidence of which is inferred from acts committed or words spoken. Gordon v. State (Ark.) 1918A-419. (Annotated.)
- 2. What Constitutes Robbery—Force Requisite. To constitute the offense of robbery, the law does not require that one be beaten up before he submits. It is sufficient that he yields because of fear of the robber, and no one is required to resist to the uttermost. Gordon v. State (Ark.) 1918A-419.

#### Note.

Attempt to commit robbery or assault with intent to commit robbery. 1918A-406.

## 2. PERSONS LIABLE.

3. Where one in an assault with intent to rob is surprised in the offense and flees, and, being overtaken, assaults his pursuer,

such assault will not support the charge so as to make one charged with aiding and abetting in the crime guilty. State v. Lewis (Iowa) 1918A-403. (Annotated.)

#### 3. INSTRUCTIONS.

4. Force or Intimidation. An instruction in a prosecution for assault with intent to rob which omits to charge, that in order to make out the offense, force or intimidation must be shown to have been employed, is erroneous, and will not sustain a conviction of one charged with aiding and abetting in the crime. State v. Lewis (Iowa) 1918A-403. (Annotated.)

## 4. EVIDENCE.

- 5. The evidence is held to show the exercise of sufficient force to support, not only the charge of assault to rob, but a charge of robbery. Gordon v. State (Ark.) 1918A-419. (Annotated.)
- 6. Assault With Intent to Commit—Evidence—Sufficiency. The evidence in a prosecution for assault with intent to rob is held sufficient to show intent to commit larceny, which is an included offense, so that one charged with aiding and abetting in the crime would be guilty if there was also an assault. State v. Lewis (Iowa) 1918A-403. (Annotated.)
- 7. Evidence that one entered an hotel with the intention of stealing the proprietor's money, that he was armed with a slung-shot and revolver, and that he approached the proprietor with the purpose of getting the money, is held to present a question for the jury as to whether his acts constituted an assault so as to make one charged with aiding and abetting in the crime guilty, although there was other evidence to show that accused did not intend to use his weapons except to scare the victim. State v. Lewis (Iowa) 1918A-403.

  (Annotated.)

## ROYALTIES.

See Patents.

RULE AGAINST PERPETUITIES.
See Perpetuities,

## RULES.

Validity and enforcement, see Carriers of Passengers, 16, 47-50, 52.

Patient's agreement to obey no defense to false imprisonment, see Hospitals and Asylums, 6.

Promulgation of, see Master and Servant, 22, 23.

Right to promulgate, see Telegraphs and Telephones, 22, 23.

Of water company, see Waterworks and Water Companies, 8, 9.

# RULES OF CONSTRUCTION.

See Statutes, 47.

#### SABBATH.

See Sundays and Holidays.

#### SAFE APPLIANCES.

Duty toward passengers, see Carriers of Passengers, 41.

#### SAFE PLACE TO WORK,

See Master and Servant, 9, 10.

#### SAFE PREMISES.

Duty toward passengers, see Carriers of Passengers, 42-46.

## SALARY.

Remedy for wrongful discharge, see Assumpsit, 1.

Asset of bankrupt, see Bankruptcy, 3.

Division of, see Bribery, 1.

Of judges, see Judges, 3-8.

Payment after illegal appointment, see Public Officers, 18.

De facto officer, see Public Officers, 30, 35. Right of de jure officer salary paid to de facto officer, see Public Officers, 32.

Effect of neglect, see Public Officers, 32-34, 43.

School teachers, see Schools, 31.

## SALES.

- 1. Formation of Contract, 735.
- 2. Construction of Contract, 735.
- Delivery of Goods, 736.
   Acceptance, 736.
   When Title Passes, 736.

- 6. Warranties, 736.
- a. In General, 736. b. Remedy for Breach, 738.
  7. Rights of Vendor, 739.
  2. Right to Rescind, 739.
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  - - c. Stoppage in Transitu, 740. d. Actions, 740.
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- Rights of Vendee, 741.
   Conditional Sales, 741.

  - a. In General, 741. b. Remedies of Vendor, 741. c. Remedies of Vendee, 742.
- 10. Bulk Sales Law, 742.
  - a. Validity, 742.
  - b. Construction, 742.
  - c. Actions, 742.

See Frauds, Statute of, 3-9; Judicial Sales. Title to automobile fittings, see Accession,

Auction sales, see Auctions and Auctioneers, 4, 5.

Sales in bankruptcy, see Bankruptcy, 23. Intoxicants, see Conflict of Laws, 1-3. Apportionment of proceeds of mass sale, see Confusion, 3.

Of corporate officers, see Corporations, 54, 55.

Sales of growing crop, see Crops, 2. Of executors and administrators, see Exe-

cutors and Administrators, 32-46.

Sale of lease of pond, fish not included, see Fish and Game, 2.

Guardian's sale of ward's personalty, see Guardian and Ward, 14.

Control by vendor of resale price, see Monopolies, 9.

Agreement to abstain on sale of business, see Monopolies, 13, 14.

Restriction by vendor patentee of use of article by vendee, see Patents, 1.

Receiver's sales, see Receivers, 12.

Warranty in sale of ship, see Ships and Shipping, 4, 5.

Trustee's sales, see Trusts and Trustees. 23-25.

Liability of warehouseman to vendor after sale, see Warehouses, 2.

## 1. FORMATION OF CONTRACT.

- 1. Parties to Transaction. There is not a sale by T. to G., where G. ordered lumber a sale by T. to G., where G. ordered lumber of F., and F. ordered it of T., and T. delivered it to G., and primarily billed it to F., and wrote G. to protect it, though after F. ordered it of T., G. promised T. to see that it got its money. First National Bank v. G. Geske & Co. (Wash.) 1917B-564.
- 2. Offer and Acceptance—Acceptance of Offer Once Rejected. Where a tentative contract to buy accessories and act as the seller's agent in a certain territory was rejected by the seller and a new contract sent to the buyer, which he rejected, the seller cannot sue on the original tentative contract, as an express contract, for the price of accessories shipped to the buyer but not accepted by him. Cook v. Story (Wash.) 1917C-985. (Annotated.)

# CONSTRUCTION OF CONTRACT.

- 3. Good Will-Implied Transfer. As an incident of the good will, the agreement of the seller with the buyer of a business and its good will not to become a competitor passes, without formal written assignment. to one to whom the buyer sells the business and good will, which latter, without mention, passes with the sale of the business. Public Opinion Pub. Co. v. Ransom (S. Dak.) 1917A-1010. (Annotated.)
- 4. "Market Price"—Selling Price Fixed by Combination. As "market price" has no hard and fast meaning, and, when the market is not open, but the selling price is fixed by a combination of dealers, market price is market value or quoted price of the dealer, where plaintiff contractor purchased cement at a stated price per

1916C-1918B.

barrel under an agreement that he was to have a reduction or rebate if the market price fell below that named while deliveries were being made to him, and later the defendant quoted a lower price to the county for county roads for the advantage of contractors generally, the quotation to the county, without limitation as to quantity for the benefit of those engaged in the same kind of work as plaintiff, is a reduction in market price which entitles plaintiff to a rebate. McGarry v. Superior Portland Cement Co. (Wash.) 1918A-572. (Annotated.)

#### Notes.

Selling price fixed by combination or monopoly as "market price." 1918A-575. Sale of business as passing good will without mention thereof. 1917A-1015.

## 3. DELIVERY OF GOODS.

5. Necessity of Acceptance. To constitute a valid delivery on sale of personal property, there must be an acceptance of it by the purchaser or his agent. Constructive delivery may be an exception. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.

## 4. ACCEPTANCE.

6. Effect of Rejection of Offer—Goods Ordered on Basis of Offer. Where the buyer ordered accessories on faith of a tentative contract made by him with the seller's agent and repudiated by the seller, and a new contract sent, which the buyer rejected, he is under no obligation to accept the accessories ordered. Cook v. Story (Wash.) 1917C-985.

## Note.

Acceptance of offer once rejected as consummating contract of sale. 1917C-987.

# 5. WHEN TITLE PASSES.

- 7. In the face of a refusal to receive delivery and the property in performance of a contract of purchase and sale, the purchaser standing on a repudiation of it declared while the contract was wholly executory, with repudiation not subsequently waived or withdrawn, title cannot be cast upon the purchaser by operation of law. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.
- 8. Unless the contract stipulates the contrary, delivery and acceptance of property and vesting of title thereunder and payment of the purchase price therefor are concurrent acts, and, until delivery and acceptance title does not vest, and the purchase price payable only on the vesting of title is not recoverable in a suit for the purchase price. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.
- 9. The attempted delivery did not vest title, and suit for the purchase price can-

- not be maintained, nor can the freight charges incurred after notice of cancellation be recovered. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.
- 10. Title Acquired. Otherwise than by estoppel, a buyer of personal property acquires no better title than that of the seller from whom he buys. Howard v. Mc-Phail (R. I.) 1917A-186.
- 11. Delivery to Carrier. The ownership of sand sold to the defendant f. o. b. its station does not pass until its delivery. Central of Ga. R. Co. v. Southern Ferro Concrete Co. (Ala.) 1916E-376.

## 6. WARRANTIES.

### a. In General.

- 12. Consideration for Warranty. A warranty that there are no undisclosed liabilities against a company given by a part of the owners of its stock, whereby one having an executory contract of purchase thereof is induced to proceed to a consummation of it when not legally bound to do so has consideration. Pacific Power, etc. Co. v. White (Wash.) 1918B-125.
- 13. Duration-When Contract Executed. A contract of September 8th in terms: Articles of agreement between named persons witnesseth that the parties of the first part have bargained and agreed to sell and do hereby sell to the party of the second part all the stock of a certain company for \$25,000, of which \$1,000 is to be paid at once, and balance on or before September 17th, and on receipt of stock, and the parties of the first part agree and warrant that the company's liabilities did not on September 1st exceed \$11,500, after allowing for claims then due it, and if they do exceed it, the excess shall be deducted from the purchase price, and the parties of the first part will on or before September 13th furnish a statement of the liabilities, and then the party of the second part shall have privilege of verifying it by books, accounts, and other papers and records of the company, so that, if possible, it may be done by September 17th —is not, when an audit was furnished, an executed contract passing title, but still an executory contract, as regards consideration for the warranty of September 19th, that the liabilities did not exceed the amount shown by the audit, which before proceeding further with the consummation of the purchase the party of the second part required certain of the parties of the first part to execute; the party of the second part not being required to consummate the purchase till protected in some satisfactory way against any undis-closed liabilities of the company. Pacific Power, etc. Co. v. White (Wash.) 1918B-125.
- 14. Construction of Warranty—Meaning of "Liabilities." "Liabilities" of a cor-

poration, warranted in a contract of sale of its stock and in a separate warranty not to exceed a certain amount, are not limited to contractual liabilities, but include those for torts. Pacific Power, etc. Co. v. White (Wash.) 1918B-125.

- 15. Duration-Continuing Warranty. A warranty on which sale of the stock of a corporation is made against its liabilities, undisclosed or contingent or otherwise, exceeding a certain amount, is continuing. Pacific Power, etc. Co. v. White (Wash.) 1918B-125.
- 16. Distinction Between Warranty and Guaranty. A contract inducing consummation of purchase of the stock of a corporation, whereby part of the sellers warrant that the corporation's liabilities do not exceed a certain amount, is one of warranty, and not of guaranty, being an absolute undertaking in praesenti, as well as in futuro. Pacific Power, etc. Co. v. White (Wash.) 1918B-125.
- Power—Evidence of Breach. In an action for their price and a seeds received in January would not grow when planted in good soil about April, with evidence that they were not properly kept after receipt, and that plaintiff had properly tested them before sending, is held not sufficient to support a verdict for counterclaim for breach of warranty of the seeds as capable of germinating. Meehan v. Ingalls (Wash.) 1918B-71. (Annotated.)
- 18. Waiver of Warranty not Shown. Plaintiff purchased brick from defendant under a warranty that they should be firstclass white brick equal to sample. The brick furnished were of different color, and on being rejected for this reason, defendant's general manager informed plaintiff that the reason the brick were not of the color shown by the sample was because they were wet, but that they would regain their natural white color when dry, whereupon the plaintiff used them, but found that they did not become white after being dry. It is held that plaintiff's acceptance of the brick was conditional only, and did not amount to a waiver of the warranty. Jorgensen v. Gessell Pressed Brick Co. (Utah) 1917C-309.
- 19. Good Will Implied Warranty on Sale. It is held that the good will of a business is a species of property subject to sale, but the vendor who sells the good will of his business guarantees nothing; for, in the nature of things, he can give no assurance that the patronage of the place will continue. Harshbarger v. Eby (Idaho) 1917C-753.

(Annotated.)

20. Sale by Sample. A contract of sale of jar caps which binds the seller to ship the goods on conditions specified, one of

- which is that the caps will fit any Mason jar, and another that no promise is valid unless specified on the order, and another that no salesman can alter the conditions printed on the contract, is not a contract of sale by sample, though a sample was exhibited during negotiations, but is a contract containing a warranty that the caps will fit any Mason jar. Pickrell, etc. Co. v. Wilson Wholesale Co. (N. Car.) 1917C-344. (Annotated.)
- 21. It is not assumed that every sale where a sample is shown is a sale by sample, but to be a sale by sample there must be an understanding of the parties, express or implied, that the sale is by sample. Pickrell, etc. Co. v. Wilson Wholesale Co. (N. Car.) 1917C-344. (Annotated.)
- 22. Where a sale is by sample, the law implies that the bulk shall correspond in kind and quality with the sample. Pick-rell, etc. Co. v. Wilson Wholesale Co. (N. Car.) 1917C-344. (Annotated.)
- 23. Where defendant furnishes a sample brick to plaintiff, and assures him that the brick to be delivered under the contract will be first-class, wire-cut, white brick, in quality and color like the sample, such representation is not mere description, but constitutes an express warranty. Jorgensen v. Gessell Pressed Brick Co. (Utah) 1917C-309. (Annotated.)
- 24. Where a sale of brick is made by a manufacturer according to sample and without any conditions, there is an implied warranty that the brick to be furnished shall be like and equal to the sample are the sample and equal to the sample are th ple. Jorgensen v. Gessell Pressed Brick Co. (Utah) 1917C-309. (Annotated.)
- 25. The existence of an express warranty that brick to be furnished under a contract of sale shall be first-class, wirecut, white brick corresponding to a sample does not negative an implied warranty that the brick to be furnished shall be, in all respects of quality, fitness, and color, like the sample. Jorgensen v. Gessell Pressed Brick Co. (Utah) 1917C-309. (Annotated.)
- 26. The question whether a sale of cotton by cutting and sample and an examination of its external condition created an express or implied warranty as to its real condition, is held to present a proposition of law. Greenwood Cotton Mill v. Tolbert (S. Car.) 1917C-338. (Annotated.)
- 27. The law implies a warranty of soundness of cotton when purchased by sample, where the defect is either patent or is not known to the seller, regardless of fraud or false statement or anything to mislead the buyer to accept it. Greenwood Cotton Mill v. Tolbert (S. Car.) 1917C-338. (Annotated.)

28. When the law implies a warranty as to the soundness of a commodity, in

the absence of an agreement, it cannot be defeated by the action of the seller and the fact that the defect is latent or unknown to the seller, or that he was not negligent in not ascertaining it will not relieve him from liability. Greenwood Cotton Mill v. Tolbert (S. Car.) 1917C-338.

(Annotated.)

- 29. Waiver of Warranty Failure to Give Notice of Defect. The buyer's failure to give notice of the unsoundness of the goods bought to the seller within a reasonable time after discovering it may be considered in determining whether he waived his right to insist upon the breach of warranty. Greenwood Cotton Mill v. Tolbert (S. Car.) 1917C-338.
- 30. Implied Warranty as to Color. Where a seller of bricks for a wall to be built by the buyer knows that both sides of the wall should be faced and of uniform shade similar to a sample brick, which the architect accepted as of the required color, and agrees to furnish bricks accordingly, and the buyer thereupon gives ar order for bricks, which is accepted, there is a sale with an implied warranty that the bricks shall correspond to the sample, within Mass. St. 1908, c. 237, § 16. Gascoigne v. Cary Brick Co. (Mass.) 1917C-336. (Annotated.)
- 31. Waiver of Warranty—Acceptance of Goods. Where a sale was made under an implied warranty that the goods delivered should conform to a sample, the acceptance of title by the buyer does not, under Mass. St. 1908, c. 237, § 49, release, as a matter of law, the seller of liability; but it is a question of fact whether the buyer waived the warranty and took the goods as he found them. Gascoigne v. Cary Brick Co. (Mass.) 1917C-336.
  - 32. Implied Warranty—Fitness for Purpose. Where a dealer in pumps sold grading contractors a new impeller for a secondhand pump originally purchased from the dealer, there is no implied warranty that the new impeller would make the old pump work satisfactorily. Perine Machinery Co. v. Buck (Wash.) 1917C—341
  - 33. Implied Warranty That Article is the One Ordered. Where grading contractors ordered a new impeller for their secondhand pump from the dealer who originally sold it, and who wired the factory for a new impeller and installed it, the sale is by sample, and the only implied warranty is that the impeller furnished is the one ordered. Perine Machinery Co. v. Buck (Wash.) 1917C-341.

# (Annotated.)

# Notes.

Express or implied warranty on sale by sample. 1917C-311.

Express or implied warranty on sale of seed. 1918B-72.

# b. Remedy for Breach.

- 34. Action on Warranty—Necessary Parties. Though sale of the stock of a corporation is by all the stockholders, only those stockholders who execute a warranty against liability that the corporation's liabilities do not exceed a certain amount, whereby the purchaser is induced to consummate his purchase, are necessary parties to action on the warranty. Pacific Power, etc. Co. v. White (Wash.) 1918B-125.
- 35. Automobiles—Proof of Value. That the value of the automobile, if in good condition, would have been the sales price of \$1,350, is sufficiently proved for the buyer suing for breach of warranty, by testimony of the seller's witness that its value as received, taking into consideration its condition at that time, was \$1,250, and that in placing that value on the car as received he had deducted \$100 from the list price; thus clearly indicating that the list price would represent the value of the car in perfect condition. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.
- 36. Making Good to Subvendee as Prerequisite to Action on Warranty. The purchaser of seed warranted to be of a specified variety, and which he resells to a grower, may recover from the dealer the actual loss due to misrepresentation as to the variety although he has not liquidated his liability to the subvendee for breach of warranty. Buckbee v. P. Hohenadel, Jr., Co. (Fed.) 1918B-88. (Annotated.)
- 37. Where seed is sold to a dealer under a warranty that it is of a special variety, and the dealer in turn sends it to a grower, the warranty is carried forward to the ultimate purchaser, if it appears that such understanding was part of the first sale, and the measure of damages for breach of warranty is the difference in market value between the crop produced and such crop as the specified variety of seed would have produced under like condition. Buckbee v. P. Hohenadel, Jr., Co. (Fed.) 1918B-88.
- 38. Damages. In an action for breach of warranty of the quality and color of a certain brick sold to plaintiff for use in a residence, the measure of plaintiff's damage is the loss directly and naturally resulting in the ordinary course of events from the breach. Jorgensen v. Gessell Pressed Brick Co. (Utah) 1917C-309.
- 39. Question for Jury. Where in an action for the price of jar caps warranted to fit any Mason jar there was evidence that all Mason jars were of the same pattern and sealed in the same way, and that the caps furnished did not fit Mason jars of the Ball Bros. type carried by the buyer, and 'during the trial a witness for the seller sealed the Mason jars in question with the caps shipped to the buyer, the issue of compliance by the seller with the

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warranty is for the jury, and a charge that, if the jury believes the evidence, the verdict must be for the seller, is erroneous, for the demonstration at the trial cannot be considered to the exclusion of the other evidence. Pickrell, etc. Co. v. Wilson Wholesale Co. (N. Car.) 1917C-344.

- 40. Remedies of Buyer—Action for Damages. Where there is a breach of warranty, the buyer may be entitled to relief by an action for damages without a rescission of the contract of sale. Greenwood Cotton Mill v. Tolbert (S. Car.) 1917C-338.
- 41. Right to Damages. Where a seller of bricks under an implied warranty shipped bricks which did not conform to the warranty, the buyer could recover the damages sustained. Gascoigne v. Cary Brick Co. (Mass.) 1917C-336.
- Measure of Damages—Consequential Damage. Where a seller of bricks under an implied warranty to conform to a sample delivered bricks not conforming thereto, with knowledge that the buyer would use the bricks in erecting a wall, the buyer, knowing of the defect, cannot recover damages caused by his use of the bricks in erecting the wall; but where he relies on the warranty, and acts with reasonable diligence in using the bricks without further inspection, and their general appearance does not disclose the defects, and he promptly notifies the seller of the defects, he can, under Mass. St. 1908, c. 237, § 49, recover not only the difference between the value of the bricks bought and those delivered, but also the expense of rebuilding the wall. Gascoigne v. Cary Brick Co. (Mass.) 1917C-336.
- 43. Instruction as to Damages Error Prejudicial. Where a buyer of bricks for use in constructing a wall could recover as damages for breach of warranty the expenses of taking down and rebuilding the wall, the error in an instruction that he could recover only a sum equal to the difference between the value of the bricks contracted to be sold, and the value of the bricks delivered is not cured by a further instruction that the jury could find that the difference consisted in the expense to the buyer in culling from the mass the bricks used in the reconstructed wall. Gascoigne v. Cary Brick Co. (Mass.) 19170-336.
- 44. Loss of Profits. Where there was an express warranty of satisfactory performance by an impeller, for use in a secondhand pump sold contractors for grading work, damages for breach of such warranty on account of lost profits on the grading contract are not recoverable, Perine Machinery Co. v. Buck (Wash.) 1917C-341.
- 45. Rights and Duties of Buyer. Where grading contractors, who ordered by sam-

ple an impeller for their secondhand pump, discover that it will not work satisfactorily, it is their duty to return the impeller to the seller with notice. Perine Machinery Co. v. Buck (Wash.) 1917C-341.

- 46. Breach of Warranty on Sale of Automobile—Measure of Damages. Evidence as to damages in an action for breach of warranty in the sale of an automobile is held to be sufficient to warrant a verdict for \$550, as the cost of a new engine and the installation thereof. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.
- 47. Two instructions on measure of damages for breach of warranty in a sale of an automobile, varying only in using in one the term purchase price, and in the other value of the car had it been as warranted, are not inconsistent in fact, the evidence showing such value to be such price. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.

## 7. RIGHTS OF VENDOR.

## a. Right to Rescind.

48. Rescission by Seller — As Against Transferee. A seller may, on discovery that the contract was procured from him by fraud, rescind not only as against the original buyer but as against a transferee who is not a bona fide purchaser for value. W. G. Ward Lumber Co. v. American Lumber, etc. Co. (Pa.) 1918A-451.

## b. Lien.

49. Vendor's Lien-Loss - Transfer of Warehouse Receipt. General Business Law (Consol. Laws, c. 20, § 125, McKinney's Consol. Laws, Book 19), provides that a person to whom a negotiable warehouse receipt is duly negotiated thereby acquires such title as the person negotiating the receipt or the person to whose order the goods were to be delivered by the terms of the receipt had, or had ability to convey to a purchaser in good faith for value, and also the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Section 126 provides that if the receipt is non-negotiable, the transferee acquires the right to notify the warehouseman of the transfer, and thereby acquire his direct obligation to hold pos-session of the goods for him according to the receipt, but that prior to such noti-fication his title and such right may be defeated by the levy of an attachment or execution by a creditor of the transferor, or by notice to the warehouseman of a subsequent sale by the transferor. Section 133 provides that where a negotiable receipt has been issued, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom the receipt has been

negotiated. N. Y. Personal Property Law (Consol. Laws, c. 41, McKinney's Consol. Laws, Book 40), § 135, added by Laws 1911, c. 571, provides that the unpaid seller of goods who is in possession of them is entitled to retain possession until payment in the cases therein specified. It is held that from the moment that a negotiable receipt is negotiated, or from the moment of notice of the warehouseman in the case of the negotiation of a nonnegotiable receipt, the warehouseman holds possession for the transferee of the receipt, and with the transmutation of possession the vendor's lien of the transferor is at an end. Rummell v. Blanchard (N. Y.) 1917D-109. (Annotated.) Note.

Transfer of warehouse receipt as divesting vendor's lien. 1917D-112.

## c. Stoppage in Transitu.

50. Loss of Right-Transfer of Warehouse Receipt. Under N. Y. Personal Property Law, § 139 (Consol. Laws, c. 41, McKinney's Consol. Laws, Book 40), added by Laws 1911, c. 571, providing relative to a seller's right of stopping goods in transitu that goods are in transit from the time they are delivered to a carrier or bailee for transmission to the buyer, until the buyer takes delivery from the carrier or bailee, and that goods are no longer in transit if the buyer obtains delivery before the arrival of the goods at their destination, or if, after their arrival, the carrier or bailee acknowledges to the buyer that he holds the goods on his bestlef a caller and goods transferring. half, a seller of goods, transferring a negotiable warehouse receipt therefor to the buyer, cannot thereafter regain possession by the exercise of the right of stoppage in transitu, as merchandise is not in "transit" unless delivered to a bailee for the purpose of transportation, and if the transformation of the warehouseman's possession from a possession for the seller to a possession for the buyer by the transfer of the receipt was equivalent to a transit of the merchandise, the same act which marked the beginning of the transit marked also its end, and where the process of transportation has been completed and the bailee has undertaken to keep the goods as agent of the buyer, the right of stoppage is extinguished. Rummell v. Blanchard (N. Y.) 1917D-109.

#### d. Actions.

# (1) Pleading.

51. Action for Breach of Contract—Complaint Sufficient. A complaint alleged that defendant agreed to purchase twenty-five motor cars from plaintiff, but that it purchased and paid for only four, that if it had purchased the remaining twenty-one plaintiff's profit on each car would have been \$100, and that by reason of the

breach he suffered damages to the amount of \$2,100, Cal. Civ. Code, § 3300, declares that, unless otherwise provided, the measure of damages for breach of a contract is the amount which will compensate the party aggrieved for all detriment proximately caused. Section 3311 provides that a seller's damages, if the property has been resold, is the difference between the contract price and the net proceeds of the sale; and, if not resold, the difference between the contract price and the value of the property to the seller. Section 3353 declares that in estimating damages the value of property to a seller is deemed the price which he could have obtained in the nearest market. Held, that the complaint, while stating a conclusion, was sufficient as against general demurrer; for, though the seller may or may not have had the property on hand, it showed his loss. Thompson v. Hamilton Motor Co. (Cal.) 1917A-677.

## (2) Evidence.

- 52. Agreement not to Engage in Business—Breach—Proof of Damage. In an action by the purchasers of a business and the good will thereof against the seller, who had agreed not to conduct the same kind of business in the same town, plaintiffs were bound to show, with some degree of certainty, not only that the seller committed the wrongs imputed to him but that they produced an injury or resulted in a violation of plaintiffs' rights. Finch v. Michael (N. Car.) 1916E-382.
- 53. Parol Evidence of Subsequent Agreement. Evidence offered by the seller of a mule that after it had been delivered to the buyer, and within half an hour after a written contract of sale had been delivered by the buyer to the seller, and before the seller had handed such paper to a third person who was to keep it for the parties, the buyer agreed that the title to the mule should remain in the seller until payment was made, is admissible if considered as made at the time of the contract as being an agreement to secure payment not inconsistent with the contract, and if made subsequently to the contract the rule excluding parol evidence does not apply. Brown v. Mitchell (N. Car.) 1917B-933.
- 54. Evidence of Damage Sufficient. In an action for breach of a contract to purchase automobiles, evidence held to show plaintiff's damage. Thompson v. Hamilton Motor Co. (Cal.) 1917A-677.
- 55. Subsequent Contract Indicating Value Admissibility of Evidence. Defendant's offer to prove that prior to making the offer to the county it was understood that the contract with the county was not to be retroactive is properly rejected, as it cannot affect plaintiff's rights. McGarry v. Superior Portland Cement Co. (Wash.) 1918A-572.

# (3) Questions of Law or Fact.

56. In an action for the price agreed on a parol sale of stock for a price more than \$200, to a buyer already in possession as pledgee, the evidence is held to make the buyer's acceptance of possession as complete owner a question for the jury. Wilson v. Hotchkiss (Cal.) 1917B-570.

(Annotated.)

#### 8. RIGHTS OF VENDEE.

57. Bona Fide Purchasers—Consideration—Pre-existing Debt. Where lumber sold by plaintiff to a fraudulent buyer is resold to defendant in consideration of the cancellation of a pre-existing debt, such consideration does not, under the law of Ohio, constitute defendant a bona fide purchaser for value. W. G. Ward Lumber Co. v. American Lumber, etc. Co. (Pa.) 1918A—451. (Annotated.)

58. Set-off—Expenses of Buyer. Where grading contractors, who bought an impeller for their secondhand pump, promise to pay the seller's bill, making no objection to the price or that the expressage from the factory had been charged as a part of the expense of obtaining the impeller, they cannot claim an offset for items of expenditure upon other details of their pumping plant in endeavoring to make it work. Perine Machinery Co. v. Buck (Wash.) 19170-341.

59. Where grading contractors bought an impeller for their secondhand pump and notified the seller that it did not work satisfactorily, they are not authorized to expend money on other parts of the pump to perfect the plant, and then offset the expense against the seller's claim. Perine Machinery Co. v. Buck (Wash.) 1917C-341

60. Of Building-Pleading in Action on Contract. A complaint alleging that defendant, being the owner of a dwelling bouse situated at a certain street number, which it desired to dispose of, and have removed, sold the same to plaintiff, who owned the lot on the opposite side of the street to which he intended to remove it, for a valuable consideration then paid, and that defendant knew of plaintiff's purpose in purchasing the house, but afterwards refused to permit plaintiff to remove or take possession of it, sufficiently alleged a contract by defendant to sell the dwelling house and a breach, not alleging a contract for the purchase and sale of realty. Wetkopsky v. New Haven Gas Light Co. (Conn.) 1916D-968.

#### Note.

Purchaser of chattel for pre-existing debt as purchaser for value. 1918A-455.

## 9. CONDITIONAL SALES.

#### a. In General.

61. Property Attached to Realty of Third Person. Where personalty, such as machinery, is to the seller's knowledge sold to be attached to the realty of a third person other than the buyer and used for a particular purpose, in order to bind such third person by a contract of conditional sale between the buyer and seller, such as one reserving title in the seller until full payment, such third person must have actual notice of the reserved title, and its rights are not affected by the contract for payment between the buyer and seller without such notice. Allis-Chalmers Co. v. Atlantic (Iowa), 1916D, 910.

(Annotated.)

62. What Constitutes. An instrument is a conditional sales contract where it purports to be an order for a set of scales, contains shipping directions, terms of payment, provides that title shall remain in seller, loss or destruction to be borne by buyer, that on failure to pay instalments whole sum shall be due, that payments made shall on default be considered rent, seller to make repairs, and that "this contract covers all agreements between the parties," and which also contains at the end an instalment note for the price. Toledo Scale Co. v. Gogo (Mich.) 1917E-601.

63. The contract cannot be construed as authorizing a recovery independent of delivery of property or vesting of title in defendant, but instead is a contract of purchase and sale with payment conditioned upon the passing of title. Hart-Parr Co. v. Finley (N. Dak.) 1917E-706.

## Notes.

Rights of parties in case of conditional sale of property to be attached to realty of third person. 1916D-915.

Remedies of party to contract upon anticipatory breach thereof or prevention of performance. 1917E-712.

#### b. Remedies of Vendor.

64. Election by Seller Between Remedies. Upon default by the vendee in a conditional sale contract the vendor may either disaffirm and retake the property, or affirm, declare subsequent payments due, and sue for the purchase price; the election of one remedy barring any right under the other. Norman v. Meeker (Wash.) 1917D-462. (Annotated.)

## Note.

Election of remedies on breach of conditional sale. 1917D-464.

## c. Remedies of Vendee.

65. Remedies of Vendee—Breach of Warranty. Where the seller of a chattel by conditional sale seeks to reclaim it by means of an action of replevin, the buyer may defend by pleading a breach of warranty by way of recoupment in diminution or extinction of the price, as provided by the N. Y. Uniform Sales Act (Laws 1911, c. 571) § 150. Peuser v. Marsh (N. Y.) 1918B-913. (Annotated.)

#### Note.

Right of conditional vendee to recover damages for breach of warranty. 1918B-914.

# 10. BULK SALES LAW.

## a. Validity.

66. Validity of Bulk Sales Law. The Mich. Bulk Sales Act (Pub. Acts 1905, No. 223), regulating the sale of merchandise in bulk, and making sales not in accordance therewith void as against the seller's creditors, is constitutional. Coffey v. McGahey (Mich.) 1916C-923.

#### b. Construction.

- 67. Waiver of Rights by Creditor. A creditor who knows nothing of the debtor's sale of his stock of goods in bulk, or that it had been made contrary to the Mich. Bulk Sales Act (Pub. Acts 1905, No. 223), by his conversation with the seller in the presence of the purchaser, cannot waive his rights under the act, since a "waiver" is an intentional relinquishment of a known right, or such conduct as warrants an inference of a relinquishment of such right. Coffey v. McGahey (Mich.) 1916C-923.
- 68. Remedy of Creditor in Equity. Under Mich. Bulk Sales Act (Pub. Acts 1905, No. 223), providing that creditors upon knowledge that the requirements of the act have not been followed, may apply to have the purchaser become a receiver and account to creditors, the rule that a creditor must obtain a judgment at law before resorting to equity does not apply; and, apart from the statute, the rule is subject to exceptions, where a judgment cannot be had because the debtor is dead, has abscended from the state, and has no property therein. Coffey v. McGahey (Mich.), 1916C-923. (Annotated.)
- 69. Under Mich. Bulk Sales Act (Pub. Acts 1905, No. 223), on a bill in behalf of complainant and all other creditors of the seller upon the theory that the statute

made the debtor's sale absolutely void, and that his creditors could apply the property to their claims, by receivership, injunction, and an accounting, and on the theory of a creditor's bill or a bill in aid of execution, the complainant will not be denied equitable relief, on the ground that he has an adequate remedy at law, though the equitable remedy is not exclusive. Coffey v. McGahey (Mich.), 1916C-923.

(Annotated.)

#### c. Actions.

70. Action by Creditor—Parties. In a suit by the creditor of one who sold merchandise in bulk, without a compliance with the Mich. Bulk Sales Act (Pub. Acts 1905, No. 223), regulating such sales, the seller is a necessary party. Coffey v. McGahey (Mich.), 1916C-923.

#### Notes.

Remedies of creditor for violation of bulk sales law. 1916C-928,

Statutory regulation of sale of petroleum products. 1917A-167.

#### SALES IN BULK ACTS.

See Fraudulent Sales and Conveyances, 15-20.

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See Partition, 9.

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## SATISFACTION.

See Accord and Satisfaction. Of judgment, see Judgment, 53-57.

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See Banks and Banking, 75,

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## SCANDALOUS MATTER.

In telegram, right to refuse, see Telegraphs and Telephones, 24.

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## SCHOOLS.

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Gifts to, as charities, see Charities, 4. Special assessment for improvements, see Taxation, 118-120.

# 1. ESTABLISHMENT.

- 1. Legislative Control of Schools. The educational institutions of the state are under the control of the legislature, which may create, abolish, or regulate them, and the courts cannot supervise the wisdom of disciplinary regulations by the legislature. Board of Trustees v. Waugh (Miss.) 1916E-522.
- 2. While the establishment of separate normal schools for the education of teachers is not a part of the common school system, yet high schools where a normal training is given are part of the "common schools" within Ark. Const. art. 14, § 3. Dickinson v. Edmondson (Ark.) 1917C-913. (Annotated.)

# 2. CONSOLIDATION OF SCHOOLS.

- 3. Discretion of Board. Under Tenn. Acts 1913, c. 4, providing generally for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, the consolidation of schools is not required, but is merely permitted, and the question how the law shall be administered in such respect is left to the discretion of the county board of education. Cross v. Fisher (Tenn.) 1916E-1092.
- 4. Judicial Control. If a county board of education, acting under Tenn. Acts 1913, c. 4, providing for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, in consolidating certain schools into one had ignored all reasonable rules, acting in an arbitrary manner, so as to abuse its discretion, by disregarding the wishes,

welfare, and interests of the taxpayers of the district, the action of the officials would have been proper subject for correction by injunction because of abuse of power. Črosš v. Fisher (Tenn.) 1916E-1092.

## 3. ACTIONS AGAINST SCHOOL DIS-TRICTS.

- 5. Liability of School District-Defective Condition of School Premises .- The question of negligence of a school district in leaving accessible to small pupils a horizontal ladder seven feet above the concrete floor, unprotected by mats, is held under the evidence, to be for the jury. Howard v. Tacoma School District (Wash.) 1917D-792. (Annotated.)
- 6. Rem. & Bal. Wash. Code, § 951, authorizing action against a school district, for an injury to plaintiff's rights arising from some act or omission of the district, abrogates the common-law rule of its nonliability for negligence in the performance of governmental duties. Howard v. Tacoma School District (Wash.) 1917D-792. (Annotated.)
- 7. A school district, only a quasi municipal corporation, and a mere arm of the state for the administration of its school system, in providing exercise ladders in a schoolhouse, is acting in a governmental capacity, the same as in providing the schoolhouse, and not performing a private or proprietary function, and so is not liable, under the common law, for injury to a pupil exercising thereon, though resulting from negligence of its officers or agents in connection therewith. Howard v. Tacoma School District (Wash.) 1917D-792.

(Annotated.)

8. Contributory negligence of a girl pupil six years old, in going on a horizontal ladder for exercise, though told by her teacher not to do so, is held under the evidence to be a question for the jury. Howard v. Tacoma School District (Wash.) 1917D-792. (Annotated.)

### Note.

Liability of municipal corporation or school board for defective condition of public school premises. 1917D-797.

# 4. SCHOOL BUILDINGS.

9. Implied Liability-Under Contract Invalid for Failure to Require Bids. Where a board of trustees of a school district let a contract for work on a schoolhouse without advertising for bids as required by Cal. Pol. Code, § 1617, subd. 22, the school district was not liable to the contractor on a quantum meruit, since, while a school board may under some circumstances be liable upon an implied contract for benefits received by it, this implied liability arises only where the board has general power to contract with reference to a subject-matter, but the express contract which it is assumed to enter into is rendered invalid for some mere irregularity or some invalidity in its execution, and it does not arise where the express contract is invalid because a statute prescribes the only method in which a valid contract can be made, and the adoption of such mode is a jurisdictional prerequisite to the exercise of the power to contract at all. Reams v. Cooley (Cal.) 1917A-1260. (Annotated.)

10. Municipal Contracts-Necessity of Competitive Bidding. Cal. Pol. Code, § 1617, subd. 22, makes it the duty of boards of trustees of school districts to let all contracts involving an expenditure of more than \$200 for work to be done or materials or supplies to be furnished to the lowest responsible bidder and for the purpose of securing bids to publish a notice calling for bids. A board of trustees adopted plans for a school building, which the superintendent of schools refused to approve unless certain plastering was omitted. Such work was eliminated and a contract entered into, the contractor's bid being modified by making a proper deduction for the plastering and certain other work. The board, however, later determined to have the plastering done, and under an arrangement with the contractor contracted with plaintiff to do the work; the price being reached by taking the price for which the contractors would have done the work under their total bid and decreasing that by several hundred dollars. Held that, the cost having amounted to more than \$200, the contract should have been let as required by the code, and it was no answer to this objection that the original specifications upon which the contractor's bid was made included the plastering, and hence the contract with plaintiff was invalid. Reams v. Cooley (Cal.) 1917A-1260.

11. Use ef School Building—Lodge Meetings. Kirby's Ark. Dig. § 7643, authorizing school directors to permit a private school to be taught in the schoolhouse while not occupied by a public school, unless otherwise directed by the voters of the district, does not exclude other uses of school buildings, where the same do not interfere with the schools nor injure the buildings, and does not render invalid a contract authorizing a local lodge of a secret society to use a school building for a lodgeroom; the use not interfering with the school nor injuring the building. Cost v. Shinault (Ark.) 1916C—483.

(Annotated.)

12. Kirby's Ark. Dig. § 7614, conferring on school directors the power to control the school affairs with the custody of the

schoolhouses and grounds, and preserve the same, vests in the directors discretion in arrangements for the interest of the district and they may, with the approval of the voters of the district, permit a secret society to use the school building as a lodgeroom, where such use does not interfere with the school nor injure the building, but is advantageous to the district in view of its financial condition. Cost v. Shinault (Ark.) 1916C-483. (Annotated.)

## Note.

Power of school authorities to permit use of school building for other than religious or public school purposes. 1916C-485.

## 5. SCHOOL BOARDS AND OFFICERS.

#### a. School Boards.

13. Power of Board to Employ Attorney. But said section does not deprive such independent district boards of the implied power, to employ other counsel or additional counsel to assist the prosecuting attorney, where, in their judgment and reasonable discretion the character of the business, or on account of the absence of the prosecuting attorney, or his incapacity, sickness, or other disability, or his refusal to act, there is necessity therefor. Mollohan v. Cavender (W. Va.) 1918A-499.

(Annotated.)

#### Note.

Power of school district to employ counsel. 1918A-502.

# b. Officers of School Districts.

14. School Supervisors — Employment. Tenn. Acts 1913, c. 4, § 3, giving boards of education authority to employ supervisors of schools, whose duty shall be to assist county superintendents in the organization, gradation, and supervision of schools, etc., and to pay them out of the respective school funds of counties, etc., does not violate Const. art. 11, § 17, providing that no county office created by the legislature shall be filled otherwise than by the people or the county courts, since the appointees contemplated by the act are not "county officers," but mere "employees." Cross v. Fisher (Tenn.) 1916E-1092.

## c. District Attorney.

15. Independent Districts—Duty of Prosecuting Attorney to Serve. It is the duty of the prosecuting attorney, imposed by section 49, chapter 39, W. Va. Code, to serve independent district boards of education as well as other district boards, as thereby prescribed. Mollohan v. Cavender (W. Va.) 1918A-499.

## 6. SCHOOL FUNDS.

 Diversion of School Funds—Purpose for Which Appropriation Permissible. High schools fall within the term of "common schools," used by Ark. Const. art. 14, and an appropriation for such schools is authorized. Dickinson v. Edmondson (Ark.) 1917C-913. (Annotated.)

- 17. "Revenue"—Meaning of Term. In view of Mo. Const. art. 11, §§ 6, 7, providing that the school fund shall consist of certain funds together with so much of the ordinary revenue of the state as may be by law set apart for that purpose, and that, in case the public school fund shall be insufficient to sustain a free school four months in each year, the general assembly may provide for such deficiency, but in no case shall there be set apart less than twenty-five per cent of the state revenue, the word "revenue" used in Mo. Laws 1915, p. 89, § 1, appropriating one-third of the ordinary revenue paid into the state treasury for school purposes, means the annual and current income of the state, however derived, which is subject to appropriation for general public uses in contradistinction to sums which are required to be paid into the state fund; the word "revenue" in its ordinary sense meaning the annual yield of taxes, etc., collected by the state. State v. Gordon (Mo.) 1918B-(Annotated.)
- 18. Particular Items Included. Under Mo. Laws 1915, p. 89, § 1, appropriating for schools one-third of the ordinary revenue of the state, gross earnings of and fees collected by various state departments are revenue only when paid directly into the state treasury without deduction for the expenses of the departments and salaries of the officers thereof, but when such deduction is made only the surplus is revenue. State v. Gordon (Mo.) 1918B-191.

  (Annotated.)
- 19. Only the net earnings of examiners appointed by the state auditor is "ordinary revenue" within Mo. Laws 1915, p. 89, § 1, appropriating one-third for schools, for Laws 1913, p. 767, § 5, provides for payment of salaries of examiners out of the per diem received from counties and payment of surplus into the treasury. State v. Gordon (Mo.) 1918B-191. (Annotated.)
- 20. Under Mo. Laws 1915, p. 89, § 1, appropriating one-third of annual ordinary revenue for schools, neither the gross nor net income from the factory inspection fund is ordinary revenue, for such income goes into a special fund for expenses of inspection which cannot be made up from the general revenue, and the transfer to the general revenue fund is made biennially by Rev. St. 1909, § 7826. State v. Gordon (Mo.) 1918B-191. (Annotated.)
- 21. Moneys intermittently transferred from the insurance department fund to the general revenue fund are not ordinary annual revenue within Mo. Laws 1915, p. 89, § 1, appropriating one-third thereof for

schools, particularly as Rev. St. 1909, § 6884, requires payment into the special fund, and as transfers are not binding on the legislature and are made biennially. State v. Gordon (Mo.) 1918B-191.

(Annotated.)

- 22. Fines assessed against lumber companies are not "ordinary revenue," within Mo. Laws 1915, p. 89, \$ 1, appropriating one-third of annual revenue for schools, as such fines are wholly adventitious, and are in no way annual. State v. Gordon (Mo.) 1918B-191. (Annotated.)
- 23. Interest on ordinary state deposits, other than special funds, governed by Mo. Laws 1911, p. 114, § 10, requiring expenditure of the interest for the purpose of the fund, is "ordinary revenue" within Laws 1915, p. 89, § 1, appropriating one-third thereof for schools. State v. Gordon (Mo.) 1918B-191. (Annotated.)
- 24. In such case, as Mo. Laws 1913, p. 367, providing for inspections of hay and grain by warehouse commissioners, provides, in section 41, that fees shall be regulated so as to produce only sufficient funds to defray the expenses of the department, and Rev. St. 1909, § 10955, provides for payments to local commissioners out of the textbook filing fund, only the surplus remaining after payment of such charges is revenue. State v. Gordon (Mo.) 1918B-191. (Annotated.)
- 25. In such case, the word "ordinary" is to be given its usual meaning as "according to settled order," and the school fund is entitled to one-third of the regular and usual annual income of the state subject to appropriation for public uses. State v. Gordon (Mo.) 1918B-191. (Annotated.)
- 26. Distribution of School Funds—Necessity of Uniformity. While there is no express provision for uniformity, the distribution of common school funds must be uniform. Dickinson v. Edmondson (Ark.) 1917C-913.
- 27. Ark. Laws 1911, p. 299, making appropriations for state aid of high schools, is discriminatory in so far as it prohibits any aid to high schools in cities of over 3,500 inhabitants and gives all of its aid to rural high schools. Dickinson v. Edmondson (Ark.) 1917C-913.
- 28. Under Ark. Const. art. 14, § 1, providing for the establishment of free schools whereby all persons between the ages of 6 and 21 may receive gratuitous instruction, the common school funds cannot be extended for the instruction of persons without those ages. Dickinson v. Edmondson (Ark.) 1917C-913. (Annotated.)

## Note.

Power of legislature with respect to expenditure of school funds. 1917C-917.

## 7. TEACHERS IN PUBLIC SCHOOLS.

## a. Contracts With Teachers.

29. Effect of Invalidity of Contract. No recovery can be had by a school teacher for the breach of a contract which was not entered into in the manner prescribed by law where the breach occurred before any services were rendered thereunder by him. Barton v. School District (Ore.) 1917A-252. (Annotated.)

30. Contract With Teacher — Necessity That Board Act as Body. Under Ore. Laws 1913, pp. 301, 304, §§ 7, 17, providing that the school board may hire teachers, and that any duty imposed on the board as a body must be performed at a regular or special meeting, and that the consent to any particular measure obtained of individual members when not in session is not an act of the board, a contract of hiring is not made out where the minutes show that the board at a meeting made a selection of plaintiff as a teacher, but the contract was prepared by the clerk and signed by the members individually after adjournment. Barton v. School District (Ore.) 1917A-252.

## b. Compensation.

31. Fixing Minimum Salary of Teachers -Validity of Statute. Acts 35th Iowa Gen. Assem. c. 249, prohibiting and punishing the employment by any school offi-cer, of a teacher at less wages than the amount fixed for the grade of certificate of such teacher, does not violate Const. art. 1, § 1, declaring all men equal and en-·titled to acquire, possess, and protect property, nor section 6, requiring all laws of a general nature to have a uniform operation, and forbidding the granting of special provileges or immunities, as the school district is a creation of the legislature, and the powers and duties of its officers are defined by legislative act, and consequently it could enlarge or abridge the same; the object of the statute being to bring about higher standards in teaching and encompetition in qualifications courage rather than wages. Bopp v. Clark (Iowa) 1916E-417. (Annotated.)

#### Note.

Validity of statute fixing minimum salary of school teachers. 1916E-420.

## c. Removal.

32. Marriage as Ground for Removal. Ore. Laws 1913, p. 69, by section 1 gives the board of directors of every school district the power to remove and discharge all teachers as it may deem necessary; by section 4 provides that teachers employed in a district as regularly appointed teachers for not less than two successive years shall be placed upon the list of permanently

employed teachers; by section 5 that such teachers shall serve until dismissed, subject to the board's rules which shall be reasonable; by section 6 that before dismissal, any teacher on the permanent list shall receive written notice stating the cause, a copy of any charges filed, and, on request, shall be entitled to a hearing before the board; and by section 11 repealed all acts in conflict therewith. Laws 1913, c. 172, a general law, detailing the powers of district school boards, effective the same day, provides by section 1, subd. 22, that the board shall dismiss teachers only for good cause shown. Relator a teacher on the permanent list, on her engagement on May 19, 1913, for the ensuing school year commencing September 15, 1913, signed an acceptance form, containing a resolution of the board that marriage of women teachers should terminate their service, and, upon her marriage on January 4, 1915, was removed under the resolution without charges, notice, or hearing. It is held that the board had no power to dismiss a teacher for a cause which was not reasonable; that if her marriage was a reasonable cause for dismissal, the attempted dismissal was ineffective for want of complaint, notice, and hearing; that the acceptance agreement had expired; but that her marriage was not a reasonable cause for dismissal. Richards v. District School Board (Ore.) 1917D-266. (Annotated.)

#### Note.

Marriage as ground for removal of woman school teacher. 1917D-271.

#### 8. PURILS IN PUBLIC SCHOOLS.

## a. Admission.

33. Requiring Physical Examination of Pupils—Validity of Regulation. The board of education of a city school district, as a condition to their admission, required each pupil to furnish a physical report based upon a physical examination by a physician furnished by the board or at the option of the parents by a physician se-lected and paid by them. It was admitted that the regulation was adopted and enforced for the purpose of guarding the community and pupils against the spread of contagious and infectious diseases; that since its adoption and enforcement the health of the children had greatly im-proved, and no epidemics had broken out in the schools causing them to close, though contagious diseases had been epidemic in the city, and in former years had been carried into the schools; that the cleanliness of the schools and freedom from filthy vermin had been greatly improved; that physical culture, athletic exercises, and the cultivation of vocal talent were parts of the course of instruction; that such regulation was further adopted to determine whether any pupil had any physical defect, so that such exercises would be dangerous to his health, or any defect requiring special assistance or attention in order to maintain the pupil's regular position in his classes, or to enable him to hear, see, and secure full benefit of the recitations. It is held that, conceding that such regulation was a matter of government or legislation, and related to the health of the pupils, and though the legislature has delegated certain police powers relating to health to the board of health and medical examiners, the regulation was valid, since municipal or quasi municipal corporations have such police powers as are necessary in the performance of the particular function for which they were created. Streich v. Board of Education (S. Dak.) 1917A-760. (Annotated.)

- 34. Such regulation was not invalid, as adding to the qualifications for admission prescribed by law, since no pupil would be excluded from the school except upon his own volition, or unless the physical examination showed him to be suffering from some disease rendering him a menace to his associates. Streich v. Board of Education (S. Dak.) 1917A-760. (Annotated.)
- 35. That physical culture, athletics, and the cultivation of vocal talent are not required by statute to be taught in the public schools, does not render such regulation invalid, since there is nothing in the statute forbidding school districts to provide instruction in branches other than those specified, and every child attending the school has a right to share the benefits of such instruction so far as physically and mentally able. Streich v. Board of Education (S. Dak.) 1917A-760. (Annotated.)
- 36. Such regulation was not invalid, as constituting such a violation of a personal right as is not justified by the end sought, since the conventionalities of the time recognize the absolute propriety of submitting to an examination by a physician; especially where it was not shown that any exposure of the person or manipulation of the body such as would shock the sensibilities of the most refined person would be required. Streich v. Board of Education (S. Dak.) 1917A-760. (Annotated.
- 37. Such regulation was not invalid, on the theory that the physical examination might cause such mental suggestion of diseases as might result in disease; it not appearing that the pupil need even know the contents of the report, and the doctrine of mental suggestion not being an accepted doctrine recognized by the courts. Streich v. Board of Education (S. Dak.) 1917A-760. (Annotated.)
- 38. Such regulation involved no question of religious liberty, as school boards in making rules for the control of the public schools should not base them upon the tenets of any particular religious sect.

Streich v. Board of Education (S. Dak.) 1917A-760. (Annotated.)

Note.

Validity of health regulation relating to school children. 1917A-765.

## b. Separation of Races.

39. Separate Schools for White and Colored Children. While the child of a white person and one having less than oneeighth negro blood is entitled to exercise the rights of a white man, in view of S. Car. Const. art. 3, § 33, authorizing the marriage of such persons, school trustees, under S. Car. Civ. Code, 1912, § 1761, subd. 3, providing that the trustees shall have authority and it shall be their duty to suspend or dismiss pupils when the best interest of the schools make it necessary, may, upon providing a school for children of this class, distinct from both the white and negro schools, suspend such child from the white schools when for the best interest of the other white pupils, who would be withdrawn if it was allowed to remain, notwithstanding section 1780, declaring that it shall be unlawful for pupils of one race to attend the schools provided for another, and Const. art. 11, § 7, providing for separate schools for whites and negroes. Tucker v. Blease (S. Car.) 1916C-796.

(Annotated.)

## c. Transportation of Pupils.

40. Validity of Statute. Tenn. Acts 1913, c. 4, § 2, providing for the transportation of children residing too far from a school to attend otherwise, if there are enough children so situated, though vesting a discretion in school boards to discriminate reasonably between pupils living in sufficient numbers at a distance from a school to need transportation, and those so living in insufficient numbers, is not violative of Const. art. 11, § 12, setting apart the interest on the common school fund for the equal benefit of all the people, since such section must be construed with section 8 of the same article, providing that the legislature shall not pass any law for the benefit of individuals inconsistent with the general law of the land, nor any law granting to any individual rights or exemptions other than such as may be extended by the same law to any member of the community who can bring himself within the law, for while, by necessity, children of some citizens resident at a distance from the schools may be deprived of the transportation extended to others, nevertheless such citizens can bring themselves within the law by changing residence. Cross v. Fisher (Tenn.) 1916E-1092. (Annotated.)

## d. Exclusion from School.

41. Liability of Board of Education— Expulsion of Pupil. To support a judg1916C-1918B.

ment imposing a penalty under section 2900, Minn. Gen. St. 1913, upon a member of the board of education of a city for having voted to exclude a pupil from a public school, the findings must show that the vote related to such pupil and that no sufficient cause existed for the exclusion. Bright v. Beard (Minn.) 1918A-399.

42. Grounds—Exposure to Contagion. It is also held that the school authorities including members of boards of education have authority to temporarily exclude from school attendance pupils who have been exposed to contagious and infectious diseases, and that the danger of contracting and spreading the disease to which such pupils have been exposed is sufficient cause for voting to so exclude them. Chapter 299, Minn. Laws 1903 (section 4640, Gen. St. 1913), does not apply to a pupil who has been exposed to smallpox. Bright v. Beard (Minn.) 1918A-399.

(Annotated.)

43. In this case the findings show that a case of smallpox had developed in the public school wherein plaintiff was a pupil; that defendant, as a member of the board of education, voted for a resolution requiring the pupils in that school who had been exposed to the contagion to be vaccinated and in default thereof to be excluded from attendance until the lapse of two weeks; and that was the only act of defendant in the premises. But since the findings fail to show that plaintiff was either named in the resolution, or came within its terms, the judgment imposing a penalty is not sustained. Bright v. Beard (Minn.) 1918A-399.

#### Note.

Power to expel or suspend pupil from school. 1918A-400.

# e. Prohibition of Secret Societies.

44. Miss. Laws 1912, c. 177, abolishing all secret orders and fraternities, etc., and prohibiting their existence in the University of Mississippi and other educational institutions supported in whole or in part by the state, and providing that no student in any such institution who is a member of any such order or fraternity shall be permitted to receive any honors, diplomas, or distinctions, or to contend for any prize, unless he shall sign a written agreement not to affiliate with such order, attend its meetings, or contribute any dues or donations while attending such institution, does not violate Const. Miss. 1890, § 1, providing for the distribution of the powers of the government into three distinct departments, section 2, prohibiting any person or collection of persons belonging to one of such departments from exercising any powers belonging to either of the others, nor is it discriminatory, within Const.

U. S. Amend. 14, against applicants for admission to the University of Mississippi who are already affiliated with such a fraternity at other institutions, since the right to attend such university is not a material right, but is conferred by law, and one seeking the benefit of the law must submit to the conditions imposed thereby. Board of Trustees v. Waugh (Miss.) 1916E-522. (Annotated.)

45. In a suit to enjoin the board of trustees of a university from enforcing an order requiring applicants for admission to the University to sign a pledge not to become a member of or assist in the organization of any secret order or fraternity, allegations of the bill that the fraternity of which the complainant was a member had for its paramount purpose the enforcement and promotion of good morals and the highest possible attainment and standing in class, and good order and discipline in the student body of the different colleges with which it was connected, do not render the bill good against demurrer on the theory that, having been admitted by the demurrer, they show that the frater-nity has a high moral purpose, since the court will take notice of the law prohibiting fraternities in educational institutions, and the bill therefore shows that complainant is seeking to disobey the law. Board of Trustees v. Waugh (Miss.) 1916E-522.

(Annotated.) 46. Under Miss. Laws 1912, c. 177, abolishing all secret orders, fraternities, etc., among students, and prohibiting their existence in the University of Mississippi and other educational institutions supported in whole or in part by the state, providing that no student in any such institution who is a member of any such order or fraternity shall be permitted to receive any honors, diplomas, or distinctions, or to compete for any prize, unless he shall agree in writing not to affiliate with such orders during his attendance at such school, or to contribute any dues or donations to such order, requiring trustees and faculties to enforce the provisions thereof, and providing that any member of any board of trustees or faculty, knowingly permitting any violation thereof, or failing or refusing to take proper steps for its enforcement, shall be removed by the governor, the board of trustees of the University of Mississippi has power to require a student, as a condition precedent to his right to enter the university, to sign a pledge that he is not and will not become a member of any such order or fraternity, or aid, abet, or encourage the organization thereof, will not apply for nor accept any scholarship or medal, or in any way be the beneficiary of any self-help fund, or accept any position in the university, if he violates such pledge, and will make it his purpose and endeavor to avoid violating either the letter or spirit of that act. Board of Trustees v. Waugh (Miss.) 1916E-522. (Annotated.)

#### Note.

Validity of statutory or other prohibition against secret societies among students. 1916E-527.

#### SCHOOL LANDS.

See Public Lands.

#### SCIENTER.

Running from accident, see Automobiles, 66.

#### SEAMEN.

As within Federal Employers' Liability Act, see Master and Servant, 59.

As within Workmen's Compensation Act, see Master and Servant, 243-247, 262.

#### SEARCHES AND SEIZURES.

Order to produce books as unreasonable, see Discovery, 2.

Confiscation of liquor unlawfully kept, see Intoxicating Liquors, 17, 22.

Duty of sheriff to investigate crime, see Sheriffs and Constables, 5, 6.

- 1. Service of Search Warrant—Designation of Officer. Under Ore. L. O. L. § 2518, authorizing a justice of the peace to appoint some suitable person not a party to serve any process from his court when such service could not be made for want of an officer, where the docket states that a complaint and warrant were placed in the hands of a person as special constable, but the special constable appointment is not evidenced by any writing indorsed on the writ or otherwise, and no evidence is offered and no finding made that the warrant could not be served for want of an officer, the justice is without authority to appoint him, and he is not a "duly appointed officer." Smith v. McDuffee (Ore.) 1916D-947.
- 2. Admission of Papers Taken from Accused. In a prosecution for attempt to entice a girl to enter employment of another for immoral purposes, the admission in evidence, without defendant's consent, of letters taken from his private papers, access to which was obtained by keys taken from his person by officers, does not deprive defendant of his constitutional rights, to be secure from unreasonable searches and seizure, and not be compelled to testify against himself. State v. Reed (Mont.) 1917E-783.
- 3. Warrant—Designation of Premises to be Searched. Ore. Const. art. 1, § 9, provides that no search warrant shall be issued but upon probable cause supported by oath or affirmation particularly describ-

ing the place to be searched and the person or things to be seized. Ore. L. O. L. §§ 1852, 1853, authorize a justice of the peace to issue a warrant to search for personal property at any place within his county, when the property has been stolen. Section 1856 prescribes the form of the warrant, requiring the place to be searched to be described with reasonable particularity. Held, that a warrant com-manding search on all the premises of a person for certain property, not even designating the county in which the writ is to be executed, is invalid; the description being insufficient to enable a surveyor, either with or without the aid of extrinsic evidence, to locate the premises. Smith v. McDuffee (Ore.) 1916D-947.

(Annotated.)

4. Strict Construction of Statute Allowing Search. A proceeding for search of premises for personal property being in invitum, the statute authorizing it is to be strictly construed, and no presumptions of regularity are to be invoked in aid of the process when an officer undertakes to justify under it. Smith v. McAfee (Ore.) 1916D-947.

#### Note.

Sufficiency of description of premises in search warrant or affidavit therefor. 1916D-952.

#### SEARCH OF TITLE.

Purchaser's right to time for, see Judicial Sales, 3.

#### SECOND APPEAL.

See Appeal and Error, 7, 96-102.

#### SECONDARY EVIDENCE.

See Evidence, 43-50.

# SECOND DELIVERY.

Meaning, see Escrow, 1.

## SECRET SOCIETIES.

See Societies and Clubs.

#### SECURITIES.

As including bonds, see Taxation, 163.

## SEDUCTION.

As element of damage, see Breach of Promise of Marriage, 15.

1. Action by Another for Same Cause. A judgment awarding a divorced mother damages for seduction of a minor daughter in her custody will not be set aside because the father, who was without right,

had also instituted suit for the seduction. Malone v. Topfer (Md.) 1916E-1272.

- 2. Action for Seduction—Bight of Mother. A divorced wife, who has the custody of and has supported a minor daughter of the marriage, although the court has not granted her the exclusive custody, may maintain an action for seduction of the daughter. Malone v. Topfer (Md.) 1916E-1272. (Annotated.)
- 3. A divorced wife held to have the custody of a minor daughter of the marriage, so as to entitle her to sue for seduction of the daughter. Malone v. Topfer (Md.) 1916E-1272. (Annotated.)
- 4. Evidence—Reputation of Defendant. In a prosecution for seduction under promise of marriage, defendant is not limited to proof of his character for morality and chastity, but is entitled to prove that his general reputation as a peaceable lawabiding citizen is good. Bishop v. State (Tex.) 1916E-379. (Annotated.)

#### Notes.

Admissibility of evidence of defendant's reputation in prosecution for seduction. 1916E-381.

Right of mother to maintain action for daughter's seduction. 1916E-1275.

#### SEEDS.

Warranty of fertility, see Sales, 17.

#### SEEPAGE.

Action for damages, see Parties, 11.

SELECTION OF HOMESTEAD. See Homestead, 3-7.

SELECTIVE DRAFT.

See Army and Navy, 1-9.

## SELF-DEFENSE.

See Assault, 12; Homicide, 57, 67, 68.
Wounding of innocent bystander, see
Negligence, 102, 116.

#### SELF-DESTRUCTION.

See Suicide.

SELF-EXECUTING PROVISIONS. See Constitutional Law, 90-98.

## SELF-INCRIMINATION.

See Argument and Conduct of Counsel, 2.

**SELF-SERVING DECLARATIONS.** See Admissions and Declarations, 1-3.

#### SENDING.

Meaning, see Libel and Slander, 165.

#### SENTENCE AND PUNISHMENT.

- Validity and Construction of Statutes, 750.
- 2. Consecutive Terms of Imprisonment, 751.
- 3. Suspension of Sentence, 751.
- 4. Cruel and Unusual Punishment, 751.
- 5. Discretion of Court, 752.
- 6. Place of Imprisonment, 752.
- 7. Remand for Resentence, 752.

Interrogation of prisoner, see Appeal and Error, 210.

Excessive sentence, relief, see Habeas Corpus, 5.

In prosecutions under liquor laws, see Intoxicating Liquors, 107-109.

# 1. VALIDITY AND CONSTRUCTION OF STATUTE.

- 1. It is the penalty prescribed by a statute for a single offense, and not the aggregate of punishments inflicted for several offenses of the same character joined in one indictment, on all of which there was a conviction, which bears on the question of the penalty being proportioned to the nature of the offense. People v. Elliott (Ill.) 1918B-391. (Annotated.)
- 2. If the penalty prescribed by statute is not proportionate to the offense, the law is void; and the evil cannot be cured by a mere modification on appeal of the sentence. People v. Elliott (Ill.) 1918B-391.

  (Annotated.)
- 3. The penalty prescribed by Ill. Anti-Saloon Territory Act (Laws 1907, p. 297) for sale of liquors in anti-saloon territory, a fine of not less than \$20 nor more than \$100, or imprisonment for not less than ten days nor more than thirty days, or both, is clearly not disproportioned to the nature of the offense. People v. Elliott (Ill.) 1918B-391. (Annotated.)
- 4. The statute prescribing as a penalty for sale in anti-saloon territory a fine of from \$20 to \$100, or imprisonment from ten to thirty days, or both, being valid, sentences for the minimum fine and imprisonment on each of seventy-one counts are not invalid as imposing cruel and unusual punishment because of the aggregate. People v. Elliott (III.) 1918B-391.

  (Annotated.)
- 5. Provision as to Disposition of Fine—Validity. That part of section 9205, N. Dak. Rev. Codes 1905, which provides that the defendant, upon conviction, shall "pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all the estate of the party so convicted and sentenced, and shall be enforced by execution or other process for the use of the state, county, precinct, district, town, city, or

school district whose moneys or securities have been so embezzled," is unconstitutional in that it violates section 154 of the constitution of North Dakota, which provides that "the interest and income of this [land grant] fund, together with the net proceeds of all fines for violation of state laws, and all other sums which may be added thereto by law, shall be faithfully used and applied each year for the benefit of the common schools of the state." State v. Bickford (N. Dak.) 1916D-150.

- 6. Fines—Embezzlement Statute Fine or Compensation. That part of section 9205, N. Dak. Rev. Codes 1905, which provides that in case of conviction the defendant shall, in addition to serving a term of imprisonment, "pay a fine equal to double the amount of money or other property so embezzled as aforesaid; which fine shall operate as a judgment at law on all the estate of the party so convicted and sentenced, and shall be enforced by execution or other process for the use of the state, county, precinct, district, town, city, or school district whose moneys or securities have been so embezzled," imposes a fine, and did not merely include in said statute a provision for the compensation of the state or municipality injured. State v. Bickford (N. Dak.) 1916D-140.
- 7. Insanity of One Condemned to Death. Ark. Acts 1913, p. 172, providing that, when a judgment of death is pronounced on any person, such person shall be conveyed to the state penitentiary and there kept until executed, does not by implication repeal Kirby's Dig. § 2454, authorizing the sheriff to hold an inquest into the sanity of the person sentenced to be executed. Ferguson v. Martineau (Ark.) 1916E-421. (Annotated.)
- 8. Penalty Proportioned to Nature of Offense. There must be a clear violation of the provision of the Ill. state's Bill of Rights, § 11, that "all penalties shall be proportioned to the nature of the offense," to warrant holding a statute invalid as contravening it. People v. Elliott (Ill.) 1918B-391. (Annotated.)
- 9. The provision of the III. state's Bill of Rights, § 11, that "all penalties shall be proportioned to the nature of the offense"—that is, that the penalty prescribed for an offense shall be in proportion to the nature of the offense—is directed to the lawmaking power. People v. Elliott (III.) 1918B-391. (Annotated.)

## 2. CONSECUTIVE TERMS OF IMPRIS-ONMENT.

10. Form of Sentence—Conviction on Several Counts. The correct method for sentencing one on several counts is not for a total time of imprisonment in gross, but for a specified time under each, the time under the second to commence when

the first ends, and so on to the last; and it is not enough to state that the sentences shall run consecutively or successively. People v. Elliott (Ill.) 1918B-391.

## 3. SUSPENSION OF SENTENCE.

- 11. A federal district court exceeds its power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the legality of the conviction. Ex parte United States (U. S.) 1917B-355. (Annotated.)
- 12. Regardless of statute, one convicted and sentenced to execution will, where he becomes insane after trial, be granted a stay of execution. Hence the chancery court cannot justify an order enjoining execution on the ground that the party had no remedy at law. Ferguson v. Martineau (Ark.) 1916E-421. (Annotated.)

## 4. CRUEL AND UNUSUAL PUNISH-MENT.

- 13. The provision of Const. U. S. Amend. 8, against imposition of excessive fines, and infliction of cruel and unusual punishment, does not apply to state legislation, but is restricted exclusively to the federal government, its courts and officers. People v. Elliott (Iil.) 1918B-391. (Annotated.)
- 14. A punishment authorized by statute is never held cruel or unusual or not proportioned to the nature of the offense unless it is a barbarous one unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. People v. Elliott (III.) 1918B-391. (Annotated.)
- 15. Under Md. Declaration of Rights, art. 16, declaring that no law to inflict cruel and unusual penalties shall be made, and article 25, declaring that cruel or unusual punishments shall not be inflicted by the courts of law, a judgment and sentence of capital punishment for the crime of assault with intent to rape, imposed under the discretion given the court in respect to such crime by Code Pub. Gen. Laws 1904, art. 27, § 17, is not unconstitutional. Dutton v. State (Md.) 1916D-89.
- 16. Const. U. S. Amend. 8, declaring that cruel and unusual punishments shall not be inflicted, is not a restraint upon and does not apply to the legislature of a state, but only to the national legislature. Dutton v. State (Md.) 1916C-89.
- 17. Abortion Sentence not Excessive. Under N. Car. Revisal 1905, § 3618, providing that any person who shall administer or procure any woman pregnant or quick with child to take any drug with intent to destroy the child shall be imprisoned not less than one nor more than ten years, and fined at the court's discre-

tion, and section 3619 providing that any person who shall administer or procure any pregnant woman to take any drug with intent to procure a miscarriage, or injure the woman, shall be imprisoned not less than one nor more than five years, and fined at the court's discretion, imprisonment for three years and a fine of \$1,000 for procuring a pregnant woman to take a drug with intent to procure a miscarriage was not a cruel and unusual punishment. State v. Shaft (N. Car.) 1916C-627.

#### Note.

What is cruel and unusual punishment. 1918B-396.

## 5. DISCRETION OF COURT.

- 18. That sentences are for both fine and imprisonment, as authorized by statute, is a matter in the court's discretion. People v. Elliott (Ill.) 1918B-391. (Annotated.)
- 19. Review of Sentence. Sentences on a number of counts being within the terms of a valid statute, the judgment cannot be reversed because the appellate court would have imposed less severe sentences, and considers them unnecessarily severe for the accomplishment of the purposes of the statute. People v. Elliott (Ill.) 1918B-

## 6. PLACE OF IMPRISONMENT.

20. Where a statute is silent as to the place of imprisonment, and any doubt exists as to whether it shall be in the penitentiary or county jail, accused should be imprisoned in the county jail. Gherna v. State (Ariz.) 1916D-94.

#### 7. REMAND FOR RESENTENCE.

21. Error in Sentence-Remand for Sentence. There being no error, except in the imposition of the sentences, the case will be remanded for proper sentences. People v. Elliott (Ill.) 1918B-391.

## SEPARATE PROPERTY.

Of wife, see Husband and Wife, 26-29. Of husband, right of disposition, see Husband and Wife, 30-32.

# SEPARATION.

See Divorce; Marriage.

# SEPARATION AGREEMENTS.

As defense for divorce, see Divorce, 28-31, 47.

# SERIOUS ILLNESS.

Meaning, see Life Insurance.

#### SERVANT.

Defined, see Master and Servant, 264.

#### SERVICE.

Notice of appeal, see Appeal and Error, 43-45.

Of notice of claim of lien, see Mechanics' Liens, 27.

Service of search warrant, see Searches and Seizures, 1.

#### SERVICE OF PROCESS.

See Process, 3-17.

## SERVICES.

Actionable deceit in procuring, see Fraud,

Action for by wife alone, see Husband and Wife, 13.

Husband's action for services of wife, see Husband and Wife, 37.

Of infant, enforcement of contract, see

Infants, 2, 3, 8.
Action for value, accrual, see Limitation of Actions, 22-24.

#### SET-OFF AND COUNTERCLAIM.

See Bankruptcy, 4-8.
Effect of amount on jurisdiction, see Appeal and Error, 12.

Of deposit against debt due insolvent bank, Banks and Banking, 48-53.

Not permitted in unlawful detainer, see Forcible Entry and Detainer, 3.

Tort in wrongful enhancement as counterclaim in contract, see Monopolies, 23. Against receiver, see Receivers, 7, 8, 10.

- 1. Counterclaim for Tort in Action for Tort. Under Wis. St. 1913, § 2656, authorizing a counterclaim arising out of the transaction set forth in the complaint, defendant, in an action for slander, may plead as a counterclaim a slander by plaintiff arising at the same time and place as the slander alleged in the complaint, for the word "transaction" includes the entire word encounter. Powell v. Powell (Wis.) 1917D-113. (Annotated.)
- 2. Claims not Connected With Cause of Action. In a suit for conversion, alleged counterclaims based on contracts, not connected with the transaction set forth in the complaint and growing out of the in-dorsement of promissory notes by the bankrupt, to whose estate plaintiff had succeeded, do not fall within the classes enumerated by N. Y. Code Civ. Proc. § 501, defining counterclaims. Morris v. Windsor Trust Co. (N. Y.) 1916C-972.
- 3. Connection With Subject-matter of Action Breach of Warranty Against Claim for Repairs. Though plaintiff's action is for repairs of an automobile, the

answer' alleging and the proof being that the repairs were made in an attempt to make good plaintiff's warranty in the sale of the machine to defendant, a counterclaim for breach of the warranty is one "connected with the subject of the action," and so authorized by Wyo. Comp. St. 1910, § 4391, whether the "subject of the action" which within the meaning of such statute, is either the property involved or a right alleged to have been violated, be regarded as the machine, or the sale thereof, or the right claimed to recover for the repairs. Studebaker Corporation v. Hanson (Wyo.) 1917E-557.

## Notes.

Waiver of failure to reply to counterclaim. 1917D-619.

Amount in controversy for purpose of appeal where defendant has filed counterclaim, 1917D-99.

Counterclaim for tort in action for tort. 1917D-114.

## SETTING ASIDE.

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See Verdicts, 1.

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Regulation of trimming on roads, see Trees and Timber, 13-17.

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## SHERIFFS AND CONSTABLES.

- 1. Rights, Duties and Powers, 753.
- Liability for Official Acts of Neglect, 754.
- 3. Liability on Official Bond, 754.
- 4. Compensation, 754.
- 5. Suspension and Removal, 754.

Duty to arrest without warrant, see Arrest, 3-5.

Levy upon moneys in custodia legis, see Garnishment, 3. Duty on threatened violation of liquor law, see Intoxicating Liquors, 88.

Liability to senior creditor for selling first under junior execution, see Judicial Sales, 2.

Duty to hold inquest on sanity of capital convict, see Sentence and Punishment, 7.

Residence of sheriff, see Taxation, 195. As public officer, see Taxation, 196.

# 1. RIGHTS, DUTIES AND POWERS.

- 1. Powers of Sheriff. The office of sheriff carries all the common-law powers and duties except as modified by statute. State v. Reichman (Tenn.) 1918B-889.
- 2. Duty to Prevent Crime. Under Shannon's Tenn. Code, § 6889, a sheriff who has "notice" of an offense and does not do his duty to prevent it is guilty of a misdemeanor, and any knowledge from any source is notice within the statute. State v. Reichman (Tenn.) 1918B-889.
- 3. Since cities have police officials, the sheriff may assume that they will perform their duties, but if he has knowledge of neglect on their part, or reason to think there is neglect, he must inform himself and prevent and suppress offenses in cities as well as rural districts. State v. Reichman (Tenn.) 1918B-889.
- 4. Duty to Enforce Law—Notice of Violation. When a sheriff learns that a city in his county is collecting tribute from numerous liquor dealers and leaving them otherwise undisturbed, this is notice to him that the law is being violated and no effort made to enforce it. State v. Reichman (Tenn.) 1918B-889.
- 5. Duty of Investigation. While a sheriff need not make a forcible entrance into a suspected residence or place of business to discover violations of the liquor law, he or his deputies should enter open salons and make arrests if justified by what they see therein. State v. Reichman (Tenn.) 1918B-889.
- 6. Notice of Violation of Law. The duty of the sheriff, having notice of commission of an offense, being to prevent or suppress it, involves the duty to at least make some investigation, and it is not necessary in case of unlawful sales of intoxicating liquors, for the sheriff to actually see sales before swearing out warrants. State v. Reichman (Tenn.) 1918B-889.
- 7. Although the sheriff is not bound to maintain a detective force, and no statute in terms makes it his duty to swear out warrants or give information to the grand jury, yet, being commanded to prevent and suppress crimes and breaches of the peace, he must use all the means provided by law to accomplish such end. State v. Reichman (Tenn.) 1918B-889.

# 2. LIABILITY FOR OFFICIAL ACTS OF NEGLECT.

8. A sheriff, holding two executions against property and selling the property under the junior execution, is liable for the value of property at the time of the sale, and not merely for the difference between the price obtained and that which could have been obtained by a sale under the senior execution. Continental Distributing Co. v. Hays (Wash.) 1917B-708.

(Annotated.)

9. Under Rem. & Bal. Wash. Code, § 647, providing that plaintiff may have defendant's property attached as security for the satisfaction of such judgment as he may recover, and section 657 providing that where there are several attachments against the same defendant they shall be executed in the order in which they were received by the sheriff, the rights of the first attaching creditor cannot be interfered with by a subsequent attachment or execution, and any act of the sheriff, causing such an interference, renders him liable for the damages suffered. Continental Distributing Co. v. Hays (Wash.) 1917B-708. (Annotated.)

## 3. LIABILITY ON OFFICIAL BOND.

10. Liability 0f Sureties Where the bond of a constable is conditioned upon his faithfully executing and returning all process and paying over according to law all money that shall come into his hands by virtue of his office, there can be no recovery on the bond where it is not alleged that any process was directed or delivered to the constable, or that he had in his possession any such a paper, or any money, either officially or privately, or that plaintiff suffered damage because the constable failed to return a writ, if he had one, or that she was a party to or interested in any action in which the process might have been issued. Davis v. Hall (Ore.) 1916D-922.

11. Assault by Constable. A complaint alleging that a constable, without exhibiting or serving any process, took chattels from the plaintiff, and, while she was endeavoring to protect her right therein, assaulted and maltreated her, and failed to execute and return the process to him directed in the replevin of the chattels, does not show a liability of the sureties on the constable's bond conditioned only that he should execute and return all process and pay over according to law all money coming into his hands by virtue of his office. Davis v. Hall (Ore.) 1916D-922.

(Annotated.)

## Note.

Liability of sureties on bond of sheriff as constable for assault committed by officer. 1916D-923.

## 4. COMPENSATION.

- 12. Deputy—Right to Fees as Between Deputy and Officer. Construing section 3521 of the N. Dak. Compiled Laws of 1913, which provides that "In addition to the salary prescribed in the preceding section, the sheriff or his deputy or deputies shall be allowed ten cents per mile for each and every mile actually and necessarily traveled in the performance of their official duties," it is held that the ten cents mileage belongs to the deputy, and not to the sheriff, where the work is done and the distance is actually and necessarily traveled, not by the sheriff, but by such deputy. Scofield v. Wilcox (N. Dak.) 1918A—836. (Annotated.)
- 13. Commission on Sale—Purchase by Person Entitled to Proceeds. Under Wyo. Comp. St. 1910, § 1214, providing that the sheriff shall receive a commission on money collected on execution or other process, in view of §§ 4698, 4700, 4703, 4705, 4733–4735, the sheriff is entitled to such commission where at the execution sale the judgment creditor purchases the property for less than the judgment debt, although no money actually changes hands; the purchase price being merely credited upon the judgment and execution. Lyman v. Thorn (Wyo.) 1918A-368.

(Annotated.)

# 5. SUSPENSION AND REMOVAL.

- 14. A sheriff who has made an honest and reasonably intelligent effort to do his duty will not be removed by the courts, though his efforts may not have been wholly successful, his right to continue in office depending rather on the good faith of his efforts than on the degree of his success. State v. Reichman (Tenn.) 1918B-889.

  (Annotated.)
- 15. Failure to Enforce Law. In proceedings to remove a sheriff for failure to enforce the liquor law, he is precluded, by his admission that he did nothing in a city within his county but to serve process where liquor was openly sold in violation of law, from asserting that no wilful neglect of his duty has been shown. State v. Reichman (Tenn.) 1918B-889.

(Annotated.)

- 16. In a proceeding for his removal the evidence is held to show that a sheriff failed to perform his duties to prevent and suppress breaches of the peace by unlawful sale and threatened unlawful sale of intoxicating liquors. State v. Reichman (Tenn.) 1918B-889. (Annotated.)
- 17. It is no defense for the sheriff's failure to orevent breaches of the peace by unlawful sales of intoxicating liquors, that the state was proceeding against offenders under the Tenn. Nuisance Act (Laws 1913 [2d Ex. Sess.] c. 2), or that

the criminal court administration was lax and nothing would have been accomplished in case of arrest. State v. Reichman (Tenn.) 1918B-889. (Annotated.)

## SHERMAN ACT.

Combination of ocean carriers, see Monopolies, 17.

#### SHIP.

Meaning, see Intoxicating Liquors, 81.

#### SHIPS AND SHIPPING.

Restoration of illegal prize, see Admiralty.

Liability for injuring bridge, see Bridges. 1-4,

Duty toward passenger, see Carriers of Passengers, 21, 22, 26, 68, 69.

Ferryboat, definition, see Ferries, 1. Loss of ship, what is, see Master and Ser-

vant, 6

Payment of purchase price, see Payment, 8-10.

- 1. Damages for Collision—Loss of Use Injured Vessel. Loss through delay while making repairs is an element of the damages recoverable for collision, and where the injured vessel was under a time charter the rate of charter hire may be accepted as prima facie fixing the measure of damages. The Brand (Fed.) 1917B-996. (Annotated.)
- 2. Collision—Sailing Vessel in Fault-Side Lights in Improper Position. schooner is held to have been solely in fault for a collision with a crossing steamship at night in Delaware bay for carrying her side lights in such position that the one on the side next the steamship was obscured by the sails and could not be seen from the steamship until too late to avoid the collision. The Brand (Fed.) 1917B-996.
- 3. Damages Recoverable for Collision-Death of Human Being. In a proceeding on behalf of the Crown against persons negligently causing the sinking of a naval vessel, no recovery can be had for the value of pensions paid by the Crown to the dependents of sailors and officers whose deaths were caused thereby. Admiralty Commissioners v. S. S. Amerika (Annotated.) (Eng.) 1917B-877.
- 4. Fraud—Concealment—Effect of Express Warranty. An express warranty in a bill of sale conveying a ship and her freight that the ship is unencumbered does not defeat liability for an implied misrepresentation by concealment of the fact that the freight was encumbered. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.
- Implied Warranty—Effect of Express Warranty. A bill of sale conveying a ship and her freight, which expressly war-

ranted the ship free from incumbrance, does not thereby exclude an implied warranty that the freight is also unencumbered. Corry v. Sylvia Y Cia (Ala.) 1917E-1052.

## Note.

Right to recover damages for loss of use of vessel resulting from collision without total loss. 1917B-999.

#### SHOWS.

See Theaters and Amusements.

#### SICK PERSON.

Duty of carrier toward, see Carriers of Passengers, 1, 2, 29-31.

## SIDEWALKS.

See Streets and Highways.

#### SIGN.

Meaning, see Wills, 8, 9.

#### SIGNATURES.

See Names.

construction, see Bills and Form and Notes, 8, 30, 75-79.

Sufficiency under statute, see Frauds, Statute of, 16, 17.

Failure to sign judgment, effect, see Judgments, 3.

In notice of claim of lien, see Mechanics' Liens, 21.

# In wills, see Wills, 8-19.

See Advertising.

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SIGNBOARDS.

Estoppel by, see Estoppel, 7.

## SLANDER.

See Libel and Slander.

## SLANDER OF TITLE.

See Libel and Slander, 168.

## SLANDEROUS PER SE.

Words, see Libel and Slander, 19, 20, 25.

#### SLED.

Not a motor vehicle, see Automobiles, 5.

## SLEEPING CARS.

See Railroads, 16-18.

#### SMOKE.

City regulation, see Municipal Corporations.

#### SOCIAL CLUBS.

See Societies and Clubs.

#### SOCIETIES AND CLUBS.

See Intoxicating Liquors, 48-50, 73, 78-79. Lodge meetings in school, see Schools, 12. Prohibition of secret societies, see Schools, 44-46.

- 1. Incorporation Powers. As used in Mo. Rev. St. 1909, § 3435, which authorizes the incorporation of benevolent, religious, scientific and educational associations, and provides that any association, company, or organization which tends to the public advantage "in relation to any or several of the objects above enumerated, and what-ever is incident to such objects," may create a body corporate, the words quoted have no application to an incorporated social club, even though it be incorporated under such statute. State v. Missouri Athletic Club (Mo.) 1916D-931.
- 2. Powers—Sale of Liquor. A social club, incorporated under Mo. Rev. St. 1909, §§ 3432-3445, providing for the formation of benevolent, religious, scientific, educational, and miscellaneous associations, has no power, express or implied, to sell intoxicating liquors to its members. State v. Missouri Athletic Club (Mo.) 1916D-931.
- 3. Protection of Name. The Ga. Act of 1909 (Civ. Code 1910, §§ 1993, 1994) for the protection of any benevolent and other organization which is incorporated, against others using or adopting its name, style, or emblems, cannot be invoked by voluntary associations. Faisan v. Adair (Ga.) 1918A-243. (Annotated.)
- 4. Equity will enjoin individuals, or a corporation, that are using the name, insignia, and emblems of an existing benevolent and fraternal association to the injury of the latter. The facts examined, and held that the court did not abuse its discretion in granting an interlocutory injunction. Faisan v. Adair (Ga.) 1918A-243. (Annotated.)

Note.

Right of unincorporated benevolent. fraternal or social organization to protection in use of its name. 1918A-245.

SOLDIERS.

See Militia.

SOLDIERS AND SAILORS. See Army and Navy: Militia: War.

## SOLDIERS' HOME.

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## SOLICITATION.

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## SPECIFIC PERFORMANCE.

- 1. Requisites of Enforceable Contract, 756.
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  - b. Certainty, 757. c. Fairness, 757.
- 2. Enforceability of Particular Contracts. 757, a. Contract to Make a Will, 757.
- b. Oral Contract to Devise Land, 757. 3. Actions, 757.
  - a. Conditions Precedent, 757.

  - b. Pleading, 757.c. Evidence, 757.d. Damages, 757.

Answer, see Pleading, 17.

- 1. REQUISITES OF ENFORCEABLE CONTRACT.
  - a. Mutuality and Consent.
- 1. Contract Lacking Mutuality. Where there is no such mutuality in the contract

to convey as entitles the vendor bank to compel the cross-complainant as purchaser to pay the purchase price of the land, the alleged contract cannot be specifically enforced against the bank. Brown v. Farmers', etc. National Bank (Ore.) 1917B-1041.

## b. Certainty.

2. A contract that an existing will shall remain, which refers to the property as having been purchased by the testatrix, and which describes that will as now made and in the possession of a person named, is sufficiently definite to justify specific performance, where the bill therefor discloses as an exhibit a copy of will left in the custody of the person named. White v. Winchester (Md.) 1916D-1156.

## c. Fairness.

3. Where children surrendered their interests in favor of their mother in consideration of her permitting a will devising property to them to remain, the agreement was supported by a sufficient consideration to justify specific performance. White v. Winchester (Md.) 1916D-1156.

## 2. ENFORCEABILITY OF PARTIC-ULAR CONTRACTS.

#### a. Contract to Make a Will.

- 4. A contract by one party thereto to execute a will in favor of the other party thereto is not a testamentary disposition of the property, and, if founded on a good and valuable consideration, will be enforced. White v. Winchester (Md.) 1916D-1156.
- 5. Contract to Devise. A contract to devise real estate may be enforced by specific performance. White v. Winchester (Md.) 1916D-1156.

## b. Oral Contract to Devise Land.

6. Validity of Oral Contract to Devise. An oral contract, to devise lands falls within the operation of the statute of frauds; but where the party in whose favor the will is to be made has performed his part of the contract, and the other party dies leaving a will in which no devise is made pursuant to the oral contract, the disappointed party may apply to a court of equity for specific performance of the contract, if it is one of such a nature that a court of equity would require specific performance. Gordon v. Spellman (Ga.) 1918A-852.

#### 3. ACTIONS.

# a. Conditions Precedent.

7. As Requisite to Specific Performance—Waiver. Where, in a suit for specific

performance of an option to purchase certain land under a will, the petition alleged that olaintiff had notified defendants of his election to accept the option, and offered to pay the money required, but defendants refused to accept the same or to convey the land to plaintiff, and defendants' answer constituted a repudiation of plaintiff's interpretation of the will denying his right to purchase, and at the trial plaintiff paid the amount required into court, a tender before suit brought is waived. Tevis v. Tevis (Mo.) 1917A-865.

## b. Pleading.

8. Fraud as Defense-Facts Insufficient. In a suit for the specific performance of a contract for the sale or exchange of lands, the answer attempting to set up plaintiff's traudulent representations as to irrigation and water rights, admitting that the specific water rights tendered by plaintiff were exactly those claimed in the contract, without alleging that the plaintiff was not then the owner of them, with full power to convey title thereto, and that plaintiff, when charged with such misrepresentation, agreed that if defendant would transfer the property mentioned in the contract plaintiff would furnish additional security, and that the parties undertook to make a new agreement, not contemplating any change as to the water rights, does not state facts sufficient to constitute a defense. Drennen v. Williams (Colo.) 1197A-664.

#### c. Evidence.

9. Contract to Devise — Quantum of Proof. To enforce a contract whereby a person contracts to dispose of real estate by will, the same principle is applied and the same proof is necessary as when he contracts to convey title by deed. Brown v. Golightly (S. Car.) 1918A-1185.

(Annotated.)

## d. Damages.

10. Right of Action for Damages. If on the trial of an action against a devisee for the specific performance of the plaintiff's contract with the testator of the devisee, with reference to the land devised, it should be developed that, without fault of the plaintiff, but on account of the defendant himself, a specific performance of the contract is impossible, damages may be awarded for a breach of the contract. Gordon v. Spellman (Ga.) 1918A-852.

11. Relief Granted—Personal Liability. In an action for specific performance of a contract to convey lands, or in the alternative for damages, defendant, who when he contracted was not the owner of all the lands and personal property he agreed to convey, and was without power to make such conveyance, is personally liable on

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the contract, and, on breach thereof, liable for the resulting damages. Drennen v. Williams (Colo.) 1917A-664.

## SPEED.

Opinion evidence, see Automobiles, 42, 43.

#### SPENDTHRIFT TRUST.

See Creditors' Bills, 7. See Trusts and Trustees, 6-12.

SPLITTING CAUSES OF ACTION. See Libel and Slander, 97.

### SPOLIATION.

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## SPONGE.

Left in wound, see Physicians and Surgeons, 37, 38.

#### SPRING GUN.

Liability of landowner for manslaughter, see Weapons, 1.

#### SPUR TRACK.

Negligence in maintaining, see Railroads,

STALE CLAIMS.

See Laches.

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#### STARE DECISIS.

- 1. Power to Overrule Decisions.
- 2. Application of Doctrine.
  - a. In treneral.
  - b. Decisions Construing Constitution or Statute.
  - c. Decision Establishing Rule of Evidence.
  - d. Erroneous Decisions.
  - e. Novel Element Involved.
  - f. Obiter Dicta as Precedents.
  - g. Advisory Opinions.

Decisions as precedents, see Courts, 22-36.

## 1. POWER TO OVERRULE DECISIONS.

1. Right to Overrule Previous Decision. Under Ala. Code 1907, § 5965, requiring the supreme court, in deciding a case when there is a conflict between its existing

opinion and any former ruling in the case, to be governed by its later opinion, it is the duty of the court, where its former ruling that petitioner had a right to condemn the property desired is attacked on appeal, after the award of damages, to reconsider the former opinion, and, if convinced that it is erroneous, to disregard and overrule it. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696.

2. Under Mass. Const. 1890, § 144, vesting the judicial power of the state in the supreme court and such other courts as are provided for in the constitution, and section 146, providing that the supreme court shall have such jurisdiction as properly belongs to a court of appeals, there is no constitutional restriction on the power of the supreme court to overrule or change decisions which in its opinion are erroneous or wrongful. Brewer v. Browning (Mass.) 1918B-1013.

## 2. APPLICATION OF DOCTRINE.

## a. In General.

- 3. Previous Decision Adhered to. This court declines to review and overrule the decision in McWhorter v. Ford, 142 Ga. 554 (83 S. E. 134). Sutton v. Ford (Ga.) 1918A-106.
- b. Decisions Construing Constitution or Statute.
- 4. Single Previous Decision. As a general rule, a constitutional question once decided is no longer open, though, where the opinion is radically wrong, the court on a new appeal in the same case, or in another case, will correct the error, unless prevented by the rule of stare decisis. Greene County v. Lydy (Mo.) 1917C-274.
- 5. Decision on Constitutional Question. It is the court's duty to adhere to a ruling in a former case on a constitutional question, especially where the constitution was therein liberally construed, since an interpretation once put upon a constitution should be thereafter adhered to, unless manifestly wrong and mischievous in effect, and constitutions should receive a liberal interpretation. State v. Brantley (Miss.) 1917E-723.
- 6. Construction of Statute. The construction placed on a statute by the highest court of the state becomes a part of the original text only when it will not affect contract or property rights. State v. Missouri Athletic Club (Mo.) 1916D-931.
- c. Decision Establishing Rule of Evidence.
- 7. The doctrine of stare decisis cannot apply to a mere rule of evidence in which no one has a vested right. Williams v. Kidd (Cal.) 1916E-703.

## d. Erroneous Decisions.

8. Propriety of Overruling Previous Decision. The supreme court will overrule decided cases which operate to effect injustice or lead to wrong results, though decided by the great judges of the past. Brewer v. Browning (Mass.) 1918B-1013.

## e. Novel Element Involved.

9. Scope of Ruling. As an appellate court does not look for objections, a ruling that an instruction was not subject to a particular objection is not an approval of the instruction which will prevent consideration of a different objection in a future case. Lichtenstein v. L. Fish Furniture Co. (Ill.) 1918A-1087.

## f. Obiter Dicta as Precedents.

10. Limitations of Doctrine—Dicta. The rule of stare decisis, whereby uniformity, certainty, and stability in the law is obtained by the following of earlier precedents, contemplates only such points as are actually involved and determined in a case and mere obiter dicta or points not necessary to the decision need not be followed; general observations being construed with reference to the particular facts. Moose v. Board of Commissioners (N. Car.) 1917E-1183.

## g. Advisory Opinions.

11. Advisory Opinion of Judges. The opinion of the justices that a proposed act would be constitutional, if enacted, is advisory only and not binding as an authority. Woods v. Woburn (Mass.) (Annotated.)

STATE BOARD OF HEALTH. See Health.

STATE BOND FUND. See Public Officers, 67-74.

STATE MILITIA. See Militia.

STATE OFFICERS.

See Public Officers, 1.

## STATES.

- 1. Jurisdiction and Powers, 759.
- 2. Boundaries, 759.
- 3. Fiscal Management, 759.
  a. Appropriations, 759.
  b. Restraining Expenditure of State Funds, 760.
  4. Liability for Torts of Officers, 760.
- 5. Actions Against State, 760.
- 6. Actions on Relation, 760.
- 7. Relation of States Inter Se, 760.

Protection of wild animals, see Animals,

Liability of state for damage by wild animals, see Animals, 18.

Control of banks, see Banks and Banking, 4-10.

Respective powers of state and U. S., see Constitutional Law, 5.

Fifth amendment no limitation on state power, see Constitutional Law, 59.

Jurisdiction of state courts, see Courts, 12-18.

Power to regulate liquor traffic, see Intoxicating Liquors, 1-8.

Admission of Iowa to Union, see Jury, 3, 4. Election between federal and state law under Employers' Liability Act, see

Master and Servant, 76-80. Control of municipalities, see Municipal Corporations, 18-20.

Control of highways, see Streets and High-

Effect of statutes enacted prior to admission to Union, see Territories, 1.

# 1. JURISDICTION AND POWERS.

- 1. Legislative Power Over Real Property Titles. The conditions of ownership of real estate whether the owner is a citizen or alien, resident or nonresident, are subject to the laws of the state where situated. Cona v. Henry Hudson Co. (N. J.) 1916E-999.
- 2. Governmental Independence. several states possess the authority of independent states, except as limited by the federal constitution. Flexner v. Larson (Ill.) 1916D-810.

# 2. BOUNDARIES.

- 3. River as Boundary. By Act Cong. April 18, 1818, c. 67, 3 Stat. 428, making the Wabash river part of the boundary line between the states of Indiana and Illinois, the middle of the current becomes the boundary line, and the condemnation of a right of way for a telegraph company to the boundary line is subject to the control of the United States over the Wabash river. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.
- 4. The phrases "middle of the river" and "middle of the main channel" are equivalent expressions, and both mean the main line of the channel or the middle thread of the current. Western Union Tel. Co. v. Louisville, etc. R. Co. (Ill.) 1917B-670.

# 3. FISCAL MANAGEMENT.

## Appropriations.

5. Fiscal Affairs—Validity of Continuing Appropriation. Ark. Laws 1911, p. 299, by which the legislature made appropriations for school purposes, is valid as a continuing appropriation, where the appropriations were for authorized objects; the provision requiring biennial appropriations not applying. Dickinson v. Edmondson (Ark.) 1917C-913.

Exceeding Current Revenue—Validity of Contract. Ill. Const. art. 4, § 18, prohibits appropriations in excess of the revenue authorized by law to be raised in the period for which appropriations are made, but provides that in case of failure of revenue the general assembly may berrow moneys to be applied to the purpose for which they were obtained, or to pay the debt so created, and to no other purpose. Section 19 prohibits the general assembly from authorizing the payment of any claim or part created against the state under any contract made without express authority of law, with the exception that it may make appropriations for expenditures incurred in repelling invasion or suppressing insurrection. Ill. Cr. Code (Hurd's Rev. St. 1915-16, c. 38) § 208, provides that making a contract in excess of the amount of an appropriation subjects the public officer to a fine and removal from his office, trust, or employment. It is held that every claim or contract created or made by an officer of the state is utterly void if not within the amount of appropriations already made, unless there is express authority of law for the creation of the debt or claim or the making of the contract, that authority being "express" which con-fers power to do a particular identical thing set forth and declared exactly, plainly, and directly with well-defined limits, an authority given in direct terms, definitely and explicitly, and not left to inference or implication, as distinguished from authority which is general, implied, or not directly stated or given. Fergus v. Brady (Ill.) 1918B-220.

# b. Restraining Expenditure of State Funds.

7. Taxpayer's Action — Restraining Unauthorized Payments. A taxpayer has the right to maintain a suit to restrain the state auditor of public accounts and the state treasurer from paying out sums illegally appropriated by the general assembly, in violation of Ill. Const. art. 4, §§ 18, 19, in excess of revenue. Fergus v. Brady (Ill.) 1918B-220.

# 4. LIABILITY FOR TORTS OF OFFICERS.

8. Liability for Tort of Officer. Mass. Rev. Laws, c. 201, permitting enforcement in the courts of claims against the commonwealth, cannot be stretched to include damages for an ordinary tort committed by an officer or employee of the commonwealth, in the performance of duties prescribed by law. Burroughs v. Commonwealth (Mass.) 1917A-38.

## 5. ACTIONS AGAINST STATE.

- 9. Liability to Suit. A suit by an alien to restrain the attorney general and county attorney from enforcing to his injury the Arizona anti-alien labor law of December 14, 1914, which he asserts is repugnant to the federal constitution, cannot be regarded as a suit against the state. Truax v. Raich (U. S.) 1917B-283.
- 10. A sovereignty can be impleaded in its own courts only in the manner, to the extent, and for the causes expressed in the statute granting consent thereto. Burroughs v. Commonwealth (Mass.) 1917A-38.

# 6. ACTIONS ON RELATION.

11. State as Party. In an original proceeding in the supreme court, the state is the actual plaintiff, and the relator, a mere incident. State v. Taylor (N. Dak.) 1918A-583.

# 7. RELATION OF STATES INTER SE.

12. Relation to Each Other. The several states of the Union are foreign to each other, except so far as the United States is the paramount government as to each, binding them to recognize the fraternity among their sovereignties established by the constitution of the United States. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

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1. CONSTITUTIONAL REQUIRE-MENTS AS TO TITLE AND SUB-JECT.

## (a) In General.

- 1. To escape violating Ill. Const. art. 4, \$ 13, providing that no act shall embrace more than one subject, expressed in the title, the title need not minutely and exactly express every related matter included in the act; it being enough if all the provisions are related to the subject indicated, are part of it, or incident to it, and reasonably connected with and auxiliary to the object or purpose of the act as expressed in the title. Perkins v. Board of County Commissioners (Ill.) 1917A-27.
- 2. Under Ill. Const. art. 4, § 13, providing that, if any subject shall be embraced in an act unexpressed in the title, such act shall be void only as to so much as shall not be so expressed, the fact that a statute contains a provision unexpressed in the title does not render the whole act void. Perkins v. Board of County Commissioners (Ill.) 1917A-27.
- 3. Title Held Sufficient. The title of the act is sufficient. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.
- 4. Effect of Subsequent Codification. Where a section of a legislative act has been incorporated in the Idaho Revised Codes and adopted as a part of the complete statutes of the state, the court will not inquire into or consider the sufficiency of the original title of the act in which such section was originally adopted by the legislature. In such case, it is too the original act, which was adopted prior to the date of its incorporation and adoption in the Revised Codes of the state. Anderson v. Great Northern R. Co. (Idaho) 1916C-191.
- 5. Relation of Provisions to Subject. Notwithstanding Nev. Const. art. 4, \$ 17, providing that each law shall embrace but one subject and matters properly connected therewith, a statute may contain several provisions, provided they relate to the subject expressed in the title, or are properly connected therewith. Worthington v. District Court (Nev.) 1916E-1097.
- 6. Sufficiency of Title. The sufficiency of the title of a statute is a legislative and not a judicial question. Board of Trustees v. Waugh (Miss.) 1916E-522.
- 7. Embracing More Than One Subject. Article 31 of the La. constitution does not prohibit the embracing in a statute of the means provided for the accomplishment of its object; nor does the fact that such provision is made render the statute obnox-

ious to the objection that it embraces more than one object. Louisiana State Board v. Tanzmann (La.) 1917E-217.

- b. Statutes Relating to Particular Subjects.
- 8. Liquor Law. The Hazel Law (27 Del. Laws, c. 139), entitled "An act regulating the shipment or carrying of spirituous, vinous, or malt liquor into local option territory or the delivery of same in such territory," by section 1 prohibits common carriers from accepting such liquor for shipment into local option territory, by section 2 prohibits any person engaged in the manufacture or sale of such liquor from delivering it in local option territory, by section 5 excepts shipments to physicians and druggists in limited quantities, and by section 6 prohibits any person from bringing from any point within the state into local option territory more than one gallon of whiskey in 24 hours. Held that, while sections 1 and 2, standing alone, established prohibition, and not a regulation, yet the act, construed as a whole, was a regulation of shipments, and the subject of the act was properly expressed in its title, as required by Const. Del. art. 2, § 16. Van Winkle v. State (Del.) 1916D-104.
- 9. Divorce. The title of an act entitled "An act relating to marriage and divorce" is sufficient, within Nev. Const. art. 4, § 17, providing that each law shall embrace but one subject and matters properly connected therewith, to justify provisions in the body of the act prescribing the length of residence required before parties may apply for a divorce. Worthington v. District Court (Nev.) 1916E-1097.
- 10. Public Utilities Act. Public Utilities Act, § 81, providing for the repeal of the "act establishing a board of railroad and warehouse commissioners," together with acts declaring express companies to be common carriers, subject to the jurisdiction of the railroad and warehouse commission, is not in violation of Const. art. 4, § 13, declaring that no law shall be revived or amended by reference to its title only, for the utilities act is complete in itself, and not an amendment of any prior act. State Public Utilities Com. v. Chicago, etc. R. Co. (III.) 1917C-50.
- 11. Emergency Loan by County. Nev. Act March 13, 1903 (Laws 1903, c. 78), §§ 6, 7 (Rev. Laws, §§ 3831, 3832), authorizing county commissioners, in case of great necessity or emergency, to make a temporary loan, and requiring them at the next tax levy to make a levy for its payment, does not, in violation of Const. art. 14, § 17, relate to a subject not embraced in the title, "An act relating to county government and the reduction of the rate of county taxation." First National Bank v. Nye County (Nev.) 1917C-1195.

- 12. Authorizing Consolidation of Corporations. Burns' Ann. St. Ind. 1914, § 5690, relating to the consolidation of street railroad companies, amending Act March 3, 1899, does not violate Const. art. 4, § 19, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, in that the original act under its title might have authorized such consolidation. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 13. Liability of Railroad for Fire. That proviso is germane to the subject expressed in the title, which was "An act to establish the responsibility of railroads, corporations, companies, and persons owning or operating railroads for damages by fires communicated by locomotives." Pittsburgh, etc. R. Co. v. Chappell (Ind.) 19184-627.
- 14. Prohibition Law. The act approved November 17, 1915 (Acts Ga. 1915, p. 77), is not unconstitutional on the ground that it contains matter different from what is expressed in its title. Delaney v. Plunkett (Ga.) 1917E-685.

## 2. REQUISITES OF STATUTES.

- 15. Requisites Certainty. The provisions of chapter 39, as amended by chapters 26 and 133, Session Laws Okla. 1913, are not void for uncertainty in respect to the duties therein imposed upon police officers. State v. Linn (Okla.) 1918B-139.
- 16. Incomplete Statute. If a legislative enactment is so uncertain that the court cannot determine with any reasonable degree of certainty, what its purpose was, or if it be so incomplete that it cannot be executed, it must be condemned as void. State v. Board of State Canvassers (Wis.) 1916D-159.
- 17. Uncertainty. That a statute, in some provisions, is so vague, uncertain, and indefinite in its terms as to be incapable of execution, does not render it void, so long as it does not infringe some constitutional provision and is capable of execution in its more essential provisions, Perkins v. Board of County Commissioners (III.) 1917A-27.

# 3. MANDATORY AND PERMISSIVE STATUTES.

- 18. A legislative provision accompanied by a penalty for failure to observe it is mandatory. Cramer's Election Case (Pa.) 1916E-914.
- 19. Compliance with the commands of a mandatory statute is a condition precedent to the validity of an act or determination under it, and the prescribed mode of doing the act or reaching the determination must be strictly pursued. People v. Snell (N. Y.) 1917D-222.
- 20. Directory or Mandatory. In determining whether statutes are mandatory

or directory the legislative intent governs. People v. Graham (Ill.) 1916C-391.

#### 4. ENACTMENT.

## a. Enacting Clause.

21. The enacting clause of a statute can be extended by the preamble, but cannot be restrained by it. Brown v. Eric R. Co. (N. J.) 19170-496. (Annotated.)

# b. Reading or Printing of Bill.

22. Formalities of Enactment — Three Readings in Each House. Const. Tenn. art. 2, § 18, requiring a bill to be read and passed in each house on three separate days, is satisfied, where it is introduced in duplicate in the two houses, and the Senate bill, after passing its third reading and being enrolled, is on the third reading in the house substituted for the house bill and passed. Heiskell v. Knox County (Tenn.) 1916E-1281.

## c. Action by Governor.

23. Nature of Veto Power. While the veto power is ordinarily exercised by the person possessing the executive power, it is not an "executive" but a "legislative" power. Gottstein v. Lister (Wash.) 1917D-1008.

24. Action of Executive - Parol Evidence. Under Ark. Const. art. 6, § 15, providing that every bill which shall have passed the general assembly shall be presented to the governor, and that if he approve it he shall sign it, but that if he shall not approve it he shall return it with his objections to the house in which it originated, which shall enter the objections at large in their journal, and proceed to reconsider it, in mandamus proceedings by an association, alleging that it was specially interested, to compel the secretary of state to publish among the acts of the legislature a statute which the association claimed the governor had approved, parol evidence extrinsic to the legislative records, which showed that the bill was vetoed and not approved, is inadmissible to determine whether the governor first approved the bill before subsequently vetoing it. Arkansas State Fair Assoc. v. Hodges (Ark.) 1917C-829. (Annotated.)

## Note.

Admissibility of extrinsic evidence with respect to approval or disapproval of bill by executive. 1917C-836.

## d. Legislative Journals.

25. Evidence of Enactment—Conclusiveness of Journals. Journals of the legislature cannot be impeached even for fraud or mistake, but any errors therein can be corrected only by the legislature. Heiskell v. Knox County (Tenn.) 1916E-1281.

26. Enactment—Presumption of Regularity. The senate journal does not affirmatively show that the bill was not read by sections on its final passage and the presumption is that the requirements of section 15 of article 2 of the Kan. constitution were observed. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.

## e. Enactment Over Veto.

27. Requisite Number of Votes. In passing a bill by the Senate upon reconsideration after a veto it is not essential that two-thirds of all the senators vote therefor, but it is sufficient if two-thirds of a quorum support such bill. State v. Missouri Pacific R. Co. (Kan.) 1917A-612.

## 5. EFFECT OF PARTIAL INVALIDITY.

- 28. Ind. Employers' Liability Act March 2, 1911 (Laws 1911, c. 88), § 7, providing that all questions of assumption of risk, negligence or contributory negligence shall be for the jury, or for the courts in causes tried without a jury, if invalid, is entirely severable from the other provisions of that act. Vandalia Railroad Co. v. Stillwell (Ind.) 1916D-258.
- 29. If the provision of the Corrupt Practice Act (N. Dak. Comp. Laws 1913, §§ 923-944) attempting to govern the election of United States senators and members of Congress is invalid, it is severable and does not affect the validity of the act as applied to the election of state and county officers. Diehl v. Gotten (N. Dak.) 1918A-884.
- 30. As the exemption is not so interwoven with the texture of the Mont. Farm Loan Act (Laws 1915, c. 28) or so indispensable to its purposes or operation as to compel the view that without it the act would not have been passed, its invalidity will not affect the act itself. Hill v. Rae (Mont.) 1917E-210.
- 31. As such Mont. Farm Loan Act may be carried out without such unconstitutional appropriation of money as a guaranty to lenders under the act, the act itself will not fall. Hill v. Rae (Mont.) 1917E-210.
- 32. If a duly enacted statute contains provisions that are invalid because in conflict with the organic law, and such invalid portions may be severed, and the remainder of the statute may then be made effective for the purpose designed, and will not cause results not intended by the legislature, and it does not appear that the statute would not have been enacted without the invalid portions, the invalid portions of the act should be disregarded and the valid portions enforced if it can be done to effectuate the legislative intent. State v. Philips (Fla.) 1918A-138.
- 33. The proviso of Burns' Ind. Ann. St. 1914, § 5525a, that the burden of proof of

- contributory negligence is upon the railroad company in an action for damages caused by fire, if not within the title, does not render the entire act void under Const. art. 4, § 19, requiring the subject of the statute to be expressed in the title, since the act would be complete, sensible, and capable of execution with that proviso eliminated. Pittsburgh, etc. R. Co. v. Chappell (Ind.) 1918A-627.
- 34. Where the provisions of the Commission Merchants' Law (Rem. & Bal. Wash. Code, §§ 7024-7035) applicable to defendants were valid, the invalidity of other portions which could be separated from the remainder will not defeat the entire act. State v. Bowen & Co. (Wash,) 1917B-625.
- 35. Under Const. Amend. 7, approved March 10, 1911 (Laws Wash. 1911, p. 136), providing for the initiative and referendum and that an initiative measure shall be in operation after the thirtieth day after the election, initiative measure No. 3 (Laws 1915, p. 2), prohibiting the manufacture, keeping, sale, etc., of intoxicating liquors, before any attempt to enforce its provisions prior to January 1, 1916, even if violative of the amendment by reason of the postponement of its operation, would have no effect upon the constitutionality of other provisions thereof, as section 26 expressly so declares. Gottstein v. Lister (Wash.) 1917D-1008.
- 36. The possible invalidity of so much of Mich. Pub. Acts 1913, act No. 301, licensing and regulating private employment agencies, as prescribes the fees which may be demanded or retained, does not affect the validity of other provisions of the act from which the provision in respect to fees is separable. Brazee v. Michigan (U. S.) 19170-522.
- 37. Where a statute is in part invalid, the court must uphold the balance, where, by so doing, it carries out the legislative intent. Greene County v. Lydy (Mo.) 19170-274.
- 38. The Public Utilities Act will not be held invalid because of the invalidity of portions of the act which are not necessary or inseparable parts of the act, without which it would not have been passed, where their elimination will leave a valid act capable of being carried out. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.
- 39. If part of an enactment is unconstitutional and the remainder is not, and is reasonably complete by itself, and the former was not such inducement to the entirety but what the latter might, within reasonable probability, have been enacted by itself, to that extent it should be approved and otherwise disapproved. State v. Board of State Canvassers (Wis.) 1916D-159. (Annotated.)

- 40. The Hazel Law (27 Del. Laws, c. 139), regulating shipments of intoxicating liquors into local option territory of the state for any purpose, except to physicians and druggists, though invalid as to an interstate shipment intended for the receiver's personal consumption, recognized by the act itself to be lawful, is a valid enactment in so far as it regulates, limits, or prohibits the shipment of liquor from one part of the state into a prohibition district in another part of the state. Van Winkle v. State (Del.) 1916D-104. (Annotated.)
- 41. In determining the constitutionality of a statute, the valid parts should be separated, if possible, from those which are invalid, and be permitted to stand, unless the different parts are so intimately connected with and dependent upon each other as to show a legislative intent that, if all could not be carried into effect, the residue would not have been enacted independently. American Express Co. v. Beer (Miss.) 1916D-127. (Annotated.)
- 42. A part of a law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other, without impairing the force and effect of the section which remains, and where the legislative purpose as expressed in such section can be accomplished and given effect, independently of the void section, and, when the entire act is taken into consideration it cannot be said that the legislature would not have passed the section retained had it been known that the void section must fail. Held, that section 1, of chapter 23, N. Mex. S. L. 1901, is valid and enforceable even though section 5 of the same act is unconstitutional, under the above rule. State v. Brooken (N. Mex.) 1916D-136. (Annotated.)
- 43. When a part of a statute is unconstitutional, that fact does not compel the courts to declare the remainder void, unless the unconstitutional part is of such import that the other parts of the statute, if sustained without it, would cause results not contemplated or desired by the legislature. The question to be determined is whether the obnoxious part is an inducement of the whole act, or whether it is merely an incident thereto. The test to be applied in determining whether the unconstitutional provision in a statute invalidates the whole enactment is the answer to the following questions: (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
  (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part

- from the unconstitutional part, and to give effect to the former only? State v. Bickford (N. Dak.) 1916D-140. (Annotated.)
- 44. Where a part of a statute is unconstitutional, that fact does not require the courts to declare the remainder void also, unless all the provisions are connected in subject matter depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. Malin v. Lamoure County (N. Dak.) 19160-207.
- 45. A statute is valid in part where the valid part is separable from the invalid part, and is capable of being executed, and thereby effectuate the manifest intent of the legislature. Gherna v. State (Ariz.) 1916D-94. (Annotated.)
- 46. The unconstitutionality of a part of a statute does not render the balance of the statute invalid, where enough remains to clearly show the legislative intent and to furnish sufficient details of a working plan to carry out the intent. State v. Duncan (Mo.) 1916D-1. (Annotated.)

#### Note.

Effect of partial invalidity of statute. 1916D-9.

## 6. CONSTRUCTION,

## a. General Rules.

- 47. Rules of Statutory Construction. In construing an ambiguous legislative enactment some established rules are to be observed as unwritten law with all the force of written law, and among them:
- (a) No attempt to read a legislative enactment different from its plain words and evident meaning on its face is legitimate, if so read it "leads to no absurd consequences."
- (b) There should be real uncertainly of meaning found in a legislative enactment before resorting to reading it by aid of rules for judicial construction.
- (c) Whether the meaning of words of an enactment are plain is to be determined with reference to the connections in which they are used, the subject dealt with, the circumstances at the time, and the object in view.
- (d) The term "and leads to no absurd consequences" requires the rule that ambiguity requiring judicial construction may as well arise from applying the literal sense of words to the subject dealt with as from uncertainty of the words themselves.
- (e) An intent, however apparent, which cannot reasonably be read out of a legislative enactment, should not be adopted, but an intent. however absurd, which can be so read and shows clearly the legislalative purpose beyond reasonable doubt,

1916C-1918B.

must be adopted regardless of the effect upon validity.

(f) The very letter of an enactment may be violated to carry out a manifest legislative intent, so long as it can be found expressed within the reasonable scope of the language used.

(g) Where there is irreconcilable conflict between a legislative enactment and an earlier law, a presumption arises of a purpose to modify or repeal the latter; but that is rebuttable by circumstances and, among them, that the existing law constitutes an entire system and the later enactment would render the entirety unconstitutional or absurd. State v. Board of State Canvassers (Wis.) 1916D-159.

# b. Giving Effect to Legislative Intent Generally.

- 48. Construction to Effectuate. The court, in construing a statute, must ascertain and give effect to the intent of the legislature, and, if consistent with the intent and the reason of the statute, the court will adopt the construction which will render the statute operative. State v. Duncan (Mo.) 1916D-1.
- 49. Statutes are to be interpreted so as to give effect to their manifest purpose, as ascertained from the words used, given their common and approved meaning, and no intent can be read into a statute which is not there either in plain words or fair implication. In Re Bergeron (Mass.) 1917A-549.
- 50. When a statute is validly enacted, and its language is plain, and conveys a clear and definite meaning, the sole duty of the courts is to give to it the exact meaning conveyed by its language, adding nothing thereto and taking nothing therefrom. It is only when the meaning of a statute is in doubt that courts are required first to construe it, in order to know how to enforce it. Van Winkle v. State (Del.) 1916D-104.
- 51. In considering a statute, effect should be given to the intent of the law-makers. Uphoff v. Industrial Board (III.) 1917D-1.
- 52. The primary rule for the interpretation and construction of a statute is that the intention of the legislature is to be ascertained and given effect. People v. Chicago R. Co. (Ill.) 1917B-821.
- 53. The court, in construing a statute, cannot give to the language used any different meaning from that plainly expressed, on the theory of a contrary legislative intent. Denver v. Hobbs Estate (Colo.) 1916C-823.
- 54. The object of all statutory interpretation and construction is to ascertain and give effect to the intention of the legislature. State v. Taylor (N. Dak.) 1918A-583.

55. Statutes should be construed so as to give effect to legislative intent and avoid meaningless and absurd results. State v. Gordon (Mo.) 1918B-191.

## c. Construction as a Whole.

- 56. Effectuating All Provisions of Statute. A statute being passed as a whole, that construction giving effect to all sections should be adopted. Uphoff v. Industrial Board (III.) 1917D-1.
- 57. All Parts Considered. In arriving at the meaning and intent of a legislative enactment, every part thereof, as well as the title, must be taken into consideration. Victor Chemical Works v. Industrial Board (Ill.) 1918B-627.

## d. Liberal Construction.

58. In Aid of Military Power. A public statute relating to the military power of the government should be liberally construed so as to make such power effective. Sweetser v. Emerson (Fed.) 1917B-244.

## e. Unambiguous Statutes.

- 59. Where a statute is plain and unambiguous, whether expressed in general or limited terms, there is no room for construction to determine its meaning. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696.
- 60. The rules for the construction of statutes are only valuable in so far as their application enables the court to better ascertain the intent of the legislature, as expressed in the statute, and where the statute is plain and unambiguous there is no room for construction. Correll v. Williams, etc. Co. (Iowa) 1918A-117.
- f. Words Construed According to Their Natural and Obvious Meaning.
- 61. The meaning of a statute must primarily be determined by the language of the act itself. Whiley v. Solvay Process Co. (N. Y.) 1917A-314.
- g. Words Given Their Ordinary Meaning.
- 62. In construing a statute, words should be given their ordinary meaning. State v. Gordon (Mo.) 1918B-191.
  - h. Statutory Definitions Adopted.
- 63. The legislature may adopt reasonable modifications of former definitions of words, so as to make their interpretation conform to modern usage. Ideal Tea Co. v. Salem (Ore.) 1917D-684.
- 64. Legislative Definitions—Effect. A legislative body may within limits define the objects affected or designed to be by its own enactments, and the supreme court is ordinarily bound, in construing its acts

or ordinances, to follow its own definitions. St. Louis v. Nash (Mo.) 1918B-134.

65. Interpretation Clause—Definition of Terms. The legislature may in any act define terms specifically for that act; therefore no complaint can be made that the Ill. Public Utilities Act, § 10, defining the term "public utility," declares that it shall include corporations or receivers that own, control, operate, or manage any plant, equipment, or property used in connection with the transportation of persons, and defines the terms "railroad" as including every railroad other than a street railroad by whatsoever power operated, and a "street railroad" as including every railroad being laid upon, above, or below any street. State Public Utilities Com. v. Chicago, etc. R. Co. (Ill.) 1917C-50.

## i. Restriction of General Words.

- 66. General words and phrases in a statute may be restricted in meaning to adapt their meaning to the subject-matter in reference to which they are used. Barber v. Morgan (Conn.) 1916E-102.
- 67. The court, to harmonize conflicting statutory provisions and to effectuate the intention of the legislature, must either restrict or enlarge the ordinary meaning of the words in the statutes, and this rule has special force where the statutes must be made to conform with the constitution. State v. Pay (Utah) 1917E-173.

## j. Interpretation of Particular Words and Phrases.

68. Construction—"Other." The rule of construction requiring the word "other" in a statute to be construed as "other such like," with reference to things previously enumerated, does not apply where legislative intention is manifestly to the contrary, and the word will then receive a general construction. American Ice Co. v. Fitzhugh (Md.) 1917D-33.

## k. Conflicting Words.

69. Disregarding Inconsistent Words. In construing a statute, the courts are not confined to the literal meaning of the words, but may disregard words inconsistent with the general intent. Uphoff v. Industrial Board (III.) 1917D-1.

## 1. Construction in Favor of Validity.

70. Statutes should receive that construction which will uphold their validity. Spangler v. Mitchell (S. Dak.) 1918A-373.

## m. Inconvenience from Enforcement.

71. Avoiding Hardship. In construing a statute the courts will consider that one construction would lead to hardships by giving a remedy for ancient and forgotten

wrongs which another construction would avoid. Jacobus v. Colgate (N. Y.) 1917E-369.

# n. Construction Rendering Statute Absurd.

- 72. The courts are bound to presume that the legislature did not intend absurd consequences, leading to great injustice. Uphoff v. Industrial Board (III.) 1917D-1.
- 73. A construction of a statute which will result in great inconvenience or absurd consequences should be avoided. Uphoff v. Industrial Board (III.) 1917D-1.
- 74. Rules of strict and literal construction may be departed from, in order that absurd results may be avoided, and to insure that the statute shall be effective for the purposes intended. Sweetser v. Emerson (Fed.) 1917B-244.

## o. Retrospective or Prospective Meaning.

75. Retrospective Operation—Regulation of Procedure. The provision of Nev. Act Feb. 20, 1913 (Laws 1913, c. 10), amending section 22 of the Marriage and Divorce Act of 1861 (Laws 1861, c. 33), as amended by. Act Feb. 15, 1875 (Laws 1875, c. 22), by declaring that the court shall not grant a divorce, unless either party shall have been a resident for not less than one year, relates merely to procedure, and not to the cause of action, and applies to cases where the cause of action accrued before the act took effect. Worthington v. District Court (Nev.) 1916E-1097.

76. Retroactive Effect. A statute will not be given a retroactive effect, unless by its terms it is clearly shown that that was the legislative intent. Graves v. Dunlap (Wash.) 1917B-944.

77. Prospective Operation. Statutes should be construed prospectively, and not retrospectively, although there is no constitutional impediment. State v. Iowa Tel. Co. (Iowa) 1917E-539.

#### p. Presumption of Legislative Knowledge.

78. The legislature is presumed to know the rules and principles of construction adopted by the courts. Twentieth Street Bank v. Jacobs (W. Va.) 1917D-695.

## q. Ejusdem Generis.

79. Under the rule ejusdem generis, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to the persons or things of the same general nature or class as those enumerated. State v. Gardner (lowa) 1917D-239.

## r. Effect of Pre-existing Laws.

80. Prior State of Law. A study of the law as it was prior to enactment of the

statute to be construed, is only profitable in so far as it may aid in the interpretation of the act, but the act itself is the law which must govern the court. Correll v. Williams, etc. Co. (Iowa) 1918A-117.

#### s. Codification.

81. Construing Statutes Together—Provisions Adopted at Different Times. Though the substance of Shannon's Tenn. Code § 3935, relative to the jurisdiction to appoint administrators of the estates of non-residents was enacted prior to the Code of 1858, with which the right of action for wrongful death originated, it having been made a part of that code along with the sections giving the right of action for wrongful death, they must be construed together as if they had originated with the code, as that code was a single enactment. Sharp v. Cincinnati, etc. R. Co. (Tenn.) 1917C-1212.

## t. General and Special Statutes.

82. Statutes Relating to Courts. Statutes dealing with the courts are, as a general rule, general statutes, though not applicable to every court of like nature in the state. Greene County v. Lydy (Mo.) 19170-274.

#### u. Statutes in Pari Materia.

- 83. It is the court's duty in interpreting related statutes to give effect to both of them, if possible, rather than to destroy one of them. Palmer v. Cedar Rapids (Iowa) 1916E-558.
- 84. Consolidation of Corporations. A consolidation of two street railroad companies not in legal effect constituting a sale of the property of the constituent corporations, Burns' Ind. Ann. St. 1914, § 5690, providing that street railroad companies may consolidate upon such terms as may be by them mutually agreed upon, and section 5653, authorizing street railroad companies to sell their properties in certain cases, but providing for the payment to a dissenting shareholder of the appraised value of his stock, are not properly construed together. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 85. Intoxicating Liquors. Tenn. Acts 1913 (2d Ex. Sess.), c. 1, regulating the shipment of intoxicating liquor into the state, or between points within the state, and chapter 3, prohibiting the conveying or shipping liquor from one county to another in the state, are in pari materia, and must be construed together so as to harmonize with each other, especially since they were passed at the same legislative session and are presumed to be actuated by the same public policy; and the exceptions to the prohibition to the shipment

of liquor maintained in chapter 1 will be construed to apply to chapter 3. Bird v. State (Tenn.) 1917A-634.

## v. Remedial Statute.

- 86. Evil to be Remedied. Where a new statute is so ambiguous as to incite contrary opinion as to its meaning, the first test is to discover the evil sought to be corrected. Huntworth v. Tanner (Wash.) 1917D-676.
- 87. Judicial Notice of Current History. The court, in determining the validity of a statute, may take judicial notice of current history and the mischief the statute attempted to provide against. Greene County v. Lydy (Mo.) 1917C-274.

## w. Penal Statute.

- 88. Statutory Rules of Construction. Tex. Rev. St. 1911, art. 5502, prescribing rules for the construction of civil statutory enactments, applies and is of binding force in criminal prosecutions. Bradfield v. State (Tex.) 1917C-696.
- 89. Strict Construction. Where a law is penal and prescribes punishment, acts will be construed as without its operation, rather than within it. Huntworth v. Tanner (Wash.) 1917D-676.

## x. Statutes Adopted from Another State.

- 90. The construction given a statute by the courts of the state from which it was adopted is strongly persuasive, the presumption being that the construction was also adopted. Russel v. Jordan (Colo.) 1916C-760.
- 91. Where the legislature adopts a statute from another state, the construction given the act by the courts of the other state prior to its enactment in this state usually governs in interpreting such act here. Dale v. Marvin (Ore.) 1917C-557.
- 92. Where the legislature adopts a provision from the statutes of another state, it must be assumed that it was familiar with its interpretation there and adopted it with the statute. Mt. Vernon Tel. Co. v. Franklin Farmers, etc. Tel. Co. (Me.) 1917B-649. (Annotated.)
- 93. A decision of the supreme court of Arkansas, rendered since the laws of Arkansas were extended over the Indian Territory, where in direct conflict with the settled law of this state, "is not even persuasive." Marx v. Hefner (Okla.) 1917B-656. (Annotated.)
- 94. When a statute has been adopted from another state or country, the courts usually follow the construction which it had received by the courts of the state or country from which it is taken. Rose v.

Public Service Commission (W. Va.) 1918A-700.

Note.

Construction of adopted statute. 1917B-651.

# y. Time of Taking Effect.

95. Public Utilities Act. The act known as the "Idaho Public Utilities Act" was passed at the twelfth session of the Idaho legislature, which session was adjourned on the 8th day of March, 1913, and said act was approved by the governor on March 13, 1913, and went into effect sixty days after the adjournment of said session of the legislature, to wit, on the 8th day of May, 1913. Session Laws 1913, p. 247. Said act provided for the organization of a public utilities commission, and defined its powers and duties, and also the rights, remedies, powers, and duties of public utilities, their officers, agents, and employees, and the rights and remedies of patrons of public utilities. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

96. Under the provisions of section 10, art. 4, of the Idaho constitution, every bill passed by the legislature becomes a law upon the approval and signing of the same by the governor. Idaho Power, etc. Co. v. Blomquist (Idaho) 1916E-282.

# z. Disregarding Clerical Errors.

97. The intention of the legislature to amend a specified section of the statute must govern, and a clerical mistake as to the section amended must be disregarded. Worthington v. District Court (Nev.) 1916B-1097.

# aa. Effect of Re-enactment.

98. Re-enactment—Adoption of Prior Construction. Where, although Mass. St. 1903, c. 437, imposing taxes on foreign corporations, was construed to be inapplicable to foreign corporations whose places of business within the state were maintained solely for use in interstate commerce, the legislature re-enacted it as St. 1909, c. 490, pt. 3, without substantial change, they must be held to have adopted the prior construction. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

# bb. Avoidance of Inutility.

99. Where to give a statute a construction contended for would operate to make part of its well-considered provisions inoperative in the field covered by the statute in which such provision is found, such construction is not sustained by a claim that such provision is not idle, because intended to operate upon some statute in which it is not found, and which does not cover the field of the one in which such provision is found. Hunter v. Colfax Consolidated Coal Co. (Iowa) 1917E-803.

# cc. Presumption Against Innovation.

100. In determining the meaning of a statute, it will be presumed, in the absence of words therein specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, alter, violate, repeal, or limit another general statute or statutory system, the entire subject-matter of which is not directly nor necessarily involved in the act. Twentieth Street Bank v. Jacobs (W. Va.) 1917D-695.

#### do. Effect of Judicial Decision.

101. It is the duty of the court to maintain firmly its own function, but not trespass upon that of the legislature. The former requires solution of doubts respecting legislative purpose intended to be embodied in an enactment and the pronounced result becomes, in effect, written into such enactment. State v. Board of State Canvassers (Wis.) 1916D-159.

# ee. Reading Matter into Statute.

102. The courts cannot read into a statute matters not touched upon by the legislature, for what the legislature would have provided is a mere matter of conjecture. King v. Viscoloid Company (Mass.) 1916D—1170.

#### ff. Effect of Unrelated Statutes.

103. The construction of Ala. Code 1907, § 1035, prohibiting the employment of women and children in mines, as applicable to all mines, and not limited to coal mines, does not govern, and is not governed by, the construction of the other sections of the same chapter of the Code, since those sections are not dependent upon each other, or so closely related that each must be given the same construction. Cole v. Sloss-Sheffield Steel, etc. Co. (Ala.) 1916E-99.

## gg. Particular Aids to Construction.

104. In determining the meaning of a statute, the particular mischief which it was designed to remedy and the history of the period and of the act itself may be considered, and the statutory meaning of a word or phrase must be gathered from the purpose for which the statute was enacted. Whiley v. Solvay Process Co. (N. Y.) 1917A-314.

105. Contemporaneous Construction. In determining the meaning of a statute, contemporary construction may be resorted to, and opinions of the attorney general, which show how he construed the measure, while not binding, are of value. Huntworth v. Tanner (Wash.) 1917D-676.

106. Report of Legislative Committee. Reference may be had to the report of a

legislative drafting committee to ascertain the correct construction of the language used in a statute. Pellett v. Industrial Commission (Wis.) 1917D-884.

107. Name Given to Statute. The name given to a congressional enactment by way of designation or description in the act or the report of the committee accompanying the introduction of the bill into the House of Representatives cannot change the plain implication of the words of the statute. Caminetti v. United States (U. S.) 1917B—1168.

108. Opinion of Legislator in Aid of Construction. While debates in the legislature may be considered in determining the legislative intent, individual expression of members of the legislature will not establish such intent, in enacting a statute. Sweetser v. Emerson (Fed.) 1917B-244.

109. The rule that in construing a statute the legislative intent is to be ascertained and given effect does not permit the court to consider statements made by the author of a bill, or by those interested in its passage, or by members of legislature adopting it, showing the meaning or effect of the language used in the bill as understood by the persons making such statements. People v. Chicago R. Co. (III.) 1917B-821.

- 110. Practical Construction. The construction of executive officers intrusted with the duty of carrying out statutes is entitled to great weight. State v. Gordon (Mo.) 1918B-191.
- 111. Construction of Police Regulations. Laws and regulations necessary for the protection of the health, morals, and safety of society are within the police power, and should be given such a construction as will suppress the mischief aimed at. State v. Lipkin (N. Car.) 1917D-137.
- 112. Motive of Legislature. Where the language of a statute is unambiguous, it is not for the courts to inquire as to the motive of the legislature, nor to depart from the meaning which is clearly conveyed. Greenleaf v. Minneapolis, etc. R. Co. (N. Dak.) 1917D-908.
- 113. Effect of Preamble. The preamble, which is a clause at the beginning of a constitution or statute, explanatory of the reasons for its enactment and the objects sought to be accomplished, will not govern where the body of the act is broader than the proposition expressed, but if the body of the act can be given a construction consistent with the purpose declared in the preamble it will be so construed. Huntworth v. Tanner (Wash.) 1917D-676.

114. Resort may be had to the preamble or recitals of legislative intent in a statute only when the enacting part is ambiguous and doubtful. Brown v. Erie R. Co. (N. J.) 1917C-496. (Annotated.)

115. Effect of Form of Issue. No different rule of construction will be applied to a proceeding under the statute to procure the issuance of funding bonds, where a protest or remonstrance is filed thereto, and issues thus framed, from that to be applied in ordinary cases. In re Application of State, etc. (Okla.) 1916E-399.

### Note.

Preamble as aid to construction of statute. 1917C-500.

### 7. AMENDMENT OR REPEAL.

# a. In General.

116. Revision—Effect of Verbal Changes. In the revisions of the statute, the alteration of phraseology, or the omission or addition of words, will not necessarily change the operation or construction of the former statutes unless the legislative intent to make such change is clear. Cole v. Sloss-Sheffield Steel, etc. Co. (Ala.) 1916E-99.

# b. Repeal by Implication.

117. Amendment — Effect as Repeal. Nev. Act Feb. 15, 1875 (Laws 1875, c. 22), entitled "An act to amend an act entitled 'An act relating to marriage and divorce approved November 28, 1861," and containing only three sections, purports, by section 1, to amend section 22 of the original act by re-enacting the section as changed. Sections 2 and 3 are the ordinary repeal of inconsistent laws, and a provision as to when it shall take effect. Act Feb. 20, 1913 (Laws 1913, c. 10), entitled "An act to amend an act entitled 'An act to amend an act relating to marriage and divorce approved Nov 28, 1861," purports to amend "section 22" by re-enacting it with the changes affected by the amendment and repealing conflicting acts. It is held that, in view of Const. art. 4, § 19, providing that no law shall be revised or amended by reference, but the act or section as amended shall be re-enacted and published, the act of 1875 did not repeal section 22 of the original act, and the act of 1913 was not void as attempting to amend section 22 after such repeal, but the unchanged part of the section as originally enacted continued in force, notwithstanding the amendments, so that the title of the act of 1913 is sufficient. Worthington v. District Court (Nev.) 1916E-1097.

118. If the legislature did not intend the law of 1911 to be restrained so as not to impair the efficiency of the existing law, the purpose is too much involved in obscurity to be discoverable with the reasonable degree of certainty essential to effect being given thereto. State v. Board of State Canvassers (Wis.) 1916D-159.

119. There being no provision in the Smith and Parks Bills (Ala. Gen. Acts

1911, pp. 249-288, 26-31) defining what are unlawful drinking places, the provisions of section 5 of Act August 9, 1909 (Acts Sp. Sess. 1909, pp. 10, 11), defining unlawful drinking places, were not repealed, except in so far as regularly issued licenses to maintain drinking places afford the legal right to maintain such places. Borok v. Birmingham (Ala.) 1916C-1061.

120. Presumption. Repeals of statutes by implication are not favored. State v. Iowa Tel. Co. (Iowa) 1917E-539.

121. Repeal by Statute—Partial Repeal. A statute incorporating partially a rule of the common law does not operate as a repeal of the rest of the rule. Yazoo, etc. R. Co. v. Scott (Miss.) 1917E—880.

# c. Repeal of Repealing Statute, Effect.

122. Such constitutional provision is restricted in its application to express statutory revivals of prior statutes, and does not abrogate the common-law rule that, when a repealing statute is itself repealed, the first statute is revived without formal words, in the absence of any contrary intention, expressly declared or necessarily implied from the enactment. Manchester Twp. Supervisors v. Wayne Co. Commissions (Pa.) 1918B-278. (Annotated.)

123. Revival of Former Act. County commissioners must keep in repair so much of an abandoned turnpike as passes through a township, as required by Pa. Act April 20, 1905 (P. L. 237), and Act April 25, 1907 (P. L. 104), where Act May 10, 1909 (P. L. 499), repealing such prior acts, was itself repealed by Act March 15, 1911 (P. L. 21), since the rule that, where a repealing statute is repealed that, where a repealing statute is repealed to affected by Const. art. 3, § 6, providing that no law shall be revived, amended, or extended by reference to its title only, and that so much as is revived shall be reenacted and published at length. Manchester Twp. Supervisors v. Wayne Co. Commissioners (Pa.) 1918B-278.

(Annotated.)

#### Note.

Effect of repeal or amendment of repealing statute as reviving repealed statute. 1918B-281.

# d. Effect of Invalidity of Amendment.

124. Effect on Original Act. The invalidity of an amending statute, which merely added a provision to the original statute, does not avoid the original. Reliance Auto Repair Co. v. Nugent (Wis.) 1917B-307.

#### e. Effect on Pending Action.

125. Effect of Repeal on Existing Cause of Action. A judgment of \$2,000 against a municipality for personal injuries was

set aside because the charter limited a recovery in such cases to \$100. Subsequently such charter provision was repealed, and plaintiff moved for an order directing a judgment upon the verdict. It is held that, since the repealing enactment did not provide for the maintenance of existing causes of action, plaintiff could not recover more than the amount originally limited. Pullen v. Eugene (Ore.) 1917D-933

#### STATUTORY DUTY.

Mandamus to compel performance, see Mandamus, 19-20.

#### STAY BOND.

See Appeal and Error, 481-484.

#### STEAM RAILROAD.

See Railroads.

## STEAMSHIP EMPLOYEES.

As within Federal Employers' Liability Act, see Master and Servant, 59. As within Workmen's Compensation Act, see Master and Servant, 243-247, 262,

### STENOGRAPHER.

Dictation to no publication, see Libel and Slander, 6.
Communications with employer as privi-

leged, see Witnesses, 33.

### STENOGRAPHIC NOTES.

In record on appeal, see Appeal and Error, 66.

#### STEVEDORE.

As within Workmen's Compensation Act, see Master and Servant, 245.

### STIPULATIONS.

Waiver of error by stipulation, see Appeal and Error 181, 182.

Extending time of trial, see Dismissal and Nonsuit.

As affecting judicial notice, see Evidence, 2.

Selection of judge by agreement, see Judges, 2.

- 1. Parties. Filing in a suit in equity, by one not a party, of stipulation to be bound by the decree to be entered is irregular; he should be made a party if he is to be affected by the proceeding. Hanscom v. Malden. etc. Gaslight Co. (Mass.) 1917A-145.
- 2. Setting Aside—Act of One of Two Attorneys. Where the only resident attorney and attorney of record in a lawsuit signs and consents to the filing of a stipulation advancing the cause upon the calen-

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dar of the supreme court and setting it for hearing upon a day certain, such stipu-lation will not be set aside upon an affidavit by him merely to the effect that "he believes" he had no authority to sign the same, and that "he is informed" his non-resident associate counsel would be engaged and unable to prepare the brief, when the facts as to the authority and engagements are clearly matters of positive knowledge to his client, and such non-resident counsel, and these persons themselves furnish no proof or affidavits whatever of the facts alleged, and when the court is satisfied that counsel had abundant time for preparation. Youmans v. Hanna (N. Dak.) 1917E-263.

3. Right to Withdraw. When in the course of a jury trial the parties agree upon two stipulations, one of which tends to increase the amount of the plaintiff's claim and the other tends to diminish it, neither party should be allowed, after the cause has been submitted to the jury upon such stipulations, to withdraw the stipulation against his interest and enforce the others. Kriss v. Union Pacific R. Co. (Neb.) 1918A-1122.

## STOCK.

Attachment of shares, see Attachment, 3, 5.

STOCK EXCHANGE. By-laws, see Corporations, 9, 11.

STOCK AND STOCKHOLDERS. See Banks and Banking, 23.

STOCK BROKERS. See Brokers, 12.

# STOCKHOLDERS.

See Corporations. In joint-stock company, see Joint Adven-

STOCKHOLDERS' LIABILITY. See Corporations, 117-136.

STOCKHOLDERS' SUITS. See Corporations, 137-143,

tures, 9, 10.

STOCK IN A CORPORATION. Meaning, see Corporations, 75.

STOCK OF MERCHANDISE Mortgage void, see Chattel Mortgages, 2, 3.

STOLEN PROPERTY. See Receiving Stolen Goods.

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# STOPPING AFTER ACCIDENT.

Violation of statute requiring, see Automobiles, 64-67.

#### STORAGE

See Warehouses.

#### STORE.

Injury by swinging door, see Negligence,

#### STRAW MAN.

Liability on deficiency judgment, see Mortgages, 28.

#### STREET RAILWAYS.

Franchise, 772.
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(7) Duty as to Fire Engines, 776. b. Contributory Negligence, 776.

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Injunction by railway company of jitneys, see Carriers of Passengers, 86.

Presumption of Negligence from accident, see Negligence, 114.

Crowding cars, see Nuisances, 7.
Consolidation, title of act authorizing, see
Statutes, 12.

Consolidation, statutes in pari materia, see Statutes, 84.

#### 1. FRANCHISE.

- 1. Construction of Franchise. A franchise granted to a street railway company must be construed strictly against the grantee. Brooklyn Heights R. Co. v. Steers (N. Y.) 1916C-791.
- 2. Power to Construct Side Tracks. Where a street railroad company's franchise does not grant the right to construct

spur tracks connecting with private property abutting on the street on which the tracks are laid, such right cannot be conferred by license issued by the city's engineer of highways. Brooklyn Heights R. Co. v. Steers (N. Y.) 19166-791.

(Annotated.)

3. Under N. Y. Const. art. 3, § 18, N. Y. Railroad Law (Laws 1890, c. 565) art. 4, §§ 90-93, and amendatory statutes prescribing the matters requisite for the granting of a street railway franchise, franchise to maintain and operate a street railroad "across, along and upon" a certain avenue and other connecting streets does not confer on the railroad company the right to construct and maintain a spur track leading from its main track in the street to abutting private property for the sole benefit of the owner and the railway company. Brooklyn Heights R. Co. v. Steers (N. Y.) 1916C-791. (Annotated.)

#### Note.

Power of street railway to construct side tracks. 1916C-793.

# 2. STATUTORY REGULATION.

4. Statutory Regulation of Carriage of Passengers—Applicability to Street Railway. By direct provision of Cal. Civ. Code, § 510, §§ 483, 2102, 2184, 2185, governing the conduct of common carriers of passengers, though for the most part having reference to railroad corporations, govern the duties of street railroad companies where applicable. Kelly v. Santa Barbara Consol. R. Co. (Cal.) 1917C-67.

#### 3. MUNICIPAL REGULATION.

### a. Regulation of Transfers.

5. The council of the City of St. Paul under that charter had the right to pass an ordinance restricting the use of street car transfers to the persons to whom they were issued. The city council possessed only such legislative power as was granted to it by the constitution or statutes in express terms and such as is necessary to the full enjoyment of powers expressly granted. The power was given to grant franchises for the operation of street railways and to regulate and control the exercise of such franchises. This conferred, by implication, the power to require issuance of transfers by the railway company and to regulate the manner of their issuance by the company, and the manner of their use by the public. St. Paul v. Robinson (Minn.) 1916E-845.

#### b. Ordering Abandonment of Sour Track.

6. A license issued by a city's highway engineer to a street railway company authorizing it to construct a spur track connecting it with private property, even if

lawful in its origin, is a revocable privilege, and is revoked by a resolution of the board of estimate and apportionment directing the railway company to remove the siding, and by the revocation of the permit by the president of the borough. Brooklyn Heights R. Co. v. Steers (N. Y.) 1916C-791. (Annotated.)

# 4. MERGER OF STREET RAILWAY CORPORATIONS.

- 7. Procedure for Consolidation—Persons Entitled to Vote. Stockholders in one street railroad company who hold bonds and shares in another company are not thereby disqualified from voting for a consolidation of the two companies, although such facts may be considered on a charge of fraud or maladministration. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 8. Effect of Consolidation—Liability for Debts of Constituent Company. Where a constituent company in a consolidation agreement has bought stocks and bonds in the other company and paid money therefor, which money is used for the benefit of the purchasing company, such company and its stockholders are liable for the indebtedness of the selling company created in raising the funds used for the benefit of the purchasing company. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 9. A consolidation agreement between two street railroad companies, which provided that the lien of mortgages executed by one company to secure its bonds, the proceeds of which inured to the benefit of the constituent company in which plaintiff held stock should be confined to the property and interest of such other company that in case of liquidating the property of plaintiffs' company might not be resorted to for satisfaction of obligations of the other company until all the preferred stock of the consolidated company had been fully redeemed, that stock should be issued for stock of the constituent companies at more nearly their true value, and that stock of the other company should be postponed to preferred stock issued to stockholders in plaintiff's company, on which annual dividends must be paid before the holders of stock converted from such company can realize on their holdings, is not unjust or fraudulent as plaintiffs. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 10. Avoidance of Consolidation for Fraud. A consolidation agreement between street railroads may be avoided for fraud on the part of the majority against minority stockholders. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 11. Estoppel of Shareholders to Object. A consolidated traction company distributed the shares of stock in one of the con-

1916C-1918B.

stituent companies to the stockholders in the other as gifts. Being subsequently in need of money, the consolidated company leased its property to another company, formed for the purpose, for nine hundred and ninety-nine years at a rental so high as to incapacitate the lessee from performing its contract. These two companies then consolidated, and stockholders who had purchased stock in the first consolidated company, after the transactions mentioned, brought suit to annul the consolidation agreement. It is held that the suit would not lie, because the assignors of complainants' stock had consented to the transactions leading to the consolidation; the assignee of shares of stock ordinarily standing in the position of his assignor and being chargeable with the conse-quences of the acts in which his assignor participated. Norton v. Union Traction Co. (Ind.) 1918A-156.

- 12. Equitable Relief Against Consolidation. To warrant the interposition of a court of equity in an action by a stockholder in one of two street railroad companies to annul a consolidation agreement between them and to restore to one of them the property owned by it prior to consolidation, the facts well pleaded must constitute a fraud or breach of trust, and that the act may be unwise is no ground for relief in equity. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 13. Burns' Ind. Ann. St. 1914, § 5690, authorizing street and interurban railroad companies to consolidate upon such terms as may be agreed upon, is not permissive merely as only affecting the rights of the state, but warrants a change in the contractual relations of the corporation and its stockholders on a majority vote. Norton v. Union Traction Co. (Ind.) 1918A—156. (Annotated.)
- 14. Where, at the time of the incorporation of a street railroad company, consolidation was authorized, it will be assumed that the stockholders of such company contracted with reference to the possibility of a future consolidation. Norton v. Union Traction Co. (Ind.) 1918A-156.

(Annotated.)

15. Where two street railroad companies consolidated under Burns' Ind. Ann. St. 1914, § 5690, authorizing the consolidation of the stock of street railroad companies upon such terms as may be by them mutually agreed upon, neither section 5659, authorizing street railroad companies, by unanimous consent of stockholders, to so amend their charters as to provide for increases of capital stock, nor section 5663, authorizing such companies theretofore organized to make provision for certain preferred stock, is applicable; the consolida-

tion agreement not being an amendment of the charters of the constituent companies, but having the effect of a dissolution of such companies and the formation of a new one with the consolidation agreement as articles of association. Norton v. Union Traction Co. (Ind.) 1918A-156.

(Annotated.)

- 16. Where Burns' Ind. Ann. St. 1914, \$5690, authorizing the consolidation of street railroad companies upon such terms as the stockholders might mutually agree upon, was in effect before either of two street railroad companies which later consolidated were incorporated, minority stockholders in such companies are bound by the agreement executed by the majority, in the absence of fraud or illegality. Norton v. Union Traction Co. (Ind.) 1918A-156. (Annotated.)
- 17. Both under Burns' Ind. Ann. St. 1914, § 5690, authorizing street and interurban railroad companies to consolidate upon such terms as may be mutually agreed upon, although silent as to the number of shareholders' votes necessary to make a consolidation, and under section 240, providing that in the construction of all statutes of this state words importing joint authority to three or more persons shall be construed as authority to a majority unless otherwise declared in the law giving such authority, unanimous action of stockholders is not necessary to consolidation. Norton v. Union Traction Co. (Ind.) 1918A-156. (Annotated.)
- 18. Directors in a street railroad company who are also directors in another company are not disqualified from voting at the stockholders' meeting for the consolidation of the two companies, where the statute authorizing consolidation does not qualify them, as stockholders are not regarded as trustees for one another. Norton v. Union Traction Co. (Ind.) 1918A-156.
- 19. Statutory Authorization Application to Leased Street Railway. Burns' Ind. Ann. St. 1914, § 5690, providing that any street railroad company or consolidated street railroad company operating any street railroad shall have the right to unite its road with any other street railroad by whatsoever power operated, and such companies are authorized to merge the stock of the respective companies, making one stock company, upon such terms as may be by them mutually agreed upon, authorizes the consolidation of two street railroad companies, one of which has leased its property to the other, which operates both roads over the objection that the leased road at the time of the merger is not "operating" its road within the view of the statute. Norton v. Union Traction Co. (Ind.) 1918A-156.

# 5. LIABILITY FOR INJURIES FROM NEGLIGENCE.

- a. General Rights and Duties.
- (1) Relative Rights of Cars and Travelers.
- 20. Use of Street. In the use of streets by railroads and street cars, the cars have the right of way over travelers for the reason that the cars are more cumbersome and difficult to stop and control than are vehicles used by travelers on the public highway; but in all other respects the rights to the use of the highway are equal. Boylan v. New Orleans R. etc. Co. (La.) 1918A-287.
- 21. A traveler has the same privilege to use the street that a street railroad has for operating its cars thereon, and, if employing a motive power increasing the speed of its cars so as to increase the danger of accidents, has a reciprocal duty to exercise a commensurate care and vigilance necessary to avoid injuries. Norman v. Charlotte Electric R. Co. (N. Car.) 1916E-508.
- 22. A street car has a right of way superior to that of a wagon, and, whether going in the same direction ahead of the car or meeting it, the wagon must yield the track promptly on sight or notice of the approaching car, but is not a trespasser because on the track, and only becomes such if, after notice, it negligently remains there. Where a wagon and a car meet at right angles, the wagon has greater rights than between crossings; the road's superior right is not exclusive, and will not justify a needless interference with the public. Norman v. Charlotte Electric R. Co. (N. Car.) 1916E-508.

## Note.

Liability of street railway company for injuries caused by striking pedestrian in rounding curve. 1916E-679.

# (2) Duty as to Lookout.

23. Duty to Keep Lookout. It is the duty of those in charge of a street car, even without notice, to inform themselves of the conditions and circumstances along the line of the railway and to be on the constant lookout so as to avoid collisions and accidents. Boylan v. New Orleans R. etc. Co. (La.) 1918A-287.

#### (3) Care as to Vehicles.

24. Operation—Care as to Vehicles in Street. A motorman of a street car 18 bound to know that teams are likely to be in a street and that it is slightly down grade, and to operate his car in view of such conditions. Pollica v. Twin State Gas, etc. Co. (Vt.) 1917C-1240.

## (4) Rate of Speed.

25. Violation of Speed Ordinance by Street Railway. A street railroad's operation of a car at a speed in excess of a municipal ordinance is evidence of negligence which prevents an action for personal injury from collision from being taken from the jury. Norman v. Charlotte Electric R. Co. (N. Car.) 1916E-508.

# (5) Care in Passing Car Discharging Passengers.

26. In view of the reasonable certainty that some of the passengers alighting from a street car will attempt to cross the track parallel to that on which the car is standing, and in view of the lack of opportunity for such passengers to observe an approaching car or for the motorman to observe them, it is the duty of a motorman in charge of an approaching car on the parallel track to have the car under such control that it may be stopped on a mo-ment's notice, and it is not improper to so tell the jury, notwithstanding the contention that the word "moment" means a space of time incalculable or infinitely small, and that the instruction imposes on the street car company a duty impossible of performance. Louisville R. Co. v. Kennedy (Ky.) 1916E-996.

#### (6) Doctrine of Last Clear Chance.

- 27. Personal Injury—Negligence Incapacitating Company from Avoiding Injury. Though a person was negligent in going on a street railway track, the company is liable for an injury to him if after discovering his peril the car could have stopped in time to have avoided an injury except for a defective brake. British Columbia Elec. R. Co. v. Loach (Eng.) 1916D-497. (Annotated.)
- 28. Contributory Negligence of Driver of Vehicle. In an action against a street railroad for damages to his team from a collision, plaintiff, though negligent, can recover, where the railroad failed in its duty after it discovered the unattended team, or unless he could by ordinary care have avoided the consequence of defendant's negligence. Pollica v. Twin State Gas, etc. Co. (Vt.) 1917C-1240.
- 29. To Avoid Collision. A street railroad's liability, under the last clear chance rule, for injury to a traveler on its track does not depend upon the cessation of his contributory negligence, as its motorman should be prepared to avoid a collision probable in view of his persistent neglect of his own safety, and, with reference to such rule, proximity in point of time and space is no part of "proximate cause," which is that which, in natural and continuous sequence, without any new and independent cause, produces the result, and without which it would not have occurred, and from which a man of ordinary prudence could not have foreseen that such a result was probable under all the cir-

cumstances as they existed and were known, or should by the exercise of due care have been known to him. Norman v. Charlotte Electric R. Co. (N. Car.) 1916E-508. (Annotated.)

- 30. Collision With Automobile. On evidence in an action against a street railroad for personal injury to plaintiff while backing his automobile on its track, the question of defendant's failure to avoid injury notwithstanding plaintiff's contributory negligence held for the jury. Norman v. Charlotte Electric R. Co. (N. Car.) 1916E-508. (Annotated.)
- 31. Where defendant's motorman sees plaintiff's automobile on the track in front of his car, and knows that plaintiff is forgetful of his duty, and not aware of the approach of the car in time to prevent a collision, and that a collision will occur if plaintiff does not leave the track, unless the car was itself stopped, he is bound, as soon as a collision becomes probable, to slow down and bring his car under control so that he could stop in time to prevent a collision, and, having the last clear chance of averting collision, his failure to do so negligence. Norman v. Charlotte Electric R. Co. (N. Car.) 1916E-508.
- 32. Injury to Team on Track—Negligence Incapacitating Company from Avoiding Injury. Though a person was negligent in driving on a street railway track, the company is liable for a collision whereby his team was killed, if, after discovering his peril, the car could have been stopped in time to have avoided the injury except for a defective brake. Columbia Bithulitie v. British Columbia Elec. R. Co. (Can.) 1917E-756. (Annotated.)

## Note.

Application of last clear chance doctrine to collision between automobile and street car. 1916E-515.

### (7) Duty as to Fire Engines.

33. Duty With Respect to Fire Apparatus. Where fire apparatus of a city is given the right of way by statute, ordinance, or rule of the railway company, the persons in charge of the street car must yield to the fire apparatus and use every reasonable precaution to avoid collision. Boylan v. New Orleans R., etc. Co. (La.) 1918A-287. (Annotated.)

Care required of driver of street car or other vehicle to avoid collision with fire apparatus. 1918A-290.

# b. Contributory Negligence.

34. Care Required of Pedestrian—Crossing Tracks. A pedestrian crossing street car tracks is required to exercise such care as an ordinarly prudent person would exercise, under like circumstances, to learn of

- the approach of a car and to keep out of its way, and such care necessarily varies with the circumstances of each particular case. Louisville R. Co. v. Kennedy (Ky.) 1916E-996.
- 35. Duty of Automobile Driver at Crossing. A motorist about to cross street railway tracks is bound to look along the track immediately before driving upon it Frey v. Rhode Island Co. (R. I.) 1918A-920.
- 36. Duty of Driver as to Cars. The right of a traveler to drive a vehicle on or along a street railway track does not relieve him from the duty of looking for approaching cars having the right of way. Norman v. Charlotte Electric R. Co. (N. Car.) 1916E-508.
- 37. What Constitutes Contributory Negligence of Driver—Team not Under Control. The driver of a team is required to make a reasonable use of the street, and to exercise the care of a prudent man in avoiding injury from street cars; but one driving or being with a team upon a car track is not required to have his horse at all times under control. Pollica v. Twin State Gas, etc. Co. (Vt.) 1917C—1240.

### c. Actions.

# (1) Admissibility of Evidence.

38. Evidence—Speed of Street Car. In an action for injuries to plaintiff's delivery wagon by being struck by defendant's street car while goods were being unloaded, evidence as to the speed of the car is properly admitted. Davidson Bros. Co. v. Des Moines City B. Co. (Iowa) 1917C-1226.

#### (2) Sufficiency of Evidence.

- 39. Collision With Standing Vehicle—Evidence of Negligence Sufficient. In an action for damages to plaintiff's delivery wagon standing partly across the street, in being struck by defendant's street car coming around a curve, the evidence is held to be sufficient to support a finding that defendant's motorman was negligent. Davidson Bros. Co. v. Des Moines City R. Co. (Iowa) 1917C-1226.
- 40. Absence of Contributory Negligence not Proved. In an action for personal injuries received by a motorist and for injuries to his automobile in a collision with a street car, the evidence is held to be insufficient to sustain a verdict against the street railway company not showing the motorist's want of contributory negligence. Frey v. Rhode Island Co. (R. I.) 1918A-920.
- 41. Negligence—Striking Pedestrian in Bounding Curve. Plaintiff having often boarded street cars before they rounded a corner where she desired to board a car, approached the usual stopping place with-

out notice of an ordinance requiring the ear not to stop until it had turned the corner. The motorman signaled her to go to the far corner, which she started to do. The car was then approaching a curve at about three miles an hour, and the speed was increased to six miles before the car got around the curve which was on a grade, and, as it did so, plaintiff was struck by the outswing of the car. Held, that there was no evidence of actionable negligence on the part of the carrier. Kuhn v. Milwaukee Electric R., etc. Co. (Wis.) 1916E-678. (Annotated.)

# (3) Questions for Jury.

- 42. On evidence in an action against a street railroad company for a collision with a team standing in the street across the track, it is held that defendant's negligence was for the jury. Pollica v. Twin State Gas, etc. Co. (Vt.) 1917C-1240.
- 43. On evidence in an action for a collision of a street car with plaintiff's team standing in a street, it is held that plaintiff's contributory negligence was for the jury. Pollica v. Twin State Gas., etc. Co. (Vt.) 1917C-1240. (Annotated.)

# STREETS AND HIGHWAYS.

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## 1. DEFINITIONS AND GENERAL CON-SIDERATION.

1. What is Public Highway. Under N. J. Act Feb. 16, 1870 (P. L. p. 181), authorizing the Essex public road board to lay out, construct, improve, and maintain certain avenues in the county of Essex, including Park avenue, and providing that such avenues when constructed shall be deemed and taken to be public roads or highways, Park avenue is a public highway. Barnes v. Essex County Park Commission (N. J.) 1916E-968.

# 2. LEGISLATIVE CONTROL.

2. The legislature has plenary power over highways and public streets. School Town of Windfall City v. Somerville (Ind.) 1916D-661.

# ESTABLISHMENT AND OPENING.

3. Establishment by User—Width of Street—Extension of Original Lines. Where the stakes of an original survey of a street line could not be located, but the public had used sidewalks to a line even with the front of buildings along the street for twenty years, past the plaintiff's va-cant lot, in front of which was a sidewalk extending to the line, the plaintiff is barred from asserting ownership beyond the line, although the line, as used, made the street seventy-two feet wide where on the original plat it was only sixty-six feet wide. McCracken v. Joliet (Ill.) 1917D-144.

#### 4. VACATION, ABANDONMENT OR CONVEYANCE.

4. Right of Property Owner to Compensation. Under Md. Const. art. 3, § 40, forbidding the enactment of any law authorizing private property to be taken for public use without just compensation, Md. Code Pub. Loc. Laws, art. 4, § 6 (Laws 1898, c. 123), authorizing the mayor and city council of Baltimore to provide for laying out, opening, closing, etc., any street in such city, and to ascertain the damages caused thereby to the owner of any ground or improvements for which he ought to be compensated, and section 175 et seq., providing the procedure for opening and closing streets, an owner of property abutting on a street one block of which was closed, but not abutting on the portion of the street so closed, and whose ingress to and egress from its property is not therefore affected, though the direct approach thereto from one direction is cut off, requiring a more circuitous route, is not entitled to damages. German Evangelical, etc. Cong. v. Mayor, etc. (Md.) 1916C-231.

(Annotated.)

#### Note.

Persons entitled to compensation for vacation of street. 1916C-238.

#### 5. IMPROVEMENT.

# a. Establishment of Grade.

- 5. Damage by Grading—Improvements After Grade Established. Where a city, to make a street more convenient for travel, has lawfully established a grade, and the owner, after its establishment, but before it is physically carried into effect, improves his property without regard to the grade, the owner cannot recover damages against the city, if it, afterwards, in grading the street to conform to the established grade, interferes with the convenient use of the abutting owner's property, notwithstanding the constitutional provision that private property shall not be taken or damaged for public use without just compensation. Gray v. Salt Lake City (Utah) 1916D-1135. (Annotated.)
- 6. Time for Establishment of Grade. A city cannot be compelled to establish its grades upon all the streets, or upon the whole of any one street, within a particular time. Gray v. Salt Lake City (Utah) 1916D-1135.
- 7. Power to Establish Grade. Under Utah Comp. Laws 1907, § 206, subd. 8, giving cities power to lay out, grade, and otherwise improve streets, a city may establish street grades, and improve the street so as to conform thereto, if the grades are established for the purpose of making the streets safer and more convenient for travel. Gray v. Salt Lake City (Utah) 1916D-1135.

# b. Abandonment of Established Grade.

8. A city may, either expressly or impliedly, abandon a street grade already established, and after abandonment the situation is as though no grade had been established, and an abutting owner may assume that the city elects to consider the natural surface grade as the grade to be used for travel; the question of abandonment being ordinarily a mixed question of

law and fact. Gray v. Salt Lake City (Utah) 1916D-1135.

# c. Change of Grade.

- 9. Liability. In reducing inequalities in streets by changing the grade, more latitude should be allowed to large cities than to the smaller cities or country towns; paving being a necessity in the larger cities. Gray v. Salt Lake City (Utah) 1916D-1135.
- 10. Damages from Grading—Rights of Purchaser of Abutting Property. A purchaser of property purchases with the implied consent that the street must be made reasonably safe and convenient for travel, and cannot complain that it is lowered or filled to make it safe for travel, so long as the city has established a grade so as to inform him of the extent to which it would be lowered or raised. Gray v. Salt Lake City (Utah) 1916D—1135.
- 11. Improvement After Grade Established-Right to Damages. If an abutting owner does not conform improvements of his property to grades established by the city, he cannot recover resulting damages from the city, if the grade established is made for legitimate street purposes, such as to make the street safer and more convenient for public use; but, if it is made merely to ornament or beautify the street, the abutting owner may recover for damage to his real estate, as distinguished from his improvements, if such improvements were made after the grade was established. Gray v. Salt Lake City (Utah) 1916D-1135. (Annotated.)
- 12. Since the abutting owners are entitled to have a voice in determining whether a street should be graded, the act of grading a street may be deferred for a long time without abandoning the grade as established, so that those who wish to improve their property may make their improvements conform to the established grade. Gray v. Salt Lake City (Utah) 1916D-1135.
- 13. The owner of a city lot who has improved it in reliance upon a street grade established by ordinance may recover, on the ground or estoppel, damages for a change in the grade, though such change was made before the street was actually brought to grade. Spokane v. Ladies' Benevolent Society (Wash.) 1916E-367.

  (Annotated.)
- 14. The owner of a city lot in front of which the street grade has been fixed by ordinance, but the street never actually graded, is not entitled to damages for the change of grade, if he has made no improvements in reliance thereon. Spokane v. Ladies' Benevolent Society (Wash.) 1916E-367. (Annotated.)

#### Note.

Right of abutting owner to damages for change of street to established grade

where he improves property after grade is established. 1916D-1143.

#### d. Contracts.

15. Inclusion of Several Streets. A municipality may, under Vrooman Act (Cal. Gen. Laws 1909, Act 3930), §§ 2, 8, which confer extensive powers on the board of supervisors and provide that there shall be attached to the assessment a diagram exhibiting each street on which work has been done, improve several streets in one locality under a single contract and as a single improvement. Remillard v. Blake, etc. Co. (Cal.) 1916D-451. (Annotated.)

#### Note.

Validity of inclusion of several streets in one improvement. 1916D-455.

#### 6. USE OF STREETS.

# a. Speed Regulations.

16. Application to Fire Department. The fire apparatus of a city, while on its way to a fire, is excepted from the speed restrictions imposed by the Minn. Motor Vehicle Act (Gen. St. 1913, § 2619), although the fire be outside the city limits. Hubert v. Granzow (Minn.) 1917D-563. (Annotated.)

### Note.

Speed or other highway restriction as applicable to fire apparatus. 1917D-565.

### b. Law of the Road.

17. A municipal ordinance requiring travelers to keep as near the right-hand side of the curb of the street as possible is not in violation of Rem. & Bal. Wash. Code, § 5558 et seq., requiring travelers on the highways to turn to the right: the ordinance establishing the law of the road within the municipality. Hiscock v. Phinney (Wash.) 1916E-1044. (Annotated.)

18. Law of the Road—Applicability to Child Coasting in Street. Plaintiff's intestate, a boy of twelve years, was killed while coasting down hill on a street in the city of Eveleth, by his sled coming in collision with a sleigh of defendant which was coming up the hill on the left hand side of the street. It is held:

(1) That Minn. Laws 1911, c. 365, § 15,

(1) That Minn. Laws 1911, c. 365, § 15, providing among other things that "all vehicles... must keep to the right of the center of the street" applies to the case, and that, under the circumstances, the violation of this law by defendant was at least evidence of negligence, and justified a finding thereof. Terrill v. Virginia Brewing Co. (Minn.) 1917C-453.

(Annotated.)

#### Note.

Law of road as applicable with respect to one using highway for play. 1917C-454.

# c. Use by Traction Engine.

19. Use of Streets—Steam Roller—Frightening Horse. A municipal corporation or a contractor improving its streets is not liable for injuries resulting from the frightening of a horse at a steam roller, which was being used by the city or the contractor in the improvement of the street, or was placed on one side of the street during the course of its improvement, provided it was not left there an unreasonable time. Tanner v. Culpeper Construction Co. (Va.) 1917E-794.

(Annotated.)

## Note.

Use of highway by traction engine. 1917E-798.

#### d. Obstructions.

- 20. Fruit Stand. The maintenance and use of a fruit stand in the street surrounding a portion of two sides of a building without the consent of public authorities, though under a lease from the building owner, constitutes an obstruction or the street. Pastorino v. Detroit (Mich.) 1916D-768.
- 21. Rights by Adverse User of Street. Prior to Mich. Pub. Acts 1907, No. 46, providing that no rights as against the public shall be acquired by any person by reason of the occupation or use of any public highway, street, or alley, rights of occupancy in streets and to maintain obstructions therein could be acquired by adverse possession. Pastorino v. Detroit (Mich.) 1916D-768.
- 22. Presumptive Right in Street. A fruit stand in a street in its basic characteristics is not a permanent obstruction of the class which may be acquired by prescription; the name itself implying a hawking business which consists in offering goods for sale on the streets by outcry or by attracting the attention of persons by exposing goods in a public place, or by placards, labels, or signals. Pastorino v. Detroit (Mich.) 1916D-768.

#### e. House Moving.

23. Right to Move House in Street—Interference With Telephone Wires. Plaintiff, a resident taxpayer of a city, obtained a permit under a city ordinance, to move a house along a street. The city had granted to a telephone company a franchise to maintain poles and wires in the street. The company's manager agreed to remove the wires to enable the house to pass, but failed to do so. It is held that plaintiff, suing for damages caused by being prevented from moving the house because of the wires, was improperly nonsuited. Weeks v. Carolina Tel., etc. Co. (N. Car.) 1917C-75. (Annotated.)

## Note.

Use of streets for moving buildings. 1917C-77.

f. Exclusion of Business Vehicles.

24. Exclusion of Business Vehicles. Under N. J. Act April 22, 1907 (P. L. p. 180), § 1, providing relative to the county park commissions authorized there-by to be appointed in certain counties that such board shall have full power and authority to pass rules and regulations for the protection, regulation, and control of parks and parkways, and Act March 5, 1895 (P. L. p. 175), § 6, providing that the board shall have power, not only to lay out and open roadways, parkways, etc., but to establish the grade thereof, etc., and regulate the use thereof, while a park commission may possibly have power to prohibit the use of parkways by business vehicles of such heavy draft as would tend to injure or destroy the road, it cannot prohibit the use of a parkway by ordinary grocery delivery wagons; the protection of the highway not requiring their exclusion therefrom. Barnes v. Essex County Park Commission (N. J.) 1916E-(Annotated.)

25. The legislature may impair the public easement in a public highway by prohibiting business traffic thereon, and may delegate such power. Barnes v. Essex County Park Commission (N. J.) 1916E-968. (Annotated.)

#### Note.

Validity of ordinance prohibiting use of streets by business vehicles. 1916E-969.

# g. Rights of Abutting Owners.

# (1) In General.

26. Relative Rights of Public and Abutter. Ordinarily, the public has only an easement of passage in a highway and its incidents, and the ownership of the soil is vested in the abutting owner, but his rights are subordinate to those of the public. Chesapeake, etc. Tel. Co. v. Goldsborough (Md.) 1917A-1.

# (2) Additional Servitude.

27. What Constitutes Additional Servitude — Legislative Determination. The legislature cannot transform into a street use one which is not such, and cannot authorize, without compensation to abutting owners, the use of streets not included within or consistent with their proper purposes, and which are productive of special damages to such abutting owners, whether it is sought to impose such unlawful use upon a street already opened or one thereafter to be opened. Matter of City of New York (N. Y.) 1917A-119.

28. Use—Subway as Additional Servitude. N. Y. Rapid Transit Act (Laws 1909, c. 498), § 21, subdiv. 5, authorizes corporations having a franchise to operate a rapid transit railroad thereunder to enter upon and underneath streets, etc.,

designated by the public service commission and to construct a railroad upon the route settled upon, and provides that the use of streets, avenues, etc., for the purpose of a railroad as therein authorized shall be considered a public use consistent with the uses for which such road, streets, etc., are publicly held. Section 63 provides that roads so constructed shall be deemed a part of the public streets and highways of the city. Held, that notwithstanding such provisions the construction and operation of a subway, even through a street of which the city owns the fee. is not such a street use or public use that it may be authorized without compensation to abutting owners for substantial damages thereby caused, and when land is condemned for street purposes, such damages are not deemed included in the consequential damages to abutting property, and hence in a street opening proceeding abutting property owners are not entitled to damages because of the contemplated construction of a subway under the street. Matter of City of New York '(N. Y.) 1917A-119. (Annotated.)

#### Note.

Right of abutting owner to use sidewalk for areaways and the like. 1917A-558.

- (3) Sidewalks, Basements and Hatches.
- 29. Construction of Coal Vault—Presumption of Municipal Permission. Permission by the municipality to construct and maintain a coal vault under and an opening thereto in a city pavement will be presumed from acquiescence and use continued for several years. Hill v. Norton (W. Va.) 1917D-489.
- 30. Areaways and Hatchways Definition. As used in an ordinance regulating the construction of areaways under any sidewalk, and providing that all hatchways through sidewalks shall be provided with strong coverings, the word "areaway" was equivalent to cellar or room under the sidewalk, and the word "hatchway" referred to openings, and not to stairways or basement ways. State v. Armstrong (Neb.) 1917A-554.
- 31. "Area"—Definition. The word "area" has a somewhat elastic meaning. Originally it meant a broad piece of level ground, but in modern use it can mean any plane surtace, the inclosed space on which a building stands, the sunken space or court giving ingress and affording light to the basement of a building, a particular extent of surface. State v. Armstrong (Neb.) 1917A-54.
- 32. Rights of Abutter—Openings in Sidewalk—Regulation. Under the statutes governing cities of the first class having more than 40,000 and less than 100,000 inhabitants, the matter of allowing and regula-

ting entrances to basements through sidewalks is within the reasonable discretion of the mayor and council. State v. Armstrong (Nes.) 1917A-554. (Annotated.)

- 33. The sections of the sidewalk ordinance of the city of Lincoln quoted in the opinion cannot be construed to prohibit all opening in the sidewalk for stairways, and basement ways, in view of the statute requiring the mayor and council to regulate such openings, and the practical construction of those provisions for many years. State v. Armstrong (Neb.) 1917A-554. (Annotated.)
- 34. Stairway in Sidewalk Area. Although such stairway somewhat restricts the free and unembarrassed use of the sidewalk for pedestrians, such use may be justified on the ground that the general interest is served by making available valuable property, increasing business facilities, and encouraging improvement. State v. Armstrong (Neb.) 1917a-554.

(Annotated.)

- 35. Such permission may be given informally by resolution and without a formal ordinance. State v. Armstrong (Neb.) 1917A-554. (Annotated.)
- 36. Under the circumstances in this case, indicated in the opinion, permitting the construction and use of the stairway in question was not an abuse of discretion. State v. Armstrong (Neb.) 1917A-554.

  (Annotated.)

#### (11110101010101

# h. Injuries.(1) Question for Jury.

37. Injury from Runaway Horse. One injured by a horse running away on a street may rest on a prima facie inference of negligence from it having been left unhitched and unattended, though, whether or not the owner introduces evidence, the question of negligence is for the jury. Rosenberg v. Dahl (Ky.) 1916E-1110.)

(Annotated.)

# (2) Instructions.

38. An instruction to the effect that firemen on their way to a fire outside the city were subject to the speed restrictions imposed by that act was error. Hubert v. Granzow (Minn.) 1917D-563.

# (Annotated.)

Stopping or leaving vehicle in dangerous place in street as negligence precluding recovery for resulting injuries. 1917C-1229.

# 7. INJURIES ARISING FROM DE-FECTS IN STREETS.

# a. Extent of Liability.

39. Where there was a defect in the approaches to a culvert and it had existed

for so long a time that the town knew or ought to have known of and remedied it, the town is liable for any injuries to travelers in the exercise of due care, proximately caused thereby, and recovery cannot be limited to defects in the culvert itself. Fifield's Adm'x v. Rochester (Vt.) 1918A-1016.

#### b. Notice of Defect.

40. Injury from Defect — Liability of Municipality—Notice of Defect. A municipality charged by its charter with the duty of keeping sidewalks in repair is liable for an injury to a pedestrian from a defect in a sidewalk produced by a long continued practice of driving wagons over the walk at that place, though the municipality had no actual notice of the defect. Jamieson v. Edmonton (Can.) 1918B-379. (Annotated.)

#### c. Holes in Street.

41. What Constitutes Negligence—Slight Depression in Street. A city was not negligent in nermitting a circular hole in the middle of a street about as large as a barrel head, which was four inches deep at the deepest part and extended from the edge of the street crossing. Lalor v. New York (N. Y.) 1916E-572.

#### d. Actions,

### (1) Pleading.

42. Sufficiency of Declaration. A declaration alleging the existence of a culvert as part of a highway, that it was the duty of a town to keep it in repair, that it was not maintained in good repair, and that by reason of a defect in the highway and culvert plaintiff's intestate was thrown from his sled and killed, warrants a recovery upon proof of defects in the approaches to the culvert. Fifield's Adm'x v. Rochester (Vt.) 1918A-1016.

#### (2) Evidence.

43. Evidence — Fact of Receiving Instructions by Telephone. The testimony of a fireman that he was proceeding to a fire pursuant to instructions received by telephone from the operator at headquarters was competent to prove such fact. Hubert v. Granzow (Minn.) 1917D-563.

## (3) Questions for Jury.

44. Where a steam roller was left by a contractor who had been improving the streets upon a street for more than two months after work had been stopped by unfavorable weather in the fall, and which had been used only once during that time, and it was seldom that such work could be done during the winter, on account of the weather conditions, it is a question for the jury whether the roller was left

there an unreasonable time under the circumstances so as to render the city and the contractor liable for injuries caused by plaintiff's horse becoming frightened at it. Tanner v. Culpeper Construction Co. (Va.) 1917E-794. (Annotated.)

- 45. The question whether a defect in a highway was in the approach to a culvert is held to be for the jury in an action against a town for the death of one thrown from a sleigh by reason of the defect. Fifield's Adm'x v. Rochester (Vt.) 1918A-1016.
- 46. Evidence, in an action for the death of one killed when thrown from a sleigh, is held to present to the jury the question whether the fall was by reason of a defect in the highway for which the town was responsible. Fifield's Adm'x v. Rochester (Vt.) 1918A-1016.
- 47. Personal Injury from Defect—Liability of Municipality. In an action against a town for the wrongful death of plaintiff's intestate, who was thrown from a sleigh by reason of an alleged defect in the highway, the question whether the town had so absolutely abandoned a culvert in the road by diverting the water as to render it no longer liable for the culvert's condition is held under the evidence to be for the jury. Fifield's Adm'x v. Rochester (Vt.) 1918A-1016.

# 8. CONTROL OF PUBLIC UTILITIES COMMISSION.

48. Review of Municipal Regulation. The requirements of a city ordinance, directing a street railway company to construct extensions of its lines, are subject to review by the public utilities commission, which is authorized, upon hearing, to determine whether the requirements of such ordinance are just and reasonable. Cincinnati v. Public Utilities Commission (Ohio) 1916E-1081. (Annotated.)

49. Under the provisions of section 614-51, Ohio General Code, the public utilities commission may determine the practicability of additions and extensions of street railway lines required by a city ordinance. In reaching such determination the commission may consider the physical conditions of the proposed route as well as the necessary plan of operation of cars there-over. If upon such hearing the commission finds that operation of cars over the proposed route would entail unusual and unwarranted dangers and jeopardize the lives of passengers, it is authorized to relieve the street railway company from the obligations sought to be imposed by the ordinance complained of. Such order of the commission will not be reversed upon review by this court when it does not appear from a consideration of the record that it is unlawful or unreasonable. Cincinnati v. Public Utilities Commission (Ohio) 1916E-1081. (Annotated.)

#### STRICT.

Defined, see Municipal Corporations, 37.

#### STRICTISSIMI JURIS.

Rule as applied to surety for hire, see Suretyship, 8.

#### STRICTLY.

Defined, see Municipal Corporations, 37.

#### STRIKES.

See Labor Combinations, 3.

# STRIKING OUT.

See Pleading, 103.

# STUDENT FIREMAN.

As within Federal Employers' Liability Act, see Master and Servant, 63.

# SUBCONTRACTOR.

Defined, see Mechanics' Liens, 10.

# SUBCONTRACTOR'S LIEN.

See Mechanics' Liens, 9, 10.

# SUBJACENT SUPPORT.

See Adjoining Landowners, 1, 9-11; Easements, 8, 19.

#### SUBJECT.

Defined, see Trees and Timber, 9.

#### SUBLETTING.

See Landlord and Tenant, 21-31.

SUBMISSION ON BILL AND ANSWER. See Equity, 26-28.

SUBORNATION OF PERJURY.
See Perjury.

# SUBROGATION.

- Of insurer, see Fire Insurance, 26-29. To rights of owner, see Fire Insurance, 26-29.
- To rights of mortgagee, see Fire Insurance, 38-40.
- Action by insurer on rights by subrogation, res adjudicata, see Judgments,
- As between mortgages, see Mortgages and Deeds of Trust, 4.
- Subrogation of purchaser at foreclosure sale to rights of mortgagee, see Mortgages and Deeds of Trust, 33.

- Of redeeming vendee to rights of mortgagee, see Mortgages and Deeds of Trust, 36.
- Of surety on payment of debt, see Suretyship, 24.
- Of cotenant to rights of mortgagee, see Tenants in Common, 8.
- 1. Subrogation of Insurer to Rights Against Tortfeasor. When insurance is paid for damage to insured property caused by the wrongful act of another than the insured, the insurer is subrogated to the right of action of the insured against the wrongdoer. Powell & Powell v. Wake Water Co. (N. Car.) 1917A-1302.
- 2. The right of subrogation arises not out of the contract between the insured and the insurer, but has its origin in general principles of equity. Powell & Powell v. Wake Water Co. (N. Car.) 1917A-1302.
- 3. Release of Tortfeasor by Insured—Effect on Right to Subrogation. After insurance has been paid for damage to Insured property caused by the wrongful act of another than the wrongdoer, a release by the insured of the wrongdoer knowing of the payment of insurance cannot extinguish the right of subrogation. Powell & Powell v. Wake Water Co. (N. Car.) 1917A-1302. (Annotated.)
- 4. Right of Insurer to Sue in Own Name. If the insurance paid equals or exceeds the loss, a subrogated insurer may sue the wrongdoer in his own name; if it is less than the loss, in the name of the insured; but, if it is less than the loss, and the insured has settled the difference between the insurance and the total loss with the wrongdoer, the insurer may sue in his own name, the insured having parted with all beneficial interest in the cause of action. Powell & Powell v. Wake Water Co. (N. Car.) 1917A-1302.
- 5. Insurance—Actions—Joinder of Concurrent Insurers. One sued by insurance companies for having by negligence destroyed property of an insured upon which they have paid insurance may require all other insurance companies participating in paying the loss to be made parties to the action, to avoid multiplicity of suits. Powell & Powell v. Wake Water Co. (N. Car.) 1917A-1302.
- 6. Subrogation of Insurer to Rights Against Tortfeasor—Effect of Settlement. The right of subrogation accruing to an insurance company to recover from a tortfeasor, through whose negligence the loss was incurred, the amount paid on its policy of insurance, is not barred by a settlement between the tortfeasor and the owner for a sum less than the actual liability of the former, and for which the latter gave a full release, for such a release is a fraud upon the subrogee, which will be no defense, either at law or in equity, to its action to recover the loss remaining unsatis-

fied after applying to its satisfaction the sum paid by the tortfeasor. Fire Association v. Wells (N. J.) 1917A-1296.

(Annotated.)

- 7. Rights of Surety-Necessity of Paying Debt in Full. As a surety is not entitled to subrogation until the debt is paid in full, a surety on a bond to secure a city in the deposit of moneys in an insolvent banking institution is not entitled to subrogation, though he has paid the bond, where the bank is still largely indebted to the city, and the total amount of dividends, together with the amount of the bond, will not discharge the obligation; for in such case, if the surety were pro rata subrogated to the bank's right to receive dividends, the city would be injured. knaffl v. Knoxville Banking, etc. Co. (Tenn.) 1917C-1181. (Annotated.)
- 8. By Payment of Judgment-Owner of Land Subject to Lien. Where a judgment debtor conveyed part of a tract of land owned by him to B and subsequently conveyed the rest of the land to P, those claiming under B are entitled to pay the debt and have the judgment assigned for their use and benefit, and in such case, or in case they are compelled by legal process to pay the judgment, they will be subrogated to the rights of the judgment creditor as against the land conveyed to P, since the duty rested upon the judgmentdebtor to pay off the debt in exoneration of the land sold to B, and P took the land conveyed to him subject to the same equity. Brown v. Harding (N. Car.) 1917C-548.
- 9. Purchaser Paying Mortgage—Rights Against Holder of Paramount Title. Although it was determined that the defendant took his title with notice of facts sufficient to put him upon inquiry leading to knowledge of the fraud of one of his grantors so that he must yield up possession and lose what he paid for the land, still having paid off certain mortgages placed thereon by the plaintiff the latter cannot oust him from possession until she has accounted to him for the amount thus paid, his right of subrogation being similar to that of a mortgagee in possession and based upon the same principles of equity and fair dealing. New v. Smith (Kan.) 1917B-362.
- 10. Purchaser Paying Prior Lien. Where a purchaser buys land and takes a deed thereto, and subsequently pays a prior lien on the property, he is subrogated to the rights and remedies of such prior lien, as against a lien which is superior to his title. Peagler v. Davis (Ga.) 1917A-232.
- 11. Extent of Rights Acquired. A purchaser of land, entitled to a subrogation to the rights and remedies of a prior en cumbrancer, whose lien he discharges, cannot, as against an intervening lien, assert

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title on the ground that the land is not worth more than the lien he discharged. His subrogation is limited to the remedies of the lien creditor to whose rights he becomes subrogated. Peagler v. Davis (Ga.) 1917A-232.

#### Notes.

Right of subrogation of insurer as affected by release by insured of person causing loss. 1917A-1298.

Right of insurance company to enforce subrogation by suit in its own name. 1918A-834.

## SUBSCRIPTION FOR STOCK.

See Corporations, 28, 57-73.

## SUBTERRANEAN WATERS.

Appropriation and priority, see Waters and Watercourses, 12.

# SUCCESSION.

See Descent and Distribution.

## SUCCESSION TAXES.

See Taxation, 28, 171-179.

# SUFFICIENCY OF EVIDENCE.

See Evidence, 149-164.

### SUFFRAGE.

See Elections.

#### SUICIDE.

Effect on insurance contract, see Beneficial Associations, 2.

As proof of insanity, see Insanity, 15. Effect on incontestable clause, see Life Insurance, 26.

Effect on insurance, see Life Insurance, 40. While insane, see Life Insurance, 57-59.

As accident within Workmen's Compensation Act, see Master and Servant, 197.

## SUIT MONEY.

See Alimony and Suit Money.

SUMMARY PROCEEDINGS. See Attorneys, 12, 13.

## SUMMONS.

Service, see Process, 3, 7, 8, 12.

## SUNDAYS AND HOLIDAYS.

- 1. Validity of Contracts Made on Sunday, 784.
- Validity of Gift Made on Sunday, 784.
   Judicial Proceedings, 785.
   Ministerial Acts, 785.

- 5. Offenses. 785.

See Labor Laws, 31; Railroads, 8.

Exclusion of Sunday in computing time, see Time, 1, 3.

Sunday show in violation of statute, see Unlawful Assembly, 1.

# 1. VALIDITY OF CONTRACTS MADE ON SUNDAY.

- 1. New Contract-Evidence Insufficient. Evidence in an action upon a contract for grading and construction work, executed on Sunday, held not to show a new contract thereafter made between the parties. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.
- 2. Ratification of Sunday Contract. Such contract is incapable of ratification. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.
- 3. Validity of Contract. A contract made and delivered on Sunday is void, Gist v. Johnson-Carey Co. (Wis.) 1916E-
- 4. Part Performance. Partial payments made under a Sunday contract are not sufficient to import a new contract. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.
- 5. No Estoppel. The terms of a Sunday contract cannot be given life upon the principles of estoppel. Gist v. Johnson-Carey Co. (Wis.) 1916E-460. (Annotated.)
- 6. Under a subcontract for grading and construction work, void because made and delivered on Sunday, and in place of which no new contract was made, plaintiffs, by execution of the work and by accepting and giving receipts for payments made on the basis of estimates by the defendant's engineers, are not estopped to dispute the correctness of the estimates, where defendant knew that the payments were not received as settlements but were subject to final adjustment, and had full knowledge of plaintiff's claim before it settled with the general contractor, so that it could not have been misled or prejudiced. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.

# (Annotated.)

# Note.

Principle of estoppel as applicable to rights of parties under void Sunday contract. 1916E-467.

# 2. VALIDITY OF GIFT MADE ON SUNDAY.

7. A gift complete in itself is not violative of Mass. Rev. Laws, c. 98, requiring observance of the Lord's day, though it was made on the Lord's day, where it contained no element of labor, business, or work, was not an act of contract, and gave rise to no contractual obligation. Herries v. Bell (Mass.) 1917A-423.

(Annotated.)

Note

Validity of gift made on Sunday. 1917A-424.

# 3. JUDICIAL PROCEEDINGS.

8. Entry of Judgment on Holiday. Mo. Rev. St. 1909, § 1785, provides that no person on Sunday or any other day established a public holiday shall serve any writ, process, or other judgment, except in criminal cases, etc. Section 3880 declares that no court shall sit on Sunday, unless to receive a verdict or discharge a jury. Held that, while a judgment rendered on Sunday is void, yet, as the statute prohibiting the holding of court on Sunday does not by its terms include other holidays, a judgment of conviction entered on a legal holiday other than Sunday is valid. State v. Gould (Mo.) 1916E-855. (Annotated.)

#### Note.

Validity of official or judicial act performed on holiday. 1916E-847.

# 4. MINISTERIAL ACTS.

9. Publication of Ordinance. The publication of an ordinance of the city of St. Paul, Minn., under the 1900 Home Rule Charter may lawfully be made on Memorial Day. St. Paul v. Robinson (Minn.) 1916E-845. (Annotated.)

# 5. OFFENSES.

10. The evidence is sufficient to establish all the elements necessary to constitute an offense under the ordinance. St. Paul v. Robinson (Minn.) 1916E-845.

## Note.

Engaging in labor or amusement on Sunday as offense at common law or under statute other than Sunday law. 1918B-387.

#### SUNSTROKE CLAUSE.

Construction in accident policy, see Accident Insurance, 17.

### SUPERINTENDENCE.

Meaning, see Master and Servant, 28.

## SUPERSEDEAS.

See Appeal and Error, 481-484.

# SUPERSTITION.

As affecting testamentary capacity, see

#### SUPREME LAW.

Treaty as, see Treaties, 5.

SURETY COMPANY.

See Suretyship.

#### SURETYSHIP.

1. Liability of Surety, 785.

a. Signing of Contract, 785.

b. Delivery of Contract, 786. c. Validity of Contract, 786.

d. Construction of Contract, 786.

e. Nature of Liability, 787.

f. Discharge of Surety, 787. (1) Notice by Creditor of Breach,

787. (2) Diversion of Security Creditor, 787.

(3) Extension of Time, 787.

Actions, 787.

2. Rights of Surety Against Creditor, 788. 3. Co-suretyship, 788.

Evidence, statements inter se, see Admissions and Declarations, 13.

Release of sureties on appeal bond, see Appeal and Error, 483.

Notice to produce principal, see Bail, 2, 3. Discharge of surety, see Conflict Laws, 9.

Parol evidence to vary contract, see Evidence, 119, 123.

Necessity for written contract, see Frauds, Statute of, 13.

Wife as surety for husband, see Husband and Wife, 4-11.

# 1. LIABILITY OF SURETY.

# a. Signing of Contract.

1. Failure of Principal to Sign Bond-Effect on Liability of Surety. Iowa Code, § 4552, declares that an appeal from justice court is not perfected until the appellant gives a bond in the form prescribed by statute or its equivalent. The form of the bond as prescribed by statute provides for the signature of the appellant, but does not specifically require it. It is held that in view of the fact that the appellant would be bound regardless of whether he signed the bond or not, and as the sureties are jointly and severally liable, a bond signed by them alone is sufficient. Brown v. Mellon (Iowa) 1917C-1070.

(Annotated.)

Waiver of Failure of Principal to Execute. A surety assenting to the delivery of a surety bond, which shows on its face a failure to execute by the principal, may be bound by the incomplete instrument; and hence a complaint alleging that the bond sued on was executed by the surety is not insufficient, though the bond filed therewith as an exhibit was not signed by the principal, and though it contained a provision that it should not be construed as entered into or delivered by the surety until executed in due form by the principal, since the allegation that the bond as executed necessarily implied a waiver

of such condition precedent. American Surety Co. v. Pangburn (Ind.) 1916E-1126.

- 3. That a surety bond, signed by the surety alone and not by the principal, was joint in form does not prevent a recovery thereon, where it was delivered to the obligee by the surety with intent to be thereby bound. American Surety Co. v. Pangburn (Ind.) 1916E-1126.
- 4. Where a surety company executed a bond indemnifying a county treasurer against loss by reason of the acts of a deputy treasurer and mailed it to the treasurer, without it having been signed by the deputy, thereafter renewed it for an additional term in consideration of a further premium, and subsequently, upon application of the deputy, made a new bond which it authorized a third person to deliver to the treasurer without it having been signed by the deputy, and retained the premiums received for each bond, the facts warrant a finding that it delivered the second bond to the treasurer, with intention to be thereby bound, and it is liable thereon, notwithstanding a provision in both bonds that they should not be construed as entered into or delivered by the surety until executed in due form by the principal. American Surety Co. v. Pangburn (Ind.) 1916E-1126.
- 5. Failure of Principal to Sign Bond—Waiver. In an action on a surety bond, not signed by the principal, and containing a provision that it should not be construed as entered into or delivered by the surety until executed in due form by the principal, where the surety answered by a verified plea of non est factum, the burden is on plaintiff to prove that the bond was signed and delivered by the surety in its incomplete condition, with the purpose on the part of the surety of being bound thereby. American Surety Co. v. Pangburn (Ind.) 1916E-1126.

# Note.

Failure of principal to sign obligation as affecting liability of surety. 1917C-1073.

# b. Delivery of Contract.

6. In an action on a surety bond given by the surety to a third person, without it having been signed by the principal, with instructions to deliver it to the obligee, the court properly charged that, in determining whether the bond was delivered, the jury may consider, as tending to show the surety's intention at the time of giving possession of the bond to the third person, evidence tending to show that it delivered to the obligee a similar bond covering a previous period unexecuted by the principal. American Surety Co. v. Pangburn (Ind.) 1916E-1126.

# c. Validity of Contract.

7. Waiver of Defense by Surety—Claim Against Principal's Estate. Where a wife executed a note to plaintiff as surety for her husband, and after executing several renewals her husband died, when she paid a part of the note to the bank and executed the note sued on for the balance, the fact that she proved the last renewal as a claim against her husband's estate does not affect her right to defend her liability on the note for the balance of the debt to the bank on the ground that it was void because she was incapable of becoming surety for her husband. First National Bank v. Bertoli (Vt.) 1917B-590.

# d. Construction of Contract.

- 8. Suretyship for Hire. A surety for hire cannot invoke the rule of strictissimi juris, and its rights are measured by the law applicable to insurance contracts. American Surety Co. v. Pangburn (Ind.) 1916E-1126. (Annotated.)
- 9. Fidelity Bond Construction Bond Designating Corporate Officers as Obligees. A bond executed by a bank cashier, reciting his previous election as such, and stating the condition to be that he "shall well and faithfully apply and account for all moneys which may come into his hands as such cashier," is, when properly construed, an indemnity to the bank against loss by his default, although its officers are therein named as obligees, as president and as directors of the bank in its corporate name. Clark v. Nickell (W. Va.) 1917A—1286.
- 10. Agreement by Grantee to Pay Grantor's Debt. When a grantee contracts with his grantor to pay the latter's debt or obligation in payment, or in part payment, for the conveyance, the creditor may accept and appropriate that contract to himself, and maintain a suit in equity upon it. In equity, the grantee then becomes the principal debtor, the grantor the surety, and the creditor is substituted for the promisee or grantor.

It is immaterial in equity whether or not the contract was made or intended for the benefit of the creditor. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571.

11. Liability Independent or Secondary—Test. Whether a transaction between a married woman and her husband's creditor is one of suretyship or independent may depend on whether she received in person or for the benefit of her estate the consideration on which the contract depended; the question being determined, not from the form of the contract nor from its basis, but from its real purpose and effect. First National Bank v. Bertoli (Vt.) 1917B-590.

- 12. Construction in Favor of Obligee. Words of doubtful meaning in the language of a surety bond prescribing a limitation of action thereon must be construed in favor of the beneficiary. Comey v. United Surety Co. (N. Y.) 1917E-424.
- 13. Agreement to Resort First to Surety—Evidence Sufficient. Evidence held to sustain a finding that the wife of a purchaser of mortgaged land mortgaged her separate property to the mortgagee for the amount of the encumbrance, on the agreement that the mortgagee in case of default should first resort to her property before resorting to the property purchased by her husband, who executed notes to the vendor for the price. Hite v. Reynolds (Ky.) 1917B-619.

# e. Nature of Liability.

14. Compensated Surety. In a suit by a materialman against a compensated surety company, on a statutory bond, under a building contract, the company cannot invoke the law concerning voluntary sureties, and ask that the rule strictissimi juris be applied, where it is shown that the owner and contractor have dispensed with one of the provisions of the contract, and agreed verbally, instead of in writing, to alter and add to the building contract. Victoria Lumber Co. v. Wells (La.) 1917E-1083. (Annotated.)

#### f. Discharge of Surety.

# (1) Notice by Creditor of Breach.

15. Notice by Surety to Sue—Sufficiency. Kirby's Ark. Dig. § 7921, declares that a surety may, by written notice, require the creditor to sue the principal debtor, and that if he fail to do so within 30 days after notice, the surety shall be exonerated. A surety upon a note verbally requested the creditor to sue before the maker became insolvent, but the creditor failed to sue, and the maker became insolvent. Held, that the surety was not discharged by the creditor's failure to comply with his verbal request. Sims v. Everett (Ark.) 1916C—629. (Annotated.)

# Note.

Sufficiency as to form of notice to creditor to sue principal in order to discharge surety. 1916C-632.

(2) Diversion of Security by Creditor.

16. Diversion of Noté or Proceeds. Where defendant's testator became surety with M. on notes of a new corporation organized by M., under an agreement with the payee bank that the proceeds of one of the notes was to be used in pay-

ing a specified indebtedness of an insolvent corporation, and the other was to be used to furnish capital for the operation of the new corporation, and about one-half of the proceeds of the second note were diverted without the consent of the surety by the bank or with its knowledge to the payment of other debts of the insolvent corporation to the bank, so that the new corporation soon failed for want of capital, the surety is thereby discharged from liability on that note. Hermitage National Bank v. Carpenter (Tenn.) 1916D-730. (Annotated.)

17. The fact that some of the proceeds of the note were not charged off by the bank against the indebtedness of the insolvent corporation, but checks were drawn against them by M., as president of the new corporation, to pay the indebtedness of the old, does not entitle the bank to hold the surety. Hermitage National Bank v. Carpenter (Tenn.) 1916D-730. (Annotated.)

18. One who became surety on a note to raise capital for a new corporation is not released from liability for so much of the proceeds of the note as were diverted to the payment of the debts of another corporation with the consent of the surety. Hermitage National Bank v. Carpenter (Tenn.) 1916D-730.

(Annotated.)

#### Note.

Diversion of note or proceeds as discharging surety thereon. 1916D-733.

# (3) Extension of Time.

19. Conveyance by Wife as Security for Husband—Effect of Extension of Time of Payment. Where a husband and wife execute a deed upon property owned by her and she intrusts it to her husband to be delivered as security for a note executed by him to the grantee, and the husband without her knowledge delivers it under an arrangement made by him with the grantee that the note is to be renewed from time to time, extensions of the time of payment of the debt, made in pursuance of such arrangement, but without the knowledge of the wife, do not effect the release of her property. Moody v. Stubbs (Kan.) 1917C-362.

#### g. Actions.

- 20. Complaint Sufficient. It is held that the complaint herein states a cause of action. State v. American Surety Co. (Idaho) 1916E-209.
- 21. Joinder of Defendants. Under a joint and several bond executed pursuant to section 191 Idaho Rev. Codes, it is not necessary to sue jointly the principal and surety, but suit may be maintained

against either severally. State v. American Surety Co. (Idaho) 1916E-209.

- 22. Parties Defendant. A suit equity, by the bank, to enforce the obligation of a cashier's bond, should be brought jointly against the surviving and the personal representatives of the deceased obligors. Clark v. Nickell (W. Va.) 1917A-1286.
- 23. Consideration for Suretyship Contract by Wife-Evidence Inadmissible. A married woman having executed a note to a bank as surety for her husband who had executed a mortgage to the bank covering their homestead, the title to which was then in him, the fact that pending her indebtedness to the bank he conveyed the title of the homestead to her without consideration does not authorize the introduction of the mortgage in a suit against her by the bank, on the theory that the mortgage tended to show consideration for her note. First National Bank v. Bertoli (Vt.) 1917B-590.

## 2. RIGHTS OF SURETY AGAINST CREDITOR.

24. Though a bond to secure a city in a deposit of money in a bank declared that in case of default and payment of the claim the surety should be subro-gated to all rights of the city against the bank to the amount of such payment, the surety only has the usual rights of subrogation, and his payment, together with dividends paid by the bank, not being sufficient to discharge the obligations due from the bank, he is not entitled to subrogation to the detriment of the city. Knaffl v. Knoxville Banking, etc. Co. (Tenn.) 1917C-1181. (Annotated.)

# Note.

Payment of whole debt by surety as essential to right of subrogation to creditor's securities. 1917C-1183.

# 3. CO-SURETYSHIP.

25. Effect of Release of Cosurety. By the law of Minnesota the release of a surety by the creditor does not discharge a cosurety. Scandinavian Amer. Nat. Bank v. Kneeland (Man.) 1917B-1177. (Annotated.)

#### Note.

Effect on liability of surety of release of cosurety. 1917B-1183.

# SURFACE WATERS.

Right of landowner to divert, see Waters and Watercourses, 34.

## SUEGEONS.

See Physicians and Surgeons.

#### SURGICAL OPERATION.

Consent of patient, see Physicians and Surgeons, 17, 30-32.

Failure to test blood, see Physicians and Surgeons, 22.

Leaving sponge in wound, see Physicians and Surgeons, 37, 38.

#### SURVEY NOTES.

As evidence, see Evidence, 98, 99.

# SURVIVORSHIP.

Joint bank deposits, see Banks and Banking, 29-37.

Of joint tenant, see Joint Tenants, 1, 2, 4; Suspension.

Membership of fraternal order, see Beneficial Associations, 24, 25.

## SWINDLING.

See False Pretenses.

### SWINGING DOOR.

Injury by, see Negligence, 19, 32.

#### SYMPATHY.

Appeal to jury's sympathy, see Argument and Conduct of Counsel, 23, 24.

#### SYRUP.

Regulating sale of, see Food, 13.

TACKING POSSESSION. See Adverse Possession, 14, 15,

TAXABLE PROPERTY. See Taxation, 13.

# TAXATION.

- 1. Power of Taxation, 789.
  - a. Nature and Extent, 789.
  - b. Delegation of Power, 790.
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## 1. POWER OF TAXATION.

- a. Nature and Extent.
- 1. Limits on Taxing Power-Public Purchase. In addition to the limitations on the legislature of a state contained in the federal and state constitutions, the legislature is further subject in the passage of legislation to the limitations which inhere in the nature of our form of government, such as that the power of taxation can be validly exercised only for a public purpose, etc. Union Ice, etc. Co. v. Ruston (La.) 1916C-1274.
- Purpose of Tax What Constitutes Public Service. The term "public service," within the rule that taxes can be laid only for public purposes, is not ful-filled by an activity whereby the private interests of many individuals are fulfilled; the test in general being whether the objects or purposes have been considered

necessary to the support and for the proper use of the government, whether state or municipal. Union Ice, etc. Co. v. Ruston (La.) 1916C-1274.

- 3. Scope of Taxing Power. Although no state can give extraterritorial effect to its laws exempting the property of its subjects from taxation, except as restrained by federal or state constitutional provisions, its power as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within its jurisdiction. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.
- 4. Nature of Taxing Power. The power to tax is an attribute of sovereignty so vital to the existence of the state that it may be exercised without restriction, unless expressly prohibited. Moose v. Board of Commissioners (N. Car.) 1917E-1183.

# b. Delegation of Power.

5. Scope of Taxing Power. In matters of taxation the legislature possesses plenary power, except as such power may be limited or restricted by the constitution. It is not necessary that the constitution contain a grant of power to the legislature to deal with the question of taxation. Matter of Kessler (Idaho) 1917A-228.

## c. Equality and Uniformity.

- 6. The taxation of an ore and merchandise dock, which are a necessary part of the terminal facilities of a railroad by local authorities, at a higher rate than the balance of the railroad's property under the ad valorem law, is a violation of the constitutional rule of uniformity. Minneapolis, etc. R. Co. v. Douglas County (Wis.) 1916E-1199. (Annotated.)
- 7. Uniformity of Tax—Limitations on Federal Power. A geographical uniformity alone is what is exacted by the provisions of U. S. Const. art. 1, § 8 (8 Fed. St. Ann. 347) that "all duties, imposts, and excises shall be uniform throughout the United States." Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713.
- 8. Limitations on Classification. The constitutional limitation requiring property to be assessed in proportion to value, etc., is designed to secure uniformity and equality of enforcement of the ad valorem system of taxation, and to prohibit arbitrary and capricious modes of taxation without reference to value, but does not require that all property be taxed, nor prohibit exemptions from taxation or such classifications of property as are not purely arbitrary, capricious, or without semblance of reason. State v. Alabama Fuel, etc. Co. (Ala.) 1916E-752. (Annotated.)
- 9. Discrimination as to Proportion of Actual Value Assessed. A departure from the requirement of Ky. Const. §§ 171, 174, of uniform taxation in proportion to value, and of an identical rate as be-

tween corporate and individual property, is not permitted as to railway companies by the provision of § 182, that the general assembly shall provide by law "how railroads and railroad property shall be assessed and how taxes thereon shall be collected," but the latter provision relates merely to the mode of assessment and collection. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88. (Annotated.)

### d. Due Process of Law.

10. The due process of law clause of U. S. Const. 5th Amend. (9 Fed. St. Ann. 288), is not a limitation upon the taxing power conferred upon Congress by the federal constitution unless; under a seeming exercise of the taxing power, the taxing statute is so arbitrary as to compel the conclusion that it was not the exertion of taxation, but the confiscation of property, or is so wanting in basis for classification as to produce such a gross and patent inequality as inevitably to lead to the same conclusion. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713.

# e. Systems of State Taxation.

11. A classification of property for taxation will not be set aside by the courts unless it is not only oppressive in its operation but its inequality is so glaring that it can be judicially declared to be founded on arbitrary and capricious principles, without semblance of reason. State v. Alabama Fuel, etc. Co. (Ala.) 1916E-752. (Annotated.)

#### f. Property Outside Jurisdiction.

- 12. Extraterritorial Effect of Laws. No state taxation laws can have extraterritorial effect, since each state, except as to the United States, is an independent sovereignty, so far as relates to the power of taxation. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.
- 13. Property Subject. All property within the jurisdiction of a state, which is capable of being taxed, may be subjected to taxation, unless exempted under federal or state law; but no state can assess to its residents a tax upon their realty or tangible personalty in a foreign jurisdiction. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

## g. Taxation of Particular Subjects.

### (1) Stock of Foreign Corporations.

14. Shares of stock in a foreign corporation are taxable as property to the owner, where he is resident within the commonwealth, although the place of business and the whole property of the corporation are in another jurisdiction. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834. (Annotated.)

- 15. The taxation of a resident of the state, under the authority of Mass. Rev. Laws, c. 12, §§ 2, 4, 23, upon shares of stock held by him in foreign corporations which do no business and have no property within the state, does not take his property without due process of law. Hawley v. Malden (U. S.) 1916C-842.
- 16. The imposition of a property tax upon shares of stock in a Vermont corporation, owned by a domestic corporation, does not conflict with the constitutional guaranty of equal protection of the laws. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834. (Annotated.)
- 17. The imposition of a property tax upon the shares of a Vermont corporation, also taxed in Vermont, owned by a domestic corporation, does not conflict with the provision of the federal constitution providing for the giving in full faith and credit to the public acts of other states. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

(Annotated.)

(Annotated.)

18. The imposition of a property tax upon shares of a Vermont corporation, owned by a domestic corporation, is not a deprivation of property without due process of law. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

(Annotated.)

- 19. The imposition of a property tax upon shares of a Vermont corporation, already taxed there, owned by a domestic corporation, is no impairment of any obligation of contracts, since it must be inferred that the tax law was in effect before the acquisition of stock by the domestic corporation. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.
- 20. The imposition of a property tax upon shares of a Vermont corporation, owned by a domestic corporation, is constitutional. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

(Annotated.)

21. Shares in Foreign Corporation. The taxation of shares in a Vermont corporation, already taxed in Vermont to such corporation, owned by a resident of this jurisdiction, is not unconstitutional, as infringing the principle against double taxation of the same property, since such principle is confined in operation to double taxation in the same jurisdiction. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834. (Annotated.)

### Note.

Liability to taxation within state of slares of stock of foreign corporation. 1916C-829.

# (2) Turpentine Lease.

22. A turpentine lease is "property," upon the value of which the state can levy

an ad valorem tax. Thompson v. McLeod (Miss.) 1918A-674.

#### (3) Credits.

23. Unaccrued Rents as Credits. Rents due in July for the period from April 1st to July 1st, are not taxable as credits May 1st. State v. Royal Mineral Association (Minn.) 1918A-145.

24. Our statutes provide for the separate assessment of real and personal property. By the terms of the statutes, real property includes the land and all privileges thereto belonging, credits include every claim and demand for money and every sum of money receivable at stated periods, due or to become due. Credits are, however, personal property and they include only such demands as are classed as personalty. The term does not include unaccrued rents to issue out of land. State v. Royal Mineral Association (Minn.) 1918A-145. (Annotated.)

# (4) Intangible Property.

25. To tax intangible property, located without the jurisdiction, in the state of the owner's domicil, is not in violation of Const. U. S. Amend. 14. Welch v. Boston (Mass.) 1917D-946.

# (5) State Lands Under Contract of Purchase.

26. Wyo. Const. art. 18, § 1, provides that the state may dispose of its school lands at public sale only and for not less than \$10 per acre. Wyo. Comp. St. 1910, §§ 634, 637, 638, respectively, provide that, when any state lands shall have been purchased according to law, the board shall make and deliver to the purchaser a certificate of purchase, that whenever the purchaser has complied with the conditions of law prescribed for the sale, and has paid all of the purchase money with interest, he shall receive a patent for the land purchased, and that when the purchaser shall have been delinquent for one year in making the stipulated payments, the board may again sell the land. Const. art. 15, § 12, exempts from taxation the property of the state, but the revenue law makes no distinction affecting the interest conveyed upon a sale of land for delinquent taxes between the property of an individual and that held by an individual under a contract of purchase from the state. It is held that, as the state retains an interest in land upon which a purchaser enters under a contract of purchase, such land may not be assessed for taxes as such, though the purchaser's interest may be assessed; for a sale of the property for delinquent taxes might indirectly destroy the state's interest and violate the constitutional provision fixing the minimum price for the sale of state lands. Olds v. Little Horse Cattle Co. (Wyo.) 1917C-120.

(Annotated.)

27. A purchaser of state lands under a contract providing for payment in instalments and retention of title by the state may object to a tax on the land as land, on the ground that the entire property, instead of his interest, was illegally assessed against him. Olds v. Little Creek Cattle Co. (Wyo.) 1917C-120.

(Annotated.)

Note.

State lands under contract of purchase as subject to taxation. 1917C-129.

# (6) Probate or Administration Tax.

28. The fees or charges provided for in chapter 119 of the N. Dak. Laws of 1909 are not inheritance taxes or analogous thereto. An inheritance tax is a tax or charge upon the privilege of succeeding to or inheriting property, and is paid out of that which is inherited, while the charges in question are levied, not only upon the estate as a whole, whether solvent or insolvent, but upon the estates of wards and incompetents. Malin v. Lamoure County (N. Dak.) 1916C-207.

(Annotated.)

- 29. Such charges cannot be regarded as mere court costs, as they are in no way proportionate to or based upon the work performed or the services rendered. Main v. Lamoure County (N. Dak.) 1916C—207. (Annotated.)
- 30. They are taxes upon the property rather than taxes upon or charges for a privilege. As such they are invalid, as they are not levied according to the true value of such property, or to the uniform rule which is adopted in regard to similar property. Malin v. Lamoure County (N. Dak.) 1916C-207. (Annotated.)
- 31. Validity. Chapter 119 of the N. Dak. Laws of 1909, which is entitled "An act to amend section 2589 of the Revised Codes of 1905, relating to the fees of county court, and which provides for an initial fee of \$5 and an additional charge of \$5 for each and every \$1,000, or fraction thereof, in excess of the first \$1,000 on the value of the estates, to be paid by the petitioner for letters testamentary, of administration, or of guardianship, is un-constitutional, in so far as the additional charge or fee of \$5 for each and every \$1,000, or fraction thereof, in excess of the first \$1,000 is concerned, and violates section 11, art. 1, of the constitution of North Dakota, which provides that "all laws of a general nature shall have a uniform operation" section 22, art. 1, which provides that "all courts shall be open, and every man for any injury done to him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered with-out sale, denial or delay," section 61, art. 2, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title," etc., section 175,

art. 11, which provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state dis-tinctly the object of the same, to which only it shall be applied," and section 176, art. 11, which provides that "laws shall be passed taxing by uniform rule all property according to its true money value in money." The same is true of section of the Laws of 1913, and in so far as the fee or charge of \$5 for each and every \$1,000, or fraction thereof, in excess of the first \$1,000 is concerned. Chapter 66 of the Laws of 1903 and section 2071 of the Revised Codes of 1899, being chapter 50 of the Laws of 1890, however, are invalid even as to the initial fee of \$5, as such is not imposed upon all estates equally, but according to the value thereof. They are necessarily equally invalid as to the added fee of \$5 for every \$1,000 additional value. Malin v. Lamoure County (N. Dak.) 1916C-207. (Annotated.)

32. A requirement for reasonable court fees will be sustained, and is not unconstitutional as being a denial or sale of justice, provided that the fee is reasonable, is uniform in its application, and has some reasonable connection with the services rendered. The portions of the statute before considered, therefore, which provide for an initial fee of \$5, and for the expenditures for publishing and sending out notices, are valid, and are sustained. Malin v. Lamoure County (N. Dak.) 1916C-207. (Annotated.)

## (7) Contracts.

33. Where defendant entered into a contract to purchase the property of a church congregation paying about one-third of the consideration in cash and agreeing to pay the remainder on demand, and the congregation retained a lien on the property, possession of which it was to retain until its new building was completed, the contract was valuable "property" subject to taxation. Commonwealth v. First Christian Church (Ky.) 1918B-525.

(Annotated.)

#### (8) Corporate Stock.

34. Stock in Domestic Corporation. The state of Vermont has the power to tax all the shares of corporations organized under its laws, whether owned by its residents or those of other states or countries. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

# 2. CONSTRUCTION OF STATUTES.

35. Presumption in Favor of Power. Where a doubtful constitutional question is involved, it should not be resolved against the exercise of the taxing power by the state. State v. Nygaard (Wis.) 1917A-1065.

- 36. Unconstitutional Provisions. If Cal. St. 1911, p. 534, § 8, providing relative to the taxation of public service corporations that the operative property of the com-panies enumerated therein shall also include any property not enumerated that may be reasonably necessary for use by such companies exclusively in the operation and conduct of the particular kinds of business enumerated in that act, conflicts with Const. art. 13, § 14, limiting the tax on the property of railroad companies to property or any part thereof used exclusively in the operation of their business, the provision of the constitution must prevail and the statute cannot be upheld. Lake Tahoe R. etc. v. Roberts (Cal.) 1916C-1196. (Annotated.)
- 37. That the operation of steamboats by a railroad company stimulates and increases its rail receipts and induces travel over its rails does not render the steamers taxable as property used exclusively in the operation of the railroad business within Cal. Const. art. 13, § 14. Lake Tahoe R., etc. v. Roberts (Cal.) 1916E-1196. (Annotated.)
- 38. Exception of Docks. The exception in Wis. St. 1913, § 51.02, subsec. 7, of "ore docks and merchandise docks" from taxation under the state ad valorem law, must be held to include such docks only when they are not necessarily used by the railroad as a common carrier. Minneapolis, etc. R. Co. v. Douglas County (Wis.) 1916E-1199. (Annotated.)
- 39. State Lands Under Contract of Purchase. In view of the statutes requiring real property to be listed to the owner and assessed at its true value in money, ageneral assessment against school lands which had been sold under a certificate of purchase, but title to which had not yet passed, made in the usual manner of assessing lands, is a tax on the land as such, and not a tax on the interest of the purchaser. Olds v. Little Horse Creek Cattle Co. (Wyo.) 1917C-120.

(Annotated.)

#### 3. PLACE OF TAXATION.

- 40. Situs of Corporate Stock. Where stock in a foreign corporation is deemed the personal property of the owner, separate and distinct from the capital of the corporation, its situs for purpose of taxation is a matter of legislative control, as is also the method to be provided for its assessment. Denver v. Hobbs Estate (Colo.) 1916C-823.
- 41. Property may constitutionally have a situs in two different jurisdictions for taxation purposes, when the nature of the property requires or permits it, such as the nature of corporate stock, since the federal constitution does not prevent the conflict of state laws whereby taxation of the

- same property in two jurisdictions is possible. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.
- 42. Shares in a corporation are "personal property," with its various incidents and attributes, attaching to and following the person of the owner for purposes of taxation in the jurisdiction of his domicil; his right of ownership in such stock being a property right distinct from the various contractual rights to participate in the corporation's profits and assets which his ownership gives him. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.
- 43. Facts Showing Besidence. In a proceeding to abate taxes claimed by plaintiff to have been improperly assessed against him in a town from which he had changed his residence, evidence that after residing in the town for seventeen years he drove to another town and told the officials that he was a resident thereof, after which he was taxed therein, was insufficient to require a finding that he resided in the latter town, where he did not move his family or make any preparations to remove them from the former town but continued to live with them therein. Bartlett v. New Boston (N. H.) 1917B-777. (Annotated.)
- 44. In a proceeding to have canceled an assessment by the board of review of the city of Milwaukee for property omitted from taxation, in which the owner claimed that he did not reside in the city, the evidence is held to show that the owner had established his residence out of the city with the intention of changing his domicil, so that he was not taxable by the city. State v. Leuch (Wis.) 1917B-778. (Annotated.)
- 45. Intangible Property. Bonds and stocks, which are "intangible property" because they can be kept in a small compass and are not likely to be observed for purposes of taxation, are customarily taxable at the domicil of the owner. Welch v. Boston (Mass.) 1917D-946.
- 46. In a proceeding to tax resident trustees on personal property, such as stocks and bonds, located in a foreign state and bequeathed by a foreign testator to residents of another second foreign state, it cannot be presumed, in the absence of evidence, that there was any law in the state where the property was located which allowed it to tax the property. Welch v. Boston (Mass.) 1917D-946. (Annotated.)
- 47. Situs of Personalty Held in Trust. Mass. St. 1909, c. 490, pt. 1, § 23, declares that all personal estate within or without the commonwealth shall be assessable to the owner, while subsection 5 declares that property held in trust by an executor, administrator, or trustee shall be assessed to them in the city or town in which they reside. St. 1909, c. 516, exempts from

taxation merchandise, machinery, and animals owned by inhabitants of the state and situated in another state. A resident of Maine devised stocks and bonds in trust for persons domiciled in California. The trustees resided in Massachusetts, but the property remained in Maine. It is held that as it could not be presumed that the property was taxed in Maine, it was legally assessable to the local trustees, particularly in view of the exemption of named property and the fact that the local courts might be invoked by the beneficiaries. Welch v. Boston (Mass.) 1917D—946. (Annotated.)

Note.

Situs, for purpose of taxation, of personal property held in trust. 1917D-948.

# 4. ASSESSMENT AND VALUATION.

# a. Ownership of Property.

- 48. A vendee in possession under a contract of purchase is liable for taxes upon the theory that the vendor is the beneficial owner of the purchase money, and the vendee of the land, and hence if the state in selling public lands on instalments occupies no better position than that of an ordinary vendor, yet having retained the title, as security for the unpaid purchase money, it has an interest in the land that is "property" within Wyo. Const. art. 15, § 12, exempting from taxation state property, and the land cannot be taxed in such a manner as to imperil that interest. Olds v. Little Horse Creek Cattle Co. (Wyo.) 1917C-120. (Aunotated.)
- 49. One in possession under an option to purchase, or to complete a purchase, is not liable for taxes under the rule that a purchaser in possession must discharge the taxes, for, if the purchaser is not bound to pay the purchase money, the vendor cannot be treated in equity as the owner of the money and the purchaser the owner of the land. Olds v. Little Horse Creek Cattle Co. (Wyo.) 1917C-120. (Annotated.)

## b. Valuation of Property.

# (1) In General.

- 50. Effect of Erroneous Method of Taxation—Presumptions. A valuation for tax purposes having been shown to be the result of following a method substantially erroneous because not in accordance with the controlling statutes, there is no presumption that a like valuation would have been reached by following a correct method, and when the difference in result is very great, there is a strong presumption to the contrary. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.
- 51. The requirement of Ky. Const. § 172, that all property "shall be assessed for taxation at its fair cash value, estimated

at the price it would bring at a fair voluntary sale," will not prevent injunctive relief against steps looking to the enforcement of certain state and local so-called franchise taxes based upon an assessment of the intangible property of a public service corporation by the state board of valuation and assessment at not more than its fair cash value, where the local assessing officers, charged with valuing other classes of property, systematically undervalue such property, since to apply to one class of property the standard of fair cash value, systematically departed from with respect to other classes of property, would frustrate the principal object of that section, which, in view of the provisions of §§ 171 and 174, requiring uniformity of taxation in proportion to value, and an identical rate as between corporate and individual property, must be deemed to be equal taxation. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.

# (2) Valuation of Particular Subjects.

- 52. Froof of Discrimination in Tax. General presumptions arising from the statutory duty of assessors to assess at fair cash value, and from the oath customarily required of individual taxpayers, together with stereotyped affidavits of former assessors to the effect that they endeavored to follow the law and assess all property at its fair cash value, and that if any property was otherwise assessed it was unintentional and not pursuant to any agreement between assessor and taxpayer, do not necessarily impair the probative effect of official admissions and direct and circumstantial evidence from unimpeached private and public sources that the great mass of property in the state was intentionally, systematically, and notoriously assessed far below its actual value. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.
- 53. Valuation of Railroad Property. A strip of land approximately 100 feet wide and 21 miles long, procured by a railway company for the relocation of its road, was valued at \$137,980, being an average valuation of \$1,000 per acre on land within city limits and of \$500 per acre on land outside the city limits. The average valuation of other land within the city was less than \$150 per acre and on other land outside the city less than \$40 per acre, and no shore land similarly situated to the railroad land was valued to exceed one-third of the value placed upon the railroad land. The railroad land extended along the shore, but the company had no monopoly of shore lands, since not only were there other lands on the shore suitable for right of way purposes but, under the Wash. Defile Act (Laws 1890, p. 301), any other railroad company could in case of necessity, require surrender of a portion of such railroad land. The state tax

commissioner valued all railroad grades upon which ties were not laid at \$1,320 per mile, and an extension of the strip of land in question into another county was there valued at this rate, and this strip in the preceding year was valued at only about one-fourth of the present valuation, though lands generally were worth more then than now. Held, that the discrepancy in the valuation of the lands was so gross as to amount to constructive fraud, and that no valuation of such strip of railroad land in excess of \$45,993.34 could stand. Northern Pacific B. Co. v. Pierce County (Wash.) 1916E—1194. (Annotated.)

54. A steamboat in operation being a single indivisible fabric, where it is not used exclusively in the business of a railroad company, a part thereof cannot be so exclusively used within Cal. Const. art. 13, § 14, imposing a tax based on gross revenue on certain enumerated properties of railroad companies and on other property or any part thereof used exclusively in the operation of their business. Lake Tahoe R., etc. v. Roberts (Cal.) 1916E—1196. (Annotated.)

55. Under Cal. Const. art. 13, § 14, imposing a tax on any property or any part thereof used exclusively in the operation of a railroad company's business, only property used exclusively or a severable part of property so exclusively used in the operation of the business can be taxed, and where property is partly used for railroad purposes the gross returns from the partial use are not an element in assessing the tax. Lake Tahoe R., etc. v. Roberts (Cal.) 1916E-1196. (Annotated.)

56. An ore dock and merchandise dock constructed by a railroad company at a lake terminal, equipped with the proper appliances "necessary" to enable the railroad to properly handle freight, constitute an integral part of the railroad system, and cannot be separated from it for the purpose of taxation, even though a considerable part of the ore dock was used to transfer ore to lake carriers; the word "necessary" meaning reasonably required in the exercise of sound business prudence. Minneapolis, etc. R. Co. v. Douglas County (Wis.) 1916E-1199. (Annotated.)

57. Rem. & Bal. Wash. Code, § 9141, requires the state board of tax commissioners to make an annual assessment of the operating property of all railroads. Section 9148 requires it to include the real sequipment, and franchises, and all other real and personal property, so as to include its entire property and franchises, and that in valuing such property it shall consider the value of the entire system and of the part within the state, together with such facts as will enable a substantially correct determination of its assess-

ment value, subject to revision by the state board of equalization. Public Service Commission Law (Laws 1911, p. 604) § 92, provides that, when the commission values the property of a public service company, nothing less than the market value shall be taken as the true assessable value of its property used for the public convenience. Held, that an added item of \$12,290,000 on account of density of traffic and volume of business along its line, the nature of the country through which its line ran, the facilities for transacting railroad business owned by private individuals, such as warehouses and docks, the proximity of extensive coal mines en-abling it to obtain coal at reduced cost, regardless of its ownership, the resources of the country adjacent to its line, and the density of population and development of the tributary territory, considered as intangible elements affecting the value of its operating property, as distinguished from mere good will, was legal. Northern Pacific R. Co. v. State (Wash.) 1916E-1166. (Annotated.)

58. Such assessment of plaintiff's operating property was not unlawful, because such intangible elements or good will were not included in the physical valuation of other properties, such as hotels, theaters, wholesale and retail mercantile establishments, and other private business concerns; since such alleged item of good will value would attach to their business, rather than to their physical property, and since, even if the county assessors, required by Rem. & Bal. Wash. Code, §§ 9102, 9112, to determine the value in money of each tract or lot of real property, and to value each article of property by itself, might not include such good will, the assessment of railway operating property is committed to the state board of tax commissioners for valuation as a unit, instead of by lot or article of property. Northern Pacific R. Co. v. State (Wash.) 1916E-1166. (Annotated.)

59. The valuation of the operating property of a railroad for taxation by the state board of tax commissioners, as an entirety, and the apportioning of such valuation to the several counties through which its line runs, is a lawful method. Northern Pa-

runs, is a lawful method. Northern Pacific R. Co. v. State (Wash.) 1916E-1166. (Annotated.)

60. The assessment of railroad operating property on the basis of its value as an entirety, including intangible elements such as volume of business, nature and resources of country, etc., affecting the value of its property, while such intangible elements, or good will, are not included in the valuation of other property, does not violate Wash. Const. art. 7, § 1, declaring that all property shall be taxed in proportion to its value, section 2, declaring that the legislature shall provide a uniform and equal rate of assessment and tax-

ation on all property according to its value in money, or section 3, declaring that the legislature shall provide by general law for assessing taxes on all corporation property as nearly as may be by the methods provided for assessing individual property. Northern Pacific R. Co. v. State (Wash.) 1916E-1166. (Annotated.)

- 61. Nor does such assessment violate the due process and the equal protection of the law clauses of Const. U. S. Amend. 14 to the federal constitution. Northern Pacific R. Co. v. State (Wash.) 1916E-1166. (Annotated.)
- 62. An assessment of plaintiff railroad's operating property, as a unit, at \$126,-000,000, including an item of \$12,000,000, or 10 per cent, as the valuation of certain intangible elements, such as the volume of, and facilities for, business, the nature, resources, population, and development of the country through which its line runs as affecting the physical value of such operating property, in the absence of any wilful fraudulent acts charged against either the state board of tax commissioners making the assessment of the state board of equalization adopting it, or any charge that such boards refused to hear evidence as to value or acted arbitrarily, would not be interfered with merely on the ground that it was excessive, and because of a radical change in conditions resulting in large decrease in net earnings of the property and a permanent impairment of its value. Northern Pacific R. Co. v. State (Wash.) 1916E-1166. (Annotated.)
- 63. Effect of Easement. When an easement is carved out of one property for the benefit of another, the market value of the servient estate is thereby lessened, and that of the dominant increased, practically by just the value of the easement, and the respective tenements should be assessed accordingly. Tax Lien Co. v. Schultze (N. Y.) 1916C-636.

#### Note.

Valuation of railroad property for purpose of taxation. 1916E-1180.

### c. Review of Assessment.

- 64. Persons Entitled Failure to List Property. N. H. Pub. St. 1901, c. 59, § 11, gives a right of appeal from an assessment only to a property owner who has complied with chapter 57, §§ 8, 9, making it his duty to fill out a blank inventory and deliver it to the town selectmen; and hence a property owner who had failed to perform this duty cannot complain of the validity of the selectmen's action in taxing him for property owned by him but returned for taxation by others. Bartlett v. New Boston (N. H.) 1917B-777.
- 65. Conclusiveness of Finding. A finding of the board of review of the city of

Milwaukee, in making assessments for property omitted from taxation, that the owner resided within the city is jurisdictional, and hence is not conclusive on appeal, though sustained by some evidence. State v. Leuch (Wis.) 1917B-778.

66. The findings of an official body, such as the state board of valuation and assessment, created by Ky. Stat. §§ 4077-4081, to fix the value of the intangible property of public service corporations for so-called state and local franchise taxes, when made after a hearing and notice to the taxpayer, are quasi judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the board proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the property, or unless fraud appears. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.

## 5. EXEMPTIONS.

# a. Property Constitutionally Exempt.

- 67. The rule that a vendee in possession under a contract to purchase is liable for taxes cannot be applied so as to permit the taxation of property which is declared exempt by the constitution. Olds v. Little Horse Creek Cattle Co. (Wyo.) 1917C—120. (Annotated.)
- 68. Railroads Exemption from Taxation—When Railroad is "Completed." The words "constructed and completed," as used in article 230 of the La. constitution, and as used in the amendment to the constitution proposed by La. Act No. 16 of 1904, in connection with the exemption of railroads from taxation, mean substantially the same thing, in both instances and in neither are they susceptible of the interpretation that a railroad, the construction of which was begun before, or which was completed after, the period or date stated in the article and in the amendment, respectively, is entitled to the exemption therein granted. Sibley, etc. R. Co. v. Elliott (La.) 1916D-1228. (Annotated.)
- 69. A railroad cannot be said to have been "completed," within the meaning of the amendment to the La. constitution granting exemption from taxation to "any railroad or part of railroad that shall have been constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909," where it was built as a logging road, for a particular concern, and, up to the date last above mentioned, had been provided with no equipment that would have enabled it to serve the public, generally, as a carrier of either passengers or freight. Sibley, etc. R. Co. v. Elliott (La.) 1916D-1228. (Annotated.)

#### Note.

Meaning of "complete" or "completed" as applied to railroad. 1916D-1232.

# b. Validity of Statutes.

70. Power to Exempt Stock in Foreign The proviso in Colo. Rev. Corporation. St. 1908, § 5687, that corporate stock shall be deemed to represent the corporate property, and except in cases of banking corporations shall not be taxed, construed to apply to domestic and foreign corporations, is not in conflict with Const. art. 10, § 3, requiring that all taxes shall be uniform, and shall be levied and collected under general laws prescribing regulations securing a just valuation for taxation of all property, but is a valid exercise of the constitutional power to prescribe regulations. Denver v. Hobbs Estate (Colo.) 1916C-823.

71. Exemption of Mortgages-Validity. Revenue law, providing for a tax for recording mortgages, deeds of trust, or written contracts of conditional sale, and declaring that no ad valorem tax shall be collected on any such instrument or on the debts secured thereby after such tax has been paid, but levying an ad valorem tax on all moneys lent, solvent credits, or credits of value, except such as are secured by mortgage, deed of trust or written contract of conditional sale, on which a tax for recording has been paid, is not violative of Ala. Const. 1901, § 211, providing that all taxes shall be assessed in proportion to the value of the property; the legislature having full power to classify for taxation moneys and credits secured by written instruments and debts not so secured. State v. Alabama Fuel, etc. Co. (Ala.) 1916E-752. (Annotated.)

#### Note.

Validity of exemption from taxation of money loaned on mortgage security. 1916E-757.

#### Construction of Statutes.

# (1) In General.

72. Strict Construction of Exempting Statute. Exemptions from taxation should be strictly construed, since the purpose of the state to abandon its right to tax should not be presumed, and since equality is equity in matters of taxation. St. Louis Lodge v. Koeln (Mo.) 1916E-784.

- (2) Property Used for Educational, Charitable or Religious Purposes.
- 73. Exemption from taxation is a privilege which does not follow the property. Therefore on disposition of property used for religious worship the exemption from taxation does not follow the property. Commonwealth v. First Christian Church (Ky.) 1918B-525. (Annotated.)
- 74. Under Ky. Const. \$ 170, exempting from taxation places actually used for

religious worship and parsonages occupied as a home for the minister, a church congregation desiring a more suitable place for religious worship will not be taxed on funds to be invested in a new place of worship, which were derived from the sale of the old premises, notwithstanding the contract of sale, which provided for payments by the purchaser as needed, allowed the congregation to retain possession of its original property until the new church should be ready for occupancy; it being within the spirit of the constitution to exempt from taxation moneys intended to be devoted to acquiring a place of religious worship as well as the place itself. Commonwealth v. First Christian Church (Ky.) 1918B-(Annotated.)

75. Property Used for Religious Purposes. The trustees of a congregation entered into a contract reciting that, pursuant to a vote of the congregation, they sold and agreed to convey to defendant the property of the church in consideration of the sum of \$350,000, \$100,000 to be paid in cash upon execution of the agreement, the remainder to be paid as it might be needed to make payments upon the contract for a new church, the congregation to retain possession of the property sold until the new church was completed. It is held that title to the premises passed to defendant, and he became at least the equitable owner, and so under Ky. St. § 4023, declaring that it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not, defendant was liable for taxes on the property. v. First Christian Church monwealth (Ky.) 1918B-525. (Annotated.)

76. In such case, as defendant received compensation for all moneys paid to the church, he cannot escape taxation on the theory that the premises being used for religious worship were exempt under Const. § 170, and Ky. St. § 4026, exempting property used for religious worship from payment of taxes. Commonwealth v. First Christian Church (Ky.) 1918B-525. (Annotated.)

77. Church Property—Effect of Contract to Sell. Where property used exclusively for divine worship, and by section 57, chapter 29, W. Va. Code Supp. 1909, is exempt from taxation, is by contract in writing, recorded, sold by the trustees in November, 1910, such contract in terms reserving right in the trustees to remove the church building and foundation from the lot free of charge, and without possession taken or right of possession given by the contract to the purchaser, and with covenant and agreement therein to make and deliver to the purchaser a deed for said property on the second day

of January following, and which deed is in fact not made and delivered until the third day of January, 1911, the property so sold and conveyed is not by virtue of section 54, chapter 29, Code 1906, assessable to such purchaser for taxation for the year 1911, for he is not as provided by said section the "person who by himself or his tenents has the freehold in his possession, whether in fee or for life," so as to be "deemed the owner for the purpose of taxation." Cole v. State (W. Va.) 1916D-1256.

78. Hospital as Charity. A testatrix gave property to three persons in trust for the establishment of a hospital; the trustees to report annually to the chancery court in the county, and such court to fill all vacancies in the office of trustee. The hospital received private pay patients; public patients going there of their own accord, or sent there by the county and certain nearby cities, in-cluding the city in which the hospital was located, and which was seeking to subject the hospital to taxation. No patients were kept without charge, but some of those who came of their own accord failed to pay, and no one had ever been turned away for inability to pay. The county and such cities compensated the hospital as to patients sent by them, but in a sum less than the actual cost. operation of the hospital resulted in different years, either in a deficit or in a very small gain. There was no provision for reversion in the will, the trustees served without pay, and it did not appear that it was ever intended that any private gain should result. The profit from private patients who paid for their care and treatment went into the general fund of the hospital, and was used for maintaining it. It is held that the hospital property was exempt from taxation as a "public charity"; since whatever is done or given gratuitously in relief of the public burdens, or for the advancement of public good, is a public charity, and an institution founded and endowed as a purely public charity does not lose its character as such under the tax laws if it receives a revenue from the recipients of its bounty sufficient to keep it in operation, or, applying another test, if the object for which an institution is founded is the general public good, and not private gain, and it is so conducted that the public receives all the benefits of it, it is a purely public charity. Dayton v. Trustees of Speer's Hospital (Ky.) 1917B-275.

(Annotated.)
79. Property Used for Charity—Elks
Lodge. A lodge building used as a club
for members and their guests, in which
free entertainments of various kinds
were given and from which no profits
were realized, the surplus funds being de-

voted to charity, is not a building used exclusively for purposes purely charitable within Mo. Const. art. 10, § 6, exempting such buildings from taxation, an exclusive use implying that all other uses are excluded, a "purely charitable use" being one in which the charity is unmixed with other purposes. St. Louis Lodge v. Koeln (Mo.) 1916E-784. (Annotated.)

# Note.

Hospital as charity exempt from taxation. 1917B-278.

# (3) Corporate Stock.

80. Mass. Tax Act (St. 1909, c. 490) part 3, § 41, provides that the tax commissioner shall ascertain the market value of corporate shares, and shall estimate therefrom the fair cash value of all the shares constituting the capital stock, which shall be taken as the true value of each corporation's corporate franchise, and that from such value there shall be deducted, in the case of a domestic business corporation, the value of its property situated in another state or country and subject to taxation therein. P. S. Vt. c. 30, § 516, provides that taxes assessed on corporate stock of nonresidents shall be paid by the corporation, which may hold such stock and the dividends thereon as security for the A Massachusetts corporation, which owned shares in a Vermont corporation, was taxed thereon, and, suing to recover the tax, contended that the shares of stock which had been assessed to it were "property situated in another state and subject to taxation therein," within section 41, and so exempt from taxation. It is held that such shares were not such property, since the context in which the words occurred in the tax law demonstrated that they referred to the kind of property which, if owned by an individual and situated and taxed in another state, would be exempt from taxation in this commonwealth, such as real estate and "merchandise, machinery, and animals." Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834,

(Annotated.)

81. Colo. Rev. St. 1908, § 5659, requiring the assessor to make out an abstract of the assessment in his county, stating in detail specified things, including the assessed valuation of shares in banking corporations, without requiring the abstract to show the value of other corporate stock, discloses a legislative intention that there shall be no distinction between stock in foreign and domestic corporations. and is in harmony with the proviso in section 5687, declaring that corporate stock shall be deemed to represent the corporate property, and except in case of the banking corporations shall not be taxed, construed to apply to domestic and foreign corporations. Denver v. Hobbs' Estate (Colo.) 1916C-823. (Annotated.)

82. Colo. Rev. St. 1908, §§ 5591, 5592, making stock and bonds of corporations competent evidence of the value of plants of corporations, foreign or domestic, and providing that the entire business, plant, or enterprise of a corporation shall be valued as a unit, and that every element which gives to the corporation property an added value shall be considered in fixing the value for taxable purposes, are guides to the assessor in fixing the value of property owned by any corporation foreign or domestic, but do not indicate that corporate stock itself shall be taxed, except as covered by the property of the corporation. Denver v. Hobbs' Estate (Colo.) 1916C-823. (Annotated.)

83. The provisions of Colo. Rev. St. 1908, § 5584, that no deduction shall be allowed on account of any indebtedness on or for the capital stock of any corporation or other exempt property, indicates that corporate stock shall not be taxed separate and apart from the corporate property, as it would be unfair to permit deduction of debts for property not taxable. Denver v. Hobbs' Estate (Colo.) 1916C-823. (Annotated.)

84. The Revenue Act, of which Colo. Rev St. 1908, \$ 5687, declaring that corporate stock shall be deemed to represent the corporate property, and except in cases of banking corporations shall not be taxed, is a part, must be considered as a whole in construing section 5687, and, when so considered, stock of domestic and foreign corporations, not banking corporations, is not taxable. Denver v. Hobbs' Estate (Colo.) 1916C-823. (Annotated.)

85. Stock in Foreign Corporation. The proviso in Colo. Rev. St. 1908, § 5687, that corporate stock shall be deemed to represent the corporate property, and except in cases of banking corporations shall not be taxed, applies to domestic and foreign corporations alike. Denver v. Hobbs' Estate (Colo.) 1916C-823. (Annotated.)

# 6. PENALTY FOR NON-PAYMENT OF TAXES.

86. Restriction on Rights of Delinquent Taxpayer—Validity of Statute. A statute making the payment of taxes to date a condition precedent to obtaining an occupation license is valid though it requires the payment of taxes which became due before the enactment of the statute. In re Kalana (Hawaii) 1916D-1094.

(Annotated.)

#### Note.

Validity of statute imposing restriction on exercise of rights by delinquent tax-payer. 1916D-1099.

# 7. LIEN FOR TAXES.

#### a. In General.

87. Effect on Easement. Prior easements of light, air, and access appurtenant to adjoining lands, were not subject to a tax lien on the servient estate. Tax Lien Co. v. Schultze (N. Y.) 1916C-636.

#### b. Foreclosure.

88. Necessary Parties. In an action under Greater New York Charter (Laws 1901, c. 466, §§ 1035-1039, as amended by Laws 1908, c. 490, and Laws 1911, c. 65) to foreclose a tax lien, the owners of property adjoining the property described at the tax sale, including the easements over the property so described, are not necessary parties. Tax Lien Co. v. Schultze (N. Y.) 1916C-636.

89. Sale—Duty of Purchaser to Accept Encumbered Title. Easements of light, air, and access in the premises sold on the foreclosure of a tax lien appurtenant to adjoining lands materially affected its value, and the purchaser was not bound to accept title thereto. Tax Lien Co. v. Schultze (N. Y.) 1916C-636.

### 8. REMEDY FOR ERRONEOUS TAXA-TION OR ASSESSMENT.

## a. Injunction.

90. Enjoining Payment-Rights of Corporate Stockholder. The maintenance by a stockholder of a suit to restrain a corporation from voluntarily complying with the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185) upon the grounds of the repugnancy of the statute to the federal constitution, of the peculiar relation of the corporation to the stockholders, and their particular in-terests resulting from many of the ad-ministrative provisions of the assailed act, of the confusion, wrong, and multiplicity of suits, and the absence of all means of redress, which will result if the corporation pays the tax and complies with the act in other respects without protest, as it is alleged it is its intention to do, is not forbidden by the prohibition of U. S. Rev. Stat. § 3224, 3 Fed. St. Ann. 689, against enjoining the enforcement of taxes. Brushaber v. Union Pacific R. Co. (U.S.) 1917B-713.

91. Jurisdiction of Federal Court. State officers charged with the duty of enforcing the tax laws of the state may be enjoined by a federal court of equity from taking steps looking toward the enforcement of state and local taxes upon the intangibles assessed under state authority, which are property of a public service corporation, asserted to violate the federal constitution because of a discrimination in the

valuation of the property upon which the taxes are based, arising out of systematic undervaluation of other taxable property, although the state laws under the sanction of which the officers assumed to act in making the assessment do not contemplate any unlawful discrimination. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.

92. Right to Injunction Against Tax. A public service corporation may sue in equity to restrain state officers from taking steps looking to the enforcement of certain state and local so-called franchise taxes on the ground of discrimination in valuation of the intangible property upon which such taxes are based, notwithstanding the remedy afforded by Ky. Stat. § 162, directing the state auditor to refund taxes unlawfully collected, such remedy being inadequate to prevent equitable relief for two reasons: (a) by the decisions of the Kentucky courts this section is confined to cases where the taxes paid were wholly without warrant in law, or based upon a mistake as to the rate of taxation upon the amount assessed; (b) the bills deal with both state and local taxes, while this section applies to state taxes alone. Louisville, etc. R. Co. v. Greene (U.S.) 1917E-97.

93. Remedy Against Illegal Title. Discriminatory taxation contravening the express requirements of a state constitution is not beyond redress by injunction in the federal courts, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards, whose assessments are not subject to any process of equalization established by the state, and where the diverse results are the outcome of the intentional, systematic, persistent undervaluation of one body of officials, presumably known to and ignored by the other body, so that the two bodies act in effect in concert. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88.

94. A suit attacking the valuation of intangible corporate property for tax purposes should not have been in effect decided against the plaintiff because there was nothing in the record to show the truth of certain averments in a supplemental bill, filed with the court's permission after the hearing and decision of the cause, but before entry of the final decree, even though it cannot be said that defendants, by not answering, admitted such averments, or that the court erred in failing to give effect to them, there being nothing in the record to show that defendants were ordered to answer or to show why the averments were ignored, since plaintiff could not be held in default for omitting to introduce evidence at the hearing respecting these matters, they not having been considered by the state board which made the valuation, nor set up in the original pleadings, nor, so far as appears, deemed by any of the parties to be material until the court rendered its decision. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.

95. State as well as local so-called franchise taxes based upon an assessment of the intangible property of a public service corporation, made by the state board of valuation and assessment, may be enjoined by a federal court for discrimination contrary to U. S. Const. 14th Amend. arising out of systematic undervaluation of other taxable property, where the proper state officers charged with the enforcement of the tax law of the state are made parties. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97.

96. State officers charged with the duty of enforcing the tax laws of the state may be enjoined by a federal court of equity from taking steps looking to the enforcement of state and local taxes upon the intangible property of a public service corporation, assessed under state authority, which are asserted to violate the federal constitution because of a discrimination in the valuation of the property upon which the taxes are based, arising out of systematic undervaluation of other tax-able property, although the state laws under the sanction of which the officers assumed to act in making the assessment do not contemplate any unlawful discrimination. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88.

97. A court of equity has jurisdiction of suits to enjoin action looking to the enforcement of taxes upon the intangible property of public service corporations assessed under state authority, upon the ground of discrimination in valuation arising out of systematic undervaluation of other taxable property, where the bills assert that the unauthorized illegal valuation constitutes a cloud and a lien upon the plaintiff's property, and that, unless restrained, numerous and vexatious suits will be instituted to foreclose such lien, together with civil, penal, or criminal proceedings based upon plaintiff's sup-posed delinquency in the payment of taxes. Greene v. Louisville etc. R. Co. (U. S.) 1917E-88.

98. Equitable relief to public service corporations against the certification and enforcement by state officers of state and local so-called franchise taxes upon the ground of a discrimination in the valuation of the intangible property of the corporations upon which the taxes are based, arising out of systematic undervaluation of other taxable property, may not be denied upon the theory that, under Ky. Stat. §§ 4115-4120, 4123, a method is pro-

vided by which, instead of lowering the assessments upon their property, could, by proper procedure, compel the assessment of the property of other taxpayers to be increased, so as to come within the requirement of Ky. Const. §172 as to fair cash value, where there is nothing in these provisions to indicate that the parties situated as are these corporations, who have no different interests in the undervaluation by the local assessors from that which might be possessed by any other citizens, are entitled to be heard to complain that such assessments are too low, nor is any case cited where such a complaint has been entertained, the remedy of reassessment being a public, not a private, remedy. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88.

99. A public service corporation may sue in equity to restrain state officers from taking steps looking to the enforcement of certain state and local so-called franchise taxes on the ground of discrimina-tion in valuation of the intangible property upon which such taxes are based, notwithstanding the remedy afforded by Ky. Stat. § 162, directing the state auditor to refund taxes unlawfully collected, such remedy being inadequate to prevent equitable relief for two reasons: (a) by the decisions of the Kentucky courts this section is confined to cases where the taxes paid were wholly without warrant in law, or based upon a mistake as to the rate of taxation upon the amount assessed; (b) the bills deal with both state and local taxes, while this section applies to state taxes alone. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88.

100. The requirement of Ky. Const. § 172, that all property "shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale," will not prevent injunctive relief against steps looking to the enforcement of certain state and local socalled franchise taxes based upon an assessment of the intangible property of a public service corporation by the state board of valuation and assessment at not more than its fair cash value, where the local assessing officers charged with valuing other classes of property systematically undervalue such property, since to apply to one class of property the standard of fair cash value, systematically departed from with respect to other classes of property, would frustrate the principal object of that section, which, in view of the provisions of §§ 171 and 174, requiring uniformity of taxation in proportion to value, and an identical rate as between corporate and individual property, must be deemed to be equal taxation. Greene v. Louisville, etc. R. Co. (U. S.) 1917E-88.

# b. Recovery Back of Taxes Paid.

101. Void Levy—Rights as to Money Collected. In a township's action against a city within its boundaries to recover road and bridge funds wrongfully paid over to the city by the township officers under a mistake of law, it is no defense that the funds were derived from a void tax levy. Lamar Township v. Lamar (Mo.) 1916D-740.

102. Moneys collected as taxes under an unconstitutional statute may be recovered back under Iowa Code, § 1417, providing for the return of taxes illegally paid or exacted; such moneys being regarded as taxes. Commercial Nat. Bank v. Board of Supervisors (Iowa) 1916C-227.

103. Payment Under Mistake of Law. Under Iowa Code, § 1417, requiring the return of taxes illegally or erroneously exacted or paid, taxes paid under a mistake of law may be recovered. Commercial Nat. Bank v. Board of Supervisors (Iowa) 19160-227.

104. Payment Under Unconstitutional Statute. Taxes paid under a statute subsequently declared unconstitutional by the federal supreme court may be recovered back under Iowa Code, § 1417, providing for the return of taxes illegally exacted; for the statute was unconstitutional at the time of enactment, and the fact that it was not immediately declared so does not deprive the taxpayer of the right to reimbursement. Commercial Nat. Bank v. Board of Supervisors (Iowa) 1916C-227.

105. Voluntary Payment. Under Iowa Code, § 1417, providing for the return of taxes erroneously or illegally exacted and paid, it is no defense that the taxes were paid voluntarily. Commercial Nat. Bank v. Board of Supervisors (Iowa) 1916C-227.

Under Protest. Such 106. Payment charges, having in the case at bar been demanded of the plaintiff by an officer acting under color of law, and for public services which the plaintiff was entitled to have performed, and having been paid under written protest and under circumstances where injury to the estate and to third parties would have resulted from a refusal to pay such fees and a resort to legal remedies to compel the performance of the official duties, were paid under compulsion and duress, and can be recovered from the county upon a proper showing being made. Malin v. Lamoure County (N. Dak.) 1916C-207.

#### c. Annulment of Refunding Order.

107. Correction and Refunding-Procedure. An order of exoneration of taxes, and for repayment of taxes paid upon an

erroneous assessment, procured by the applicant and drawn on the sheriff, in his favor, pursuant to section 94, chapter 29, W. Va. Code 1899, cannot be set aside or annulled by the county court, at a subsequent term, without notice or process to such applicant. Such order or rescission is absolutely void and of no effect. Eureka Pipe Line Co. v. Riggs (W. Va.) 1918A-995.

# d. Mandamus to Compel Refund.

108. Iowa Code, § 1417, providing that the board of supervisors shall direct the treasurer to refund taxes erroneously or illegally exacted, is mandatory, and the board of supervisors may in a proper case be required by mandamus to order the treasurer to repay the taxes illegally collected. Commercial Nat. Bank v. Board of Supervisors (Iowa) 1916C-227.

# e. Refund by County Treasurer.

109. Under Iowa Code, § 1417, providing that the board of supervisors shall direct the treasurer to refund taxes erroneously paid or illegally exacted, the board must first ascertain whether the taxpayer is entitled to reimbursement, and, having done so, it is the treasurer's duty to repay from the particular funds into which the taxes have gone the amount of the illegal exaction. Commercial Nat. Bank v. Board of Supervisors (Iowa) 1916C-227.

# f. Estoppel of Taxpayer.

110. Listing Property for Taxation. Where plaintiff, pursuant to an unconstitutional statute, listed and paid taxes upon property which was not subject to taxation, the listing of the property does not estop plaintiff from asserting the illegality of the exaction and recovering the payment. Commercial Nat. Bank v. Board of Supervisors (Iowa) 1916C-227. (Annotated.)

#### Notes.

Estoppel of taxpayer to question validity of tax. 1916C-225.

Estoppel of taxpayer returning property for taxation to dispute assessment based on return. 1916C-230.

### 9. TAX SALES AND DEEDS.

a. Time for Redemption and Notice of Expiration of Time.

111. Statement of Time of Expiration. A tax deed to land is void, if issued by the county treasurer under a sale made by him November 7, 1904, where the purchaser in his notice to redeem stated that the time for redemption would expire November 8, 1906, the statutory period in fact expiring November 7, 1906. Neb., Comp. St. 1903,

e. 77, art. 1, § 214. Stewart ▼. Ridenour (Neb.) 1917A-242. (Annotated.)

112. Notice of Redemption—Sufficiency. A tax deed issued is not valid where the notice of the time for redemption was not published in accordance with N. Car. Revisal 1905, § 2903, requiring such notices, and was not directed to the trustee, in whose name title was held, even though the purchaser's affidavit showed his knowledge of the fact of the trust. Johnson v. Whilden (N. Car.) 1916C-783.

113. Notice of Expiration Insufficient. A notice of expiration of redemption from a tax sale which imposes upon the redemptioner the burden of determining which of two amounts stated therein as necessary to redeem is correct does not comply with the statutes upon the subject and is insufficient. Telford v. McGillis (Minn.) 1916E-157.

114. The notice in this respect must be definite and specific and free from doubt and uncertainty. Telford v. McGillis (Minn.) 1916E-157.

#### Note.

Sufficiency of notice to redeem from tax sale with respect to statement as to expiration of time to redeem. 1917A-243.

# b. Merger of Tax Title in Subsequent Deed.

115. Where a remainderman purchases a tax title in the circumstances above stated, and enters into possession under it, and afterwards takes a quitclaim deed from the life tenant, the tax title is not necessarily merged in the conveyance of the life estate. Jinkiaway v. Ford (Kan.) 1916D-321.

## 10. SPECIAL ASSESSMENTS.

## a. Nature and Exercise of Power.

116. Local Assessment—Power to Make. A local assessment levied by a city under the provisions of Rem. & Bal. Wash. Code, \$7767, to pay for widening a street, is levied in the exercise of the sovereign power of taxation, though by proceedings supplemental to eminent domain proceedings. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

# b. Nature of Improvement.

117. For What Purpose—Improvement Abating Nuisance. Where the power of a city to construct sewers was plenary, the fact that a proposed sewer would also do away with a public nuisance which it was the duty of the city to abate will not invalidate an assessment of benefits on the ground that the construction of the sewer was merely to abate a public nuisance. Dellaripa's Appeal (Conn.) 1917B-862.

# c. Property Subject and Exemptions.

118. Acts 1903, c. 204 (Burns' Ind. Ann. St. 1908, § 6671), providing that common school corporations, whose property has been benefited by a public improvement, shall be liable for assessments for the improvement, if assessments could have been levied had the property been privately owned, is not in conflict with Bill of Rights, § 21, declaring that no man's property shall be taken without just compensation. School Town of Windfall City v. Somerville (Ind.) 1916D-661.

(Annotated.)

119. Acts 1903, c. 204 (Burns' Ind. Ann. St. 1908, §§ 6670, 6671), providing that the real estate of common school corporations shall be liable for assessments for public improvements, is not impliedly repealed by Acts 1907, c. 110 (Burns' Ann. St. 1908, §§ 8712, 8713), which makes the same provision as to the real property of all counties, townships, towns, and other municipalities. School Town of Windfall City v. Somerville (Ind.) 1916D-661.

(Annotated.)

- 120. Liability of School Property. The exemption of educational property from taxation provided for by Ind. Const. art. 10, § 1, and Burns' Ind. Ann. St. 1908, § 10144, does not apply to local assessments against real property, based on benefits from public improvements. School Town of Windfall City v. Somerville (Ind.) 1916D-661. (Annotated.)
- 121. Railroad Right of Way. A railroad right of way, if actually benefited, may be assessed for a local drain, which is constructed under the provisions of chapter 23, N. Dak. Rev. Codes 1905, and this irrespective of the fact whether the fee is in the railroad company or not. Northern Pacific R. Co. v. Richland County (N. Dak.) 1916E-574. (Annotated.)
- 122. Chapter 23, N. Dak. Rev. Codes 1905, which provides for the assessment of railroad rights of way for the benefits conferred by the construction of local drains, does not violate the provisions of the Fourteenth Amendment to the federal constitution, nor the so-called commerce clause (section 8, art. 1) of that instrument, even though it is sought to be applied to interstate lines. Northern Pacific R. Co. v. Richland County (N. Dak.) 1916E-574. (Annotated.)
- 123. County Property. There is no express provision in the constitution of the state of Florida as to special assessments by a municipality for local improvements. Under the provisions of section 8, art. 8, of such constitution, the legislature may, by statute, give to a city authority to make a special assessment for street improvements against property belonging to the county located within the city and

used for governmental purposes, and such authority may be conferred by a special act. Gainesville v. Alachua County (Fla.) 1917D-843.

#### Notes.

Public property as subject to special assessment. 1917D-844.

Assessment of railroad right of way for street improvement. 1916E-579.

# d. Superiority of Lien.

124. Superiority to Prior Liens. The legislature may create a lien for taxes either general or by local assessment, superior to all other liens, regardless of priority of time. Carstens & Earles Seattle (Wash.) 1917A-1070. (Annotated.)

125. The fact that the general revenue statutes and certain local assessment statutes expressly provided that mortgage and other private liens should be inferior to the lien of those taxes does not require the statute creating liens for local improvements for street widening, which contains ne express provision as to priority, to be construed as not making such liens superior, since the intention of the legislature in the latter act to establish such priority is plain. Carstens & Earles v. Seattle (Wash.) 1917A-1070. (Annotated.)

#### Note.

Validity and construction of statute giving priority to lien for taxes. 1917A-1079.

# e. Contract for Making Improvement.

126. Use of Patented Article in Street That a contract for street Improvement. improvements involves the use of a patented article does not render an assessment therefor invalid under Wash. Local Improvement Law (Laws 1911, c. 98, p. 477) § 59, providing that contracts for all public improvements to be paid for by assessments shall be let on competitive bids, where the owner of the patent stipulates with the city that the patented article will be furnished to the successful bidder, and the various bidders submit their bids apparently relying on such stipulation, and no objection is made to it prior to objections to the confirmation of the assessment roll, though the stipulation provides that it shall apply only to contracts aggregating not less than 10,000 square yards and the contract in question is for only 6,650 square yards. Great Northern R. Co. v. Leavenworth (Wash.) 1916D-239. (Annotated.)

## f. Protests and Objections.

127. Protest by Property Owners. Vrooman Act (Cal. Gen. Laws 1909, Act 3930) § 3, providing that the owners of a majority of the frontage of the property on a proposed work or improvement may by protest bar the work for six months, does

not warrant the owners on each street improved in barring the work by their protest; hence the improvement of several streets together does not deprive a majority of the owners of any one of their rights. Remillard v. Blake, etc. Co. (Cal.) 1916D-451.

# g. Waiver of Objections.

128. Waiver of Irregularities—Abandonment. Where property owners executed an agreement waiving irregularities in street assessments in consideration of a deduction from the amount of the assessment, provided payment should be made within a stipulated time, the fact that the property owners did not make payment within the time fixed, so as to obtain the deduction, did not work a mutual abandonment of the waiver agreement. Remillard v. Blake, etc. Co. (Cal.) 1916D-451.

129. Irregularities in an assessment lien for street improvements may be waived by the property owners' acts. Remillard v. Blake, etc. Co. (Cal.) 1916D-451.

129½. Payment of Tax. The fact that an abutting property owner did not protest against paying a special tax levied for changing the grade of the street would not prevent him from maintaining an action for damages from changing the grade, Gray v. Salt Lake City (Utah) 1916D—1135.

130. Defects in Proceeding. Defects in an engineer's report on a proposed public improvement, as measured by the requirements of a resolution authorizing it and by Wash. Laws 1911, p. 444, § 10, in that it failed to show the proportionate amount of the cost to be borne by the property within the district and the diagram failed to show the lots specifically benefited thereby and the estimated cost to be borne by each, not being jurisdictional, are waived by property owners who appear before the council in response to the notice but fail to offer any objection touching the report, and also by property owners who fail to appear in response to such notice and permit the improvement to proceed and urge no objection prior to objecting to confirmation of the assessment roll. Great Northern R. Co. v. Leavenworth (Wash.) 1916D-239.

# h. Mode of Assessment.

131. Local Improvements—How Initiated. Under Wash. Laws 1911, p. 441, covering the subject of local improvements in cities and towns, providing that the city may define the mode of making the assessment by general ordinance not inconsistent with the statute, an assessment is not void because the proceedings were initiated prior to the passage of a general ordinance, where each step in the proceeding was directed by the city council either by resolu-

tion or ordinance, and a proper general ordinance was passed before any assessment was levied. Great Northern R. Co. v. Leavenworth (Wash.) 1916D-239.

132. Front Foot Rule—Effect of Inequality. Where several streets of varying width were improved as part of a single scheme and assessments were made on a frontage basis, the fact that property owners on narrow streets were required to pay the same amount as those on wider streets did not invalidate the assessment. Remillard v. Blake, etc. Co. (Cal.) 1916D-451.

133. Error in Description—Effect. Where the description of an assessment district for paving shows that the word "second" is through clerical mistake omitted before the name of an addition, the addition being subject to identification and the omission a mere inadvertence, it will not invalidate the description. Moore v. Paving Improvement District (Ark.) 1917D-599.

#### Note.

Time within which special or local assessment must be made. 1917E-137.

# i. Notice to Owner.

134. Constructive service of notice of a local improvement assessment satisfies the constitutional requirements of due process of law. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

135. Constructive Notice to Landowners. The service of notice of a special assessment, as required by Rem. & Bal. Wash. Code, §§ 7787-7813, by mail to the owners of the property, by the posting of notice thereon, and by advertisement in a newspaper, is constructive service only. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

136. Under Rem. & Bal. Wash. Code, §§ 7787-7813, prescribing the procedure for the creation and enforcement of liens for special assessments, which provides for only constructive service of notice and gives to all parties interested in the property the right to redeem from the tax sale, the proceeding is in rem, and the lien upon the land itself and not on the interest of any person therein, and is therefore superior to the lien of a prior mortgage, though there is no express provision to that effect in the statute. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

(Annotated.)

## j. Proceedings.

137. Resolution of Intention — Sufficiency—Description of Bridge. A resolution of intention for the construction of wooden bridges at the end of cross-walks is not defective because not describing the kind of wood to be used. Remillard v. Blake, etc. Co. (Cal.) 1916D-451.

# k. Discontinuance of Proceedings.

138. Time Within Which Proceeding may be Discontinued. Until an assessment for a public improvement has been made and adopted by the court of common council, the obligation of the city is not fixed, and the proceeding may be discontinued, notwithstanding the electors of the city have voted to appropriate a sum of money for the construction of the improvement, Dellaripa's Appeal (Conn.) 1917B-862.

### 1. Enforcement of Assessment.

139. Personal Judgment-School Corporation. Ind. Acts 1889, c. 118, as amended by Acts 1891, c. 118 (Burns' Ann. St. 1901, § 4288), relating to assessments for public improvements and authorizing a waiver of irregularities in consideration of permission to pay the assessment in 10 instalments, gave color to authority to municipal corporations to make such assessment upon land owned by common school corpora-tions. Acts 1903, c. 204 (Burns' Ann. St. 1908, \$6671), expressly validated such assessments and made the school corporations liable for assessments for improve-ments already constructed. Held, that as an agreement to waive irregularities in consideration of permission to pay the assessment in instalments created a new and independent undertaking, rendering the property holder personally liable, such an agreement made by a common school corporation, before the passage of the statute of 1903, must, after its enactment, be held to authorize a personal judgment against the corporation. School Town of Windfall City v. Somerville (Ind.) 1916D-661.

140. Enforcement of Lien—Nature of Proceeding. Proceedings to enforce a lien, which affects only the right of some person in the land, are not strictly proceedings in rem, as are those to enforce a tax lien, which affects the land itself, regardless of the ownership. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

141. Summary Proceedings. Summary proceedings for the enforcement of a local improvement assessment by sale of the land under execution of a tax deed upon failure of those interested to redeem, without further hearing upon the validity of the assessment lien, satisfies the requirements of due process of law. Carstens & Earles v. Seattle (Wash.) 1917A-1070.

# m. Review of Proceedings.

142. Assessment of Benefits—Conclusiveness of Finding. A finding by the committee of special benefits to landowners from the construction of a sewer is conclusive on appeal, where no facts appear of record showing that such finding could not reasonably have been made. Dellaripa's Appeal (Conn.) 1917B—862.

143. Proceedings for Assessment—Appeal. Under Wis. St. 1913, \$ 1087m19, providing that "any person dissatisfied with any determination" of the county board of review may appeal within twenty days, etc., an income tax assessor charged with important duties in the administration of the income tax law, and who in the first instance assessed a tax against relator's salary as circuit judge, is entitled to appeal from the action of the board of review sustaining relator's objection to the tax. State v. Nygaard (Wis.) 1917A-1065.

# n. Action to Enjoin or Set Aside.

144. Fairness—Sufficiency of Evidence. In a suit to set aside an assessment for paving purposes, the evidence is held to show that the assessment was made in good faith, and was a reasonable assessment of future benefits, and not a more arbitrary apportionment of the costs. Moore v. Paving Improvement District (Ark.) 1917D-599.

#### 11. LICENSE OR OCCUPATION TAXES.

145. Interstate Business. A state may levy a tax upon any business carried on within the state, as on the occupation of doing business as a merchant, if such tax in no way discriminates against persons residing in another state or the products and manufactures of another state, and the levying of such a tax is not a regulation of or restraint upon interstate commerce. Newport v. Wagner (Ky.) 1917A-962.

146. A license or occupation tax, imposed on an attorney for the privilege of practicing his profession, is not the same as a tax on income derived from such profession, and hence the fact that an attorney was subject to a tax on his income after having paid a license tax was not double taxation. Commonwealth v. Werth (Va.) 1916D-1263. (Annotated.)

#### 12. EXCISE OR FRANCHISE TAXES.

#### a. Nature.

147. Definition of Excise Tax. An "excise tax" is an inland impost levied on articles of manufacture or sale and also on licenses to pursue trades or dealing in commodities, and is frequently denominated a privilege or occupation tax. Albert Pick & Co. v. Jordan (Cal.) 1916C-1237.

148. Corporation—When Subject. A corporation subjects itself to the tax imposed by the Corporation Tax Act (Act Aug. 5, 1909, Fed. St. Ann. 1909 Supp. p. 829) by exercising the privilege of carrying on or doing business for any part of the year for which the tax is imnosed. Blalock v. Georgia R. etc. Co. (Fed.) 1917A-679.

# b. Validity.

# (1) Federal Corporation Tax Act.

149. Federal Corporation Tax. The tax imposed by the Corporation Tax Act (Act Aug. 5, 1909. Fed. St. Ann. 1909 Supp. 829) on corporations organized for profit and engaged in business equivalent to one per cent on the net income above \$5,000 is valid as an excise on the privilege of doing business in a corporate capacity. Blalock v. Georgia R. etc. Co. (Fed.) 1917A-679.

# (2) Foreign Corporation Tax Act.

150. Validity. Where a foreign corporation engaged in the automobile business purchased real estate and erected a substantial building for the carrying on of its repair trade, and trade in used cars, as well as a selling agency, Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3), which greatly increased the license taxes upon foreign corporations, does not deprive such corporation of equal protection of the laws; it not appearing that its real property was exclusively adapted to use for automobile business, that it was necessary for it to have purchased such property to carry on its business, or that the property could not be sold for a reasonable price. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C—214.

151. The Mass. Foreign Corporation Tax Law (St. 1909, c. 490, pt. 3) § 56 et seq., is valid, it imposing an excise or license, and not a tax upon the property of foreign corporations. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

152. Where a foreign corporation does both an intrastate and interstate business, an excise levied by the state upon its intrastate business is not invalid because the profit on the intrastate business alone is not sufficient to meet it. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 19160-214.

153. Power of State to Tax. Where a fereign corporation which does an interstate commerce business within the state also does a domestic business, the state may levy an excise tax upon it. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

# c. Construction of Statutes.

154. Where a Connecticut corporation maintained a Boston sales office where samples were kept and salesmen for the New England district had their headquarters, it is not wholly engaged in interstate commerce, it appearing that customers visited its local office, and hence is subject to Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3), Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

155. Where a foreign corporation maintained a local sales office where orders for the sale of machines were received subject to approval by the home office, but repair parts for the machines were kept at the local office and a large business in repairs was done, the corporation is not engaged wholly in interstate commerce, and is subject to the excise tax imposed by Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3). Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

156. A foreign corporation engaged in the automobile business, which maintained a local sales office where orders for machines were taken, the machines being sent as ordered, but not kept distinct for each customer, and where a large repair and used car business was carried on, is not engaged wholly in interstate commerce, and is subject to Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3). Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

157. A foreign flour manufacturing corporation, which maintained a local office from whence salesmen were sent through the country to secure retail orders for flour, which were delivered to the wholesale patrons of the company, is not wholly engaged in interstate commerce, particularly where a small stock was kept on hand for local sales, and is subject to Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3). Marconi Wireless Tel. Cov. Commonwealth (Mass.) 1916C-214.

158. A foreign holding company whose articles of association named Boston as its business office without the state of its domicil, and which maintained a Boston office, where dividends from the stock it held for the benefit of its shareholders were received and were paid, is not engaged wholly in interstate commerce, and is subject to the Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3), particularly where its officers were citizens of the state of Massachusetts, and all of its records and accounts were kept in that state. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

159. A foreign mining company whose property was located in another state, but which was authorized to maintain a Boston office, at which its directors' meetings were held, its policies shaped, and selling orders given, is not engaged in interstate commerce, although it had a general manager in charge of its mining business in the foreign state, and hence it is subject to the excision prescribed by Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3). Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

160. A foreign corporation which meintained a Boston office under a manager who had charge of the business in that vicinity, and under whom were a salesman

and a stenographer, is not, where all orders had to be approved by the New York office, and no customers came to the Boston office, payments and shipments being made from outside the state, engaged in local business so as to be subject to Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3). Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

161. Corporation Engaged Wholly in Interstate Commerce—License Tax. A foreign wireless company which maintained within the state stations at which messages to and from ships on the high seas and foreign countries were received and transmitted, but which did not transmit any local messages, is engaged wholly in interstate commerce, and is not subject to the excise tax imposed by Mass. Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3). Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214.

162. Securities Owned by Domestic Corporation. Mass. Tax Act (St. 1909, c. 490) part 3, § 43, provides that every corporation shall annually pay a tax upon its franchise, but the said tax shall not exceed a tax levied at a certain rate upon an amount 20 per cent in excess of the value, as found by the tax commissioner, of its works, structures, real estate, machinery, poles, underground conduits, wires, pipes, merchandise, "and all securities which if owned by a natural person resident in this commonwealth would be liable taxation." A domestic corporation owned a bond of a Vermont corporation, and contended that such bond was a debt due to it, and that if it were owned by a natural person resident in the commonwealth who owed money in excess of the value of the bond, as the corporation did, such natural person could not be taxed on the bond. It is held, that such domestic corporation could be taxed on the bond, since the expression of the statute, "securities which if owned by a natural person resident in this commonwealth would be liable to taxation," was not intended to establish the same standard of taxation for the corporation as for an individual; the reference to such securities being merely to determine the taxable character of the securities, which, if they possess such character, are to be taken into account in estimating the value of the corporate franchise, while, from its total assets as determining such value, the corporation is entitled, upon making proper return, to deduct its debts, and so cannot have them deducted a second time by utilizing them, after they have reduced its franchise value, to extinguish the taxable character of particular items of the corporation's property. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

163. "Securities," as used in Mass. Tax Act (St. 1909, c. 490) part 3, \$ 41, providing that the tax upon the value of a cor-

porate franchise of a domestic business corporation shall not exceed a tax levied at a certain rate upon an amount 20 per cent in excess of the value of the works, etc., "and of the securities which if owned by a natural person resident in this commonwealth would be liable to taxation," is a word of sufficiently broad import to include bonds and other evidences of indebtedness. Bellows Falls Power Co. v. Commonwealth (Mass.) 1916C-834.

#### d. Assessment and Valuation.

164. The U.S. Corporation Tax Act (Act Aug. 5, 1909, Fed. St. Ann. 1909 Supp. p. 829) provides that every corporation organized for profit and having a capital stock represented by shares and engaged in business shall pay annually a special excise tax with respect to the carrying on or doing business by it equivalent to one per cent upon its entire net income from all sources during the year above \$5,000. Section 6301 provides that such net income shall be ascertained by making certain deductions from the gross income received within the year from all sources. Section 6302 provides that there shall be deducted from the net income, the sum of \$5,000, that the tax shall be computed upon the remainder of such income for the year ending December 31, 1909, and for each calendar year thereafter, and that on or before the first day of March in each year a true and accurate return, setting forth the gross amount of income received during the year, etc., shall be made by corporations subject thereto. It is held that the amount of the tax is measured by the corporation's income during the entire calendar year in which the privilege of doing business is exercised, and not by its income during the part of the year that the privilege is exercised if the corporation does not carry on or do business during the entire year, as the prescribed tax is a single and indivisible one, and but one way of measuring the amount to be paid is provided. Blalock v. Georgia R., etc. Co. (Fed.) 1917A-679.

165. The objection that a state board, when fixing the value of the capital stock of a railway company upon the capitalization-of-income plan, pursuant to Ky. Stat. §§ 4077-4081, for the purpose of ascertaining the value for taxing purposes of its intangible property, adopted a six per cent interest rate as the basis of capitalization instead of the higher rate reached by taking the railway company's mileage in each of the states in which it operates, multiplying this by the legal rate of interest in that state, and dividing the total of the products by the total mileage, is a criticism merely of the conclusion of the board upon a question of fact which is not properly subject to review by the courts. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97. (Annotated.)

166. To avoid a double assessment there must be deducted from the Kentucky apportionment of the value of the capital stock of an interstate railway company, the value of the Kentucky portion of the mileage controlled by it (in addition to the authorized deduction of the assessed value of the property there situated) when fixing, conformably to Ky. Stat. § 4081, the value of the intangible property of such company for tax purposes, since the local franchise would be assessed against each of the separate organizations. Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97. (Annotated.)

167. Valuation of Railroad Property for Taxation-Intangible Property. The method of deducting nontaxable assets adopted by a state board of valuation and assessment when fixing the value of the capital stock of a railway company upon the capitalization-of-income plan, pursuant to Ky. Stat. §§ 4077-4081, for the purpose of ascertaining the value for taxing purposes of its intangible property, cannot be said by the courts to be fundamentally erroneous merely because there was deducted from total net income the net income only of nontaxable securities owned by the corporation, although much of the stock of other corporations thus held, while paying no dividends, or dividends of low rate, may have had large intrinsic value by reason of the control it gave over other lines and the increment it brought to the aggregate income of the company. Louisville, etc. R. Co. v. Greene (U.S.) 1917E-97. (Annotated.)

168. The value of so much of the railway mileage controlled by an interstate railway carrier as is not represented by the latter's stock holdings should be included by the state board of valuation and assessment when fixing the value of the intangible property of such company for tax purpose, conformably to Ky. Stat. § 4081, which requires that "that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state bears to the total length of the lines owned, leased, or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state." Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97. (Annotated.)

169. The controlled mileage within and without the state, and not merely the operated mileage, is what the state board of valuation and assessment must take into consideration when fixing the value of the intangible property of an interstate railway company for tax purposes, conformably to Ky. Stat. § 4081, which requires that "that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state bears to the total

length of the lines owned, leased, or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state." Louisville, etc. R. Co. v. Greene (U. S.) 1917E-97. (Annotated.)

# e. Recovery Back of Tax.

170. Estoppel of Taxpayer to Question. As Mass. St. 1903, c. 437, §§ 60, 73, 74, deny a corporation, which fails to file seasonably with the secretary of the commonwealth the certificate of its condition as a foreign corporation, the right to maintain actions in the local courts and impose severe penalties, the act of foreign corporations which maintained places of business within the state, in filing such certificate and appointing the commissioner of corporations their agent for the service of process in accordance with section 58, does not estop them from denying that they are liable to the excise tax imposed by Foreign Corporation Tax Law (St. 1909, c. 490, pt. 3), particularly as section 70 of that statute, which provides the exclusive remedy for recovering such taxes when improperly paid, does not require any preliminary protest or statement of objection before filing the petition. Marconi Wireless Tel. Co. v. Commonwealth (Mass.) 1916C-214. (Annotated.)

# 13. SUCCESSION TAXES.

#### a. Nature.

171. There is a wide distinction between a tax on the right to export or to carry out of a state property after it has passed to an heir or legatee and has become his, and a tax on the property before it passes to him, or a tax upon his right to receive or of the deceased to devise and bequeath. Moody v. Hagen (N. Dak.) 1918A-933.

172. The term "droit de detraction" means a tax which is levied on the right of removal of property from one state to another, and does not include an inheritance tax, which is merely a tax upon the right to devise and to inherit. Moody v. Hagen (N. Dak.) 1918A-933.

# b. Validity of Statutes.

173. Discrimination Against Aliens. Section 8977 of the N. Dak. Compiled Laws of 1913, which imposes a tax of twenty-five per cent on the inheritance of non-resident aliens as opposed to a tax of one and one-half per cent on the inheritances of citizens and resident aliens residing in the United States, is not in violation of section 20 of article 1 of the constitution of North Dakota, which provides that "no citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens." Nor is it in violation of section

11 of article 1 which provides that "laws of a general nature shall have a uniform operation." Nor, where the decedent was a citizen of the United States and residing therein, is it in violation of article 6 of the treaty of amity and commerce between Norway and the United States (7 Fed. St. Ann. 828) and which provides that "the subjects of the contracting parties in the respective states may fully dispose of their goods and effects either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession ab intestato, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempt from all duty, called 'droit de detraction,' on the part of the governments of the two states respectively." Moody v. Hagen (N. Dak.) 1918A-933.

# c. Property Subject to Tax.

# (1) In General.

174. Time for Taxing Future Estate. A testatrix devised all of her real estate to her husband for life with the direction that if her sister survived it should go to the sister for life, remainder to any children the sister might leave surviving her. The will further provided that in event of the sister's death before that of the husband the property should go to the sister's children, and that if the sister died without issue, the property should go over to the testatrix's cousin. Shannon's Tenn. Code, §§ 726, 727, provide that where there shall be a devise to collateral relatives to take effect after the expiration of one or more life estates, the tax on such estate shall not be payable until the person liable for it shall come into actual possession, and that the tax shall be assessed upon the value of the estate at the time the right to possession accrues. Held, that as the interest of both the cousin and the sister was liable to be divested, they were not entitled to the enjoyment of the estate so as to be liable to transfer taxes. Lemore v. Raine's Estate (Tenn.) 1916D-(Annotated.)

#### Note.

Time for taxing future estates under succession tax acts. 1916D-309.

# (2) Situs of Property.

175. Property Subject to Succession Tax. Section 1873, Idaho Rev. Codes, so far as it applies to the facts presented here, limits the right to collect transfer tax upon inheritance to cases where property shall pass by will, or by the intestate laws of

this state, from any person who may die seised or possessed of the same while a resident of Idaho, or if such decedent was a non-resident at the time of his death, which property, or some part thereof, shall be within this state. State v. Dunlap (Idaho) 1918A-546.

176. The words "property which shall pass by will" are limited by the words "or the intestate laws of this state," and the tax is not payable because the owner of the property died testate if it would not be payable had he died intestate. The right to collect the tax, in either event is dependent upon the jurisdiction of the state over the transfer. State v. Dunlap (Idaho) 1918A-546.

177. While the situs of property is a controlling factor when the right to collect a property tax is under consideration, it must be remembered that an inheritance or succession tax is not a tax upon property, but is a bonus, in the nature of an excise or duty, exacted by the state for the privilege granted by its laws of inheriting or succeeding to property on the death of the owner, and that, in considering whether or not such a bonus is due, the location of the property is material only when it invests the state with jurisdiction to control the right to make the transfer by inheritance or succession. State v. Dunlap (Idaho) 1918A-546.

#### Notes.

Situs of income of corporation for purpose of income tax. 1918A-426.

Situs of corporate stock for purposes of succession tax. 1918A-555.

### (3) Estates of Non-residents.

178. Power to Appoint Appraiser—Conditions Precedent. It was not the intention of the legislature to attempt to provide for the appointment of an appraiser under the circumstances disclosed by this application, but it authorized such appointment, by the probate court, only in cases where proceedings to probate an estate are pending, or where the decedent has left an estate subject to probate in Idaho. State v. Dunlap (Idaho) 1918A-546.

#### Note

What constitutes "residence" in jurisdiction within personal property or inheritance tax statute. 1917B-726.

# (4) Estate of Surviving Joint Tenant.

179. Estate Passing by Survivorship. The share which a joint tenant takes in the property on the death of the other joint tenant does not pass by the laws regulating intestate succession, so as to be subject to an inheritance tax, since taxation laws must be strictly construed, and the statute does not in express terms au-

thorize the taxation of the interest accruing to a surviving tenant upon termination of the joint tenancy. Attorney General v. Clark (Mass.) 1917B-119.

# 14. INCOME TAX.

a. Validity.

#### (1) In General.

180. Independent of constitutional authority, the legislature may impose a tax v. Werth on incomes. Commonwealth (Va.) 1916D-1263.

181. St. Wis. 1911, § 1087m2, subd. 3, imposing an income tax on the income arising from business transacted within the state, though such business involves transactions in interstate commerce, does not violate Const. U. S. art. 1, § 8, giving Congress power to regulate commerce with foreign nation and among the several states, since that section does not prevent the exercise of the state's taxing power, so long as the tax does not impose a burden on interstate commerce. United States Glue Co. v. Oak Creek (Wis.) 1918A-421. (Annotated.)

# (2) Federal Income Tax Act.

182. The progressive rate feature of the income tax imposed by the Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), does not cause such tax to transcend the conception of all taxation, and to be a mere arbitrary abuse of power which must be treated as wanting in due process of law. Brushaber v. Union Pacific R. Co. (U S.) (Annotated.) 1917B-713.

183. The methods of collection at the source, prescribed by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), are not wanting in due process of law because of the cost to which corporations are subjected by the duty of collection cast upon them, nor because of the resulting discrimination between corporations indebted upon coupon and registered bonds and those not so indebted, nor because of the discrimination against corporations which have assumed the payment of taxes on their bonds which results from the fact that some or all of their bondholders may be exempt from the income tax, nor because of the discrimination against owners of corporate bonds in favor of individuals none of whose income is derived from such property, nor because the law does not release corporate bondholders from the payment of a tax on their bonds, even after such taxes have been deducted by the corporation, if, after the deduction, the corporation should fail, nor because the payment of the tax by the corporation does not relieve the owners of bonds, the taxes on which have been assumed by the corporation, from their duty

to include the income from such bonds in making a return of all income. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713. (Annotated.)

184. Limiting the amount of interest which may be deducted from gross income of a corporation for the purpose of fixing the taxable income to interest on indebtedness not exceeding one-half the sum of bonded indebtedness and paid-up capital stock, as is done by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), is not wanting in due process of law because discriminating between different classes of corporations and individuals. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713. (Annotated.)

185. Allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such right of deduction to corporations, as is done by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16. Fed. St. Ann. 1914 Supp. p. 185), does not render the tax wanting in due process of Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713. (Annotated.)

186. The allowance of a deduction of \$3,000 or \$4,000 to those who pay the normal tax, as is done by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), is not wanting in due process of law because those whose incomes are greater than \$20,000 are not allowed, for the purpose of the additional or progressive tax, a second right to deduct the \$3,000 or \$4,000 which they have already enjoyed, nor because, for the purpose of the additional tax, no second right to deduct dividends received from corporations is permitted. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713.

(Annotated.)

187. The allowance of a deduction of stated amounts for the purpose of ascertaining the taxable income, as is done by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), does not render the tax wanting in due process of law because of the discrimination between married and single people, and between husbands and wives who are living together and those who are not. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713. (Annotated.)

188. No unconstitutional discrimination and want of due process of law results because the owners of houses in which they live are not compelled by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), to estimate the rental value in making up their incomes, while those who live in rented houses are

not allowed, in making up their taxable income, to deduct the rent which they have paid, nor because of the fact that although family expenses are not, as a rule, permitted to be deducted from gross income, farmers are permitted to omit from their income return certain products of the farm which are susceptible of use by them for sustaining their families during the year. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713. (Annotated.)

189. An unwarrantable delegation of legislative authority is not made by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), because certain administrative powers to enforce the act are conferred by it upon the Secretary of the Treasury. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713.

(Annotated.)

190. The whole purpose of U. S. Const. 16th Amend. giving Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," is to exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of the constitutional requirement as to apportionment of direct taxes. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713. (Annotated.)

191. The retroactive effect of the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, c. 16, Fed. St. Ann. 1914 Supp. p. 185), which fix the preceding March 1st as the time from which the taxed income for the first ten months is to be computed, does not render the tax repugnant to the due process of law clause of U. S. Const. 5th Amend. (9 Fed. St. Ann. 288), nor inconsistent with the 16th Amendment itself, since the date of retroactivity did not extend beyond the time when the latter amendment became operative. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713.

(Annotated.)

192. Power to exclude from taxation some income of designated persons and classes, and to exempt entirely certain enumerated organizations or corporations, such as labor, agricultural, or horticultural organizations, mutual savings banks, etc., is not by implication forbidden to Congress by the provisions of U. S. Const. 16th Amend. that Congress may lay and collect taxes on incomes "from whatever source derived." Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713.

(Annotated.)

193. Labor, agricultural, or horticultural organizations, mutual savings banks, etc., can be excepted from the operation of the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166,

c. 16, Fed. St. Ann. 1914 Supp. p. 185), without rendering the tax repugnant to the federal constitution. Brushaber v. Union Pacific R. Co. (U. S.) 1917B-713. (Annotated.)

#### b. Construction of Statutes.

194. Taxable Income—Attorney's Fees. Va. Tax Bill, Schedule (Acts 1902-04, c. 148, as amended by Acts 1912, c. 279), is entitled "Tax on income," and, after providing for the taxation of incomes derived from specified sources, provides (subdivision 5) for the taxation of all other gains and profits derived from any source whatever. It is held that, the statute having provided for taxation of professional incomes derived from salaries, the income of an attorney derived from fees in the practice of his profession was subject to taxation, whether the rule of ejusdem generis be applied or independent thereof. Commonwealth v. Werth (Va.) 1916D-1263. (Annotated.)

195. Place of Taxation — Residence. A high sheriff who is by law required to be a resident of the shire town of his county, and who in fact spends the greater portion of his time there in the discharge of his duties, boarding at the jail, is a resident of that town and as such subject to a local income tax, though his wife and family continue to reside at his former home. Rex v. Board of Assessors (N. Bruns.) 1917B-721. (Annotated.)

196. Exemption from Income Tax—Government or County Officer. A sheriff is not a person employed in a "government" office nor is he a county officer "whose duties are necessarily performed in" the shire town of his county, within the meaning of exempting clauses in an act imposing an income tax on residents of that town. Rex v. Board of Assessors (N. Bruns.) 1917B-721.

197. Profits on Sale Outside State-Right to Subject. Under Wis. St. 1911, § 1087m2, subd. 3, providing that the income tax shall be collected on all incomes received by every person residing within the state, and by every non-resident on incomes derived from sources within the state, provided that any person engaged in business within and without the state shall, as to income other than that derived from rentals, stocks, bonds, securities, or evidences of indebtedness, be taxed only on that proportion of such income derived from business transacted and property located within the state, the term "business transacted within the state" includes not only that part of the business of a manufacturing corporation, located within the state, which consists of sales to residents of the state, but also its sales of its manufactured articles to persons without the state, either directly or from its branch houses located outside the state

and supplied from the home factory. United States Glue Co. v. Oak Creek (Wis.) 1918A-421. (Annotated.)

198. The income from sales made by a local manufacturing company of goods purchased outside the state and sold to buyers outside the state, either from its factory in the state or indirectly through branch houses out of the state, is not income derived from "business transacted within the state," and therefore is not taxable under Wis. St. 1911, § 1087m2, subd. 3. United States Glue Co. v. Oak Creek (Wis.) 1918A-421. (Annotated.)

199. Applicability to Judicial Salary. Wis. Const. art. 4, § 26, declares that the compensation of a public officer shall not be increased or diminished during his term of office, and Const. art. 8, \$1, as amended in 1908, declares that taxes shall be uniform, and shall be levied on such property as the legislature prescribes, that taxes, which may be graduated and progressive, may be imposed on incomes. privileges, and occupations, and that reasonable exemptions may be provided. Wis. St. 1913, § 1087m2, imposes an income tax on all sadaries or fees, and provides that salaries of public officers shall not be computed as part of the taxable income, where taxation thereof would be unconstitutional. Held, that it was the intent of the statute to tax the salaries of all public officers as part of their income, if they could be taxed, and that, as the amended provision was as broad, sweeping, and specific as the provision as to compensation, the salary of a circuit judge was subject to an income tax. State v. Nygaard (Wis.) 1917A-1065.

#### Note.

Taxable personal income under income tax statute. 1916D-1265.

# 15. POLL TAXES.

200. Validity. N. Car. Const. art. 5, § 1 declares that the general assembly shall levy a capitation tax on every male inhabitant over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at \$300, and that the state and county capitation tax combined shall never exceed \$2 per head. Section 2 declares that the proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent be appropriated for the latter purpose. Section 6 provides that taxes for county purposes shall be levied in the same manner as state taxes, and shall never exceed double the state tax, except for a special purpose, and with the special approval of the legislature. N. Car. Pub. Loc. Laws 1915, c. 27, providing for the construction of good roads of Alexander county, au-

thorizes the sale of bonds for that purpose, and the levy of a sufficient special tax on all polls, all real estate and personal property, always observing the constitutional equation between taxes on property and taxes on the polls, provided there shall not be levied a tax greater than thirty-three and one-third on the \$100 valuation, and \$1 on each poll. Const. art. 7, § 7, declares that no county, city, town, or other municipal corporation shall contract any debt or loan its credit, nor shall any tax be levied except for the "necessary expenses" thereof unless authorized by vote of the majority of the qualified electors. It is held that, as the constitution is necessarily a general instrument intended to be applicable to future conditions, and as the framers of the constitution must have known that necessary state and county expenses would practically consume the tax up to the \$2 limit, the act is valid, for the limitation on the poll and on the property taxed applies only to taxes levied for the ordinary expenses of the state and county governments, and such limitation may be exceeded for a special purpose with the approval of the general assembly, as any other construction would violate long continued legislative and executive construction, would prevent improvements by the counties, and would necessitate application of a large per cent of the poll taxes levied to relief of the poor, this being narticularly true in view of the additional powers given counties and other municipalities to contract debts upon approval of a majority of the voters. Moose v. Board of Commissioners (N. Car.) 1917E-(Annotated.)

Note.

Constitutionality of poll taxes. 1917E-1208.

# 16. TAXPAYERS' ACTIONS.

201. A taxpayer is not entitled to have a city enjoined from engaging in selling electrical appliances as a part of its business of furnishing electric light, where it did not appear that any increase in taxation resulted or that money was misappropriated. Andrews v. South Haven (Mich.) 1918B-100. (Annotated.)

202. In an action brought by taxpayers against the individual members of a county board to recover money alleged to have been illegally paid out by them while acting as the board of supervisors of the county, the petition was entitled "The County of Holt, a corporation duly organized under the laws of the state of Nebraska, by M. T. Hiatt and H. M. Uttley, residents of and taxpayers in said county, who bring this action for and in behalf of all the people in the county." A motion by the defendants to dismiss the action and by the county attorney to dismiss "as to the county," for the reasons

that the case was brought without authority of the county and the county disclaimed any interest in the suit, was sustained, and judgment of 'dismissal rendered. Held, that the action should not have been dismissed, but that the plaintiffs should have been allowed to proceed. making the county a party defendant, if they so desired. Holt County v. Tomlinson (Neb.) 1917A-853. (Annotated.)

203. Dismissal. In an action by a taxpayer, brought on behalf of a county, in which the county has been made to appear as plaintiff, neither the county nor the county attorney has any absolute right to a dismissal of the case upon motion on the ground that the action was not authorized by them or either of them, since in such actions the county authorities may to some extent occupy an adverse position to the interests of plaintiff and other taxpayers. Holt County v. Tomlinson (Neb.) 1917A-(Annotated.) 853.

#### TAX DEEDS.

See Taxation, 111-115.

#### TAXICABS.

See Carriers of Passengers, 84, 90.

#### TAXPAYER'S ACTION.

See Agriculture, 5, 10; Taxation, 201-203.

#### TAX SALES.

See Taxation, 111-115.

#### TAX TITLES.

See Taxation, 111-115.

#### TEACHERS.

See Schools, 29-32.

#### TELEGRAPHS AND TELEPHONES.

- 1. Definition, 813.
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Presumption as to receipt of telegram, see Evidence, 141, 142.

Municipal operation of telephones, see Municipal Corporations, 40, 41.

Telephone lines as nuisances, see Nuisances, 4.

Service of summons by telephone, see Process, 7.

Separation of electric wires, see Railroads.

Maintenance of wires along railroad, see Railroads, 55.

# 1. DEFINITION.

1. Status as Public Utility - Mutual Company. A mutual telephone company, organized to render service to its members at cost, to connect with other telephone companies on the basis of a mutual exchange, and to connect any of its members with toll lines for long-distance service, operating in a village under a franchise giving it the right to use the streets and alleys on the express condition that no person, firm, or corporation, excepting commercial telephone companies, shall be barred from membership on payment of the same membership fees as are paid by other members and on the payment of the same annual switching fees as are paid by other members, is a "public utility," within Ill. Public Utilities Act (Hurd's Rev. St. 1913, c. 111a) \$10, defining a public utility to include every corporation operating for public use any equipment used for or in connection with the transmission of telephone messages, or that may own any franchise to engage in the telephone business; for a "public use" means a public usefulness, utility, advantage, or benefit to a community as distinguished from an individual or any particular number of individuals, without including the entire state or any political subdivision thereof, and the use may be local or limited and confined to a particular district. State Public Utilities Com. v. Noble Mut. Tel. Co. (Ill.) 1916D-897.

(Annotated.)

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# RIGHTS UNDER FRANCHISE.

- 2. Right in Streets-Formation of Contract. The acceptance by a telegraph company of a grant by city ordinance of right to erect poles and wires in streets, and its performance of conditions imposed, such as opening an office in the city, create a contract which cannot be rescinded except for good cause. Vandalia v. Postal Telegraph-Cable Co. (Ill.) 1917E-523.
- 3. Right to Use Streets-Revocation. Iowa Code 1873, § 1324, as amended by Acts 19th Gen. Assem. c. 104 (Code 1897, § 2158), providing that any person or company may construct a telegraph or telephone line along the public highways of the state or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor, when accepted by a telephone company, became a contract between the state and the company whereby the latter acquired the right to run its lines through the streets and alleys of municipalities within the state, and, being unlimited, as to time, it is a special franchise in perpetuity, constituting a contract between the state and the accepting company, subject only to a proper exercise of the regulatory police power and to expressly reserved powers. State v. Iowa Tel. Co. (Iowa) 1917E-539. (Annotated.)
- 4. A telephone company was granted and accepted a franchise to operate its lines under Iowa Code 1873, § 1324, as
- amended by Acts 19th Gen. Assem. c. 104 (Code 1897, § 2158), providing that any person or company may construct a tele-graph or telephone line along the public highways of the state or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor. Code 1897, § 775, provides that cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway, and other electric wires, and the poles and other supports thereof, by general and uniform regulations, and to provide the manner in which and places where the same shall be placed upon, along, or under the streets, roads, avenues, alleys, and public places of such city or town, and may divide the city into districts for that purpose. Section 776 provides that no franchise shall be granted, renewed or extended by any city or town for the use of the streets, highways, avenues, alleys, or public places, for any of the purposes named in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. The council may order the question of granting, renewal, or extension of any franchise submitted to a vote at a general election. or at one specially called

for that purpose, or the mayor shall sub-

- mit such question to such vote upon the petition of twenty-five property owners of each ward in a city, or fifty property owners in any incorporated town. It is held that such sections did not deprive the telephone company of its franchise to operate its lines in a city, and thus impair the obligation of its contract, and deprive it of property without due process of law, since the object of such legislation was to authorize cities to regulate such companies as were already using the streets and alleys under the grant of the legislature and others which might secure such right by general and uniform legisla-tion applicable to all, and to provide that no such franchises should thereafter be granted, renewed, or extended, except upon a referendum vote. State v. Iowa Tel. Co. (Iowa) 1917E-539.
- 5. Crossing Public Highway-Necessity of Permit. Me. Rev. St. c. 55, § 17, providing that corporations or individuals engaged in operating telephones shall not construct lines "upon and along" highways and public roads without permission from the selectmen of towns, etc., forbids the placing of telephone wires across the highways, etc., by persons not so authorized, since the word "across" is synonymous with the words "upon and along." Mt. Vernon Tel. Co. v. Franklin Farmers', etc. Tel. Co. (Me.) 1917B-649.

# 3. CONTRACT FOR USE OF RIGHT OF WAY OF RAILROAD.

- 6. Right of Way-Incidental Rights-Contract With Railroad. In an action of trespass on the freehold for damages for the cutting of parts of shade trees on plaintiff's ground overhanging a railroad right of way, a contract between the railroad and the defendant telegraph company permitting the construction of a tele-graph line over the right of way for the joint use of the railroad and the company is admissible as showing that the telegraph company had derived from the railroad the right to construct the line with rights incidental thereto. Cobb v. Western Union Tel. Co. (Vt.) 1918B-1156.
- 7. Location Under Contract—Nature of Rights. A contract, giving a telegraph company the right to maintain its wires along a railroad right of way for a term of twenty-five years, and providing that at the expiration of that period either party might terminate the contract by giving one year's notice, does not give the telegraph company a permanent easement. Louisville, etc. R. Co. v. Western Union Tel. Co. (Ala.) 1917B-696.

# 4. PRESCRIPTIVE EASEMENT FOR POLES.

8. Where a telegraph company, without grant or license, sets its poles on the border of land owned by defendants with the

cross-arms extending three feet over such land, the prescriptive use of the easement for a time exceeding the statutory period of limitation does not give it a right to attach cross-arms extending eight feet over such land for the purpose of stringing additional wires. Postal Telegraph Co. v. Forster (Ore.) 1916E-979.

(Annotated.)

- 9. Where a telegraph company, which has acquired a prescriptive right to maintain its poles with the cross-arms extending three feet over defendants' land, is about to attach cross-arms extending eight feet over such land, defendants are entitled to injunctive relief and are not limited to a recovery of damages; the suit in which such injunctive relief was granted having been brought before the new cross-arms were put up and before any extra wires had been strung, authorizing a use of the means of communication in the interest of the public. Postal Telegraph Co. v. Forster (Ore.) 1916E-979.

  (Annotated.)
- 10. Where a telegraph company has acquired a prescriptive right to maintain its poles on the border between defendants' land and a railroad right of way with the cross-arms extending three feet over defendants' land, it cannot be enjoined from using its wires for telephone purposes, though Act Cong. July 24, 1866, c. 230, 14 Stat. 221 (7 Fed. St. Ann. 205) authorizing any telegraph company to construct and operate telegraph lines over and along post roads does not give the right to maintain telephone lines, as the use of the wires for telephone purposes cast no additional burden upon defendants' premises. Postal Telegraph Co. v. Forster (Ore.) 1916E-979.

# (Annotated.)

Acquirement by prescription of right to maintain telegraph, telephone or electric light pole. 1916E-981.

# 5. DUTY TO SERVE PUBLIC WITH-OUT DISCRIMINATION.

11. Telephone companies are public service corporations, and their instruments and apparatus are devoted to a public use, and must serve the public generally, without discrimination, on compliance with their reasonable rates and regulations, being bound to conduct their business in a manner conducive to the public benefit, and subject to legislative regulation and control. Wolverton v. Mountain States Tel. etc. Co. (Colo.) 1916C-776.

# (Annotated.)

# 6. REGULATION.

# a. In General.

12. Municipal Regulation of Telephones -Validity. Where a telephone company

has been granted a franchise to operate its lines under Iowa Code 1873, § 1324, as amended by Acts 19th Gen. Assem. c. 104 (Code 1897, § 2158), providing that any person or company may construct a telegraph or telephone line along the public highways of the state or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor, its right to operate its lines through the streets and highways of a city is subject to regulation by the city under its police power. State v. Iowa Tel. Co. (Iowa) 1917E-539.

#### b. Rates.

- 13. Regulation of Rates. Contracts with public service corporations for specific rates, and for definite periods, are subject to legislative regulation. Wolverton v. Mountain States Tel., etc. Co. (Colo.) 1916C-776.
- 14. The power to fix a rate or regulation for a public service corporation is exclusively a legislative function, and the court may not fix a rate, but may determine the question of reasonableness only. Wolverton v. Mountain States Tel., etc. Co. (Colo.) 1916C-776.
- 15. Regulation of Telephone Rates. If a telephone company's franchise from a city, limiting rates to be charged, is deemed a contract, the mere fact that it was made prior to the enactment of the Ore. Public Utility Act (Laws 1911, p. 483), and before the state attempted to regulate such rates, does not debar the state from increasing the rates as fixed in the franchise, because when the state exercises its police power, it does not work any impairment of obligation of the contract; the possibility of the exercise of such power being an implied term of the contract. Woodburn v. Public Service Commission (Ore.) 1917E-996. (Annotated.)

# c. Use of Streets.

16. Regulation of Use of Streets. Under Ill. Hurd's Rev. St. 1913, c. 134, § 4, providing for municipal regulation of location and erection of wires and poles of telegraph companies, a city, under its police powers, may make reasonable regulations as to maintenance of poles and wires of telegraph companies. Vandalia v. Postal Telegraph-Cable Co. (Ill.) 1917E-523.

#### d. Control of Public Service Commission.

17. Jurisdiction—What is Public Utility—Mutual Telephone Company. Where a mutual telephone association has no authority under its charter to engage in public telephone service, or to devote its property to public use, but is organized for the

1916C-1918B.

private use of its members only, and not for profit, an order of the public utilities commission, requiring the association to cease operations for failure to obtain a certificate of convenience and necessity, as required by Ill. Laws 1913, p. 483, \$55, is void, since the jurisdiction of the commission is confined, by the terms of the act creating it, to the control and supervision of owners and operators of property devoted to a public use. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (Ill.) 1917B-495. (Annotated.)

- 18. The fact that a mutual telephone association had obtained a license from the village to construct and maintain its telephone poles and wires in the streets, under which it is about to erect great quantities of poles and wires, does not fix its character as a corporation. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (Ill.) 1917B-495. (Annotated.)
- 19. Procedure Failure to File Statement of Valuation. The failure of the public service commission to file a statement of valuation mentioned in section 10 of the Ore. Public Utility Act (Laws 1911, p. 483) does not affect the validity of an order, allowing a telephone company to charge higher rates than those stated in its franchise, since the right to make the order does not depend upon filing the statement of valuation, and, in any event, under direct provision of section 75 of the act, technical omissions are immaterial. Woodburn v. Public Service Commission (Ore.) 1917E-996.
- 20. Power to Regulate Telephone Rates. Where a municipality under its home rule charter, adopted under Ore. Const. art. 11, 32, granted a telephone franchise limiting rates to be charged, and later the Ore. Public Utility Act (Laws 1911, p. 483) was enacted, the public service commission had authority thereunder to authorize the company to charge higher rates. Woodburn v. Public Service Commission (Ore.) 1917E-996.
- 21. Jurisdiction. The diversion of streets and alleys from their legitimate use by constructing a telephone system thereon would not give the public utilities commission jurisdiction over the association. State Public Utilities Com. v. Bethany Mut. Tel. Assoc. (III.) 1917B-495.

(Annotated.)

# 7. RIGHT TO MAKE RULES AND REGULATIONS.

- 22. Requiring Payment at Office. A rule of a telephone company, requiring payment of rentals at its business office, is reasonable and valid. State v. Kenosha Home Tel. Co. (Wis.) 1916E-365.
- 23. Rules—Change in Method of Collection. A telephone company is authorized to change its method of collecting rentals

by means of collectors, so as to require payment at its business office, where such change did not entrench on contract rights or statutory mandates. State v. Kenosha Home Tel. Co. (Wis.) 1916E-365.

### 8. TRANSMISSION OF MESSAGES.

# a. Refusal to Transmit.

24. Duty to Accept Message for Transmission. A telegraph company may refuse to send a message which is obscene, slanderous, blasphemous, profane, indecent, or the like. Western Union Telegraph Co. v. Franklin (Ark.) 1916D-466.

(Annotated.)

- 25. A message tendered to a railroad and telegraph agent for transmission to his superior officer, reading: "Please advise why you cannot get a civil answer out of your agent here. If you ask him anything he has to curse you out"—is neither slanderous, profane, nor indecent, and is entitled to be transmitted. Western Union Telegraph Co. v. Franklin (Ark.) 1916D-466. (Annotated.)
- 26. That the purpose of the sender of a telegraph message refused by the company's agent was to report the conduct of the agent to his superior did not affect the right to recover the penalty prescribed by Kirby's Ark. Dig. § 7946, for refusing to send the message. Western Union Telegraph Co. v. Franklin (Ark.) 1916D-466.

  (Annotated.)

#### Note.

Liability of telegraph company for refusal to accept message for transmission. 1916D-467.

#### b. Delay in Transmission.

- 27. Inevitable Delay—Duty to Notify Sender. A telegraph company, learning that, because of conditions brought about by no fault on its part, it is unable to deliver a message, must send a service message notifying the sender why delivery cannot be made. Jones v. Western Union Telegraph Co. (S. Car.) 1917C-543.
  - (Annotated.)
- 28. Duty to Transmit Message—Liability for Delay. A telegraph company receiving a message for transmission must deliver it within a reasonable time, and, where it fails through its wrongful act so to do, it is liable for the damages proximately resulting therefrom. Jones v. Western Telegraph Co. (S. Car.) 1917C-543.

# Note.

Duty of telegraph company to notify sender of delay in transmission or delivery of message. 1917C-545.

- c. Limitation of Time for Filing Claim.
- 29. Claim for Damages—Suit as Equivalent of Filing. The stipulation of a tele-

graph blank requiring notice in writing within sixty days, of claim for damages, is satisfied by commencing an action, by service of summons, within sixty days after sending two messages, for failure to deliver the first and delay in delivering the second, though at the same time notice of claim on account of the second message only was given, the company not having thereby been misled to its damage, and though the complaint was not filed till after the sixty days. Mason v. Western Union Tel. Co. (N. Car.) 1917D-159.

(Annotated.)

#### Note.

Commencement of suit as presentation of claim within stipulation on telegraph blank, 1917D-162.

# d. Actions.

# (1) Defenses.

30. Delay of Death Message—Proximate Consequence. A telegram notifying the addressee that one denominated father had died and would be buried the following evening carries with it a suggestion that, if the addressee cannot arrive at the hour named, the funeral will be postponed; and, where the telegraph company delayed the message, recovery cannot be defeated because the addressee could not have reached the place of the funeral in time had the message been promptly delivered. Western Union Tel. Co. v Blake (Ark.) 1916C-521.

#### (2) Pleading.

31. Joinder of Causes of Action—Delay and Failure to Notify—Inconsistency. A cause of action for a telegraph company's nondelivery of a message is inconsistent with a cause of action for its failure to send a service message on learning that, because of conditions brought about by no fault on its part, it is unable to make delivery of the message, and one cannot recover damages for a wrongful failure to deliver and for a wrongful failure to send a service message. Jones v. Western Union Telegraph Co. (S. Car.) 1917C—543.

#### (3) Evidence.

32. Evidence — Hearsay — Statement of Unexecuted Intention. In an action for damages for delay in the transmission of a death message, testimony by the son and son-in-law of the deceased who assisted his wife in making the funeral arrangements that, had the addressee notified them of his intention to come, the funeral would have been postponed is not hearsay. Western Union Tel. Co. v. Blake (Ark.) 1916C-521.

# (4) Instructions.

33. Permitting Double Recovery. Where the complaint, in an action against a tele-

graph company, alleged damages for nondelivery of a message and for failure to send a service message, a charge authorizing a verdict for actual and punitive damages for nondelivery and a verdict for actual and punitive damages for failure to send a service message is erroneous and prejudicial to the company. Jones v. weekern Union Telegraph Co. (S. Car.) 1917C-543.

# (5) Questions for Jury.

34. Delay—Negligence for Jury. In an action for damages for delay in the transmission of a death message, evidence whether it could have been delivered within time by the exercise of reasonable care held sufficient to go to the jury. Western Union Tel. Co. v. Blake (Ark.) 1916C-521.

# (6) Damages.

35. Disclosing Contents of Message—Punitive Damages. Proof of wilfulness is essential to the recovery of punitive damages against a telegraph company for the act of its agent in disclosing the contents of a message. Purdy v, Western Union Tel. Co. (S. Car.) 726. (Annotated.)

#### Note.

What is excessive verdict for mental anguish in telegraph case. 1916C-524.

# (7) Appeal.

36. Instruction on Evidence Disbelieved by Jury. In an action against a telegraph company for refusal of agent to transmit message to his superior officer complaining of his conduct, where plaintiff and his witnesses testified that the agent refused to send it, and thereafter asked plaintiff to give him that "damned telegram" and that plaintiff did not let him have it, fearing he would destroy it, and the agent testified that he asked for it that he might send it, as the verdict showed that the jury believed the statements of plaintiff and his witnesses which conflicted with that of the agent, any error in the instructions given and refused relating to the subsequent offer of the agent to transmit the message are so immaterial as not to require reversal of the judgment for plaintiff. Western Union Telegraph Co. v. Franklin (Ark.) 1916D-466.

# Note,

Liability of telegraph company for disclosure of contents of message. 1916C-727.

# 9. RIGHTS AND LIABILITIES OF TELEPHONE COMPANIES.

37. Contracts — Termination. Under a contract for telephone service at a residence not extending to any definite time, and which plaintiff, the subscriber, could

1916C-1918B.

terminate at any time, the court was without power to perpetuate it for business purposes at the agreed rate for residence purposes, which might or might not be reasonable, since such contracts for fixed periods are impractical, if not impossible, from their very nature. Wolverton v. Mountain States Tel., etc. Co. (Colo.) 1916C-776.

#### TELEPHONES.

See Telegraphs and Telephones.

# TEMPORARY INJUNCTION.

Restraining order distinguished, see Injunctions, 37, 38.

# TENANCY FROM YEAR TO YEAR.

Created by holding over, see Landlord and Tenant, 49.

#### TENANT.

Who is, see Landlord and Tenant, 1.

#### TENANTS.

See Landlord and Tenant.

#### TENANTS IN COMMON.

- 1. Creation and Nature of Tenancy.
- 2. Rights and Liabilities Inter Se.
  - a. Purchase by Cotenant.
  - b. Removing Burdens from Estate,
- c. Accounting Between Cotenants.
  3. Rights and Liabilities as to Third Per-
- sons.

Wrongful confusion, effect, see Confusion, 6-9.

Interest subject to homestead, see Homestead, 6.

stead, 6.
Mining by cotenant, measure of damages, see Mines and Minerals, 8.

Agreement to suspend partition, see Partition, 2.

Partition by agreement, see Partition, 1. Partition by suit, see Partition, 4.

Partition by suit, see Partition, 4.
Presumption as to intent to create, see
Wills, 213.

# 1. CREATION AND NATURE OF TENANCY.

1. A provision in a deed by which the owner of land conveys to each of two sisters a third interest in it that, while all three may occupy it as a home so long as they remain unmarried, one of them marrying, may not longer so occupy it, is not inconsistent with a joint tenancy so as to prevent the deed creating one. It does no more than provide a contingency on which such tenancy shall cease. Wood v. Logue (Iowa) 1917B-116.

(Annotated.)

2. A deed clearly showing intent to create a joint tenancy between the grantor and grantees, and by the last clause providing that the one of them last dying is to be the absolute owner of the property, the use of the word "inherit," with reference to acquirement by survivors of the title of one dying, will be considered merely an inaccurate application of it to acquirement of title by survivorship. Wood v. Logue (Iowa) 1917B-116.

(Annotated.)

3. Estates—Joint Tenancy or Tenancy in Common. The law prefers to construe a gift to several as creating a tenancy in common instead of a joint tenancy. Allen v. Almy (Conn.) 1917B-112.

(Annotated.)

(Annotated.)

- 4. Even at common law provisions of an instrument which contemplated a division of property were construed to create a tenancy in common rather than a joint tenancy. Allen v. Almy (Conn.) 1917B-112. (Annotated.)
- 5. Nature of Title. The title to tenants in common in land is separate, there being no unity in title, but only unity of possession. Firemen's Ins. Co. v. Larey (Ark.) 1917B-1225.

#### Note.

Nature of estate resulting from creation of cotenancy. 1917B-57.

# 2. RIGHTS AND LIABILITIES INTER

#### a. Purchase by Cotenant.

- 6. Purchase of Outstanding Title—Tenants Asserting Hostile Claims. The rule which prevents one tenant in common from purchasing an outstanding title to the common property and setting it up against his cotenant is founded upon the confidential relation which is presumed to exist between them, and has no application where the circumstances surrounding them negative any such relation, and show that they, though in law tenants in common, are not such in fact, and are asserting hostile claims against each other with reference to the common property. Shelby v. Rhodes (Miss.) 1916D-1306.
- 7. Property was conveyed by a void deed to a married woman, and on her death intestate she left as heirs her husband and a minor son. The father sold the property by warranty deed to a purchaser, who had no knowledge of the interests of the son. On discovery of such interest the purchaser procured a quitclaim deed from the original grantor. It is held that, pretermitting the discussion as to whether the infant son was a tenant in common with the purchaser, the quitclaim deed did not inure to the minor to perfect his title, since the purchaser at all times held ad-

versely to the minor, and there were never any confidential relations between them. Shelby v. Rhodes (Miss.) 1916D-1306.

(Annotated.)

#### Note.

Rule preventing tenant in common from purchasing outstanding title as applicable where tenants hold adversely to each other. 1916D-1307.

- b. Removing Burdens from Estate.
- 8. Subjection of Share of Tenant to Mortgage Debt-Subrogation to Rights of Mortgagee. Plaintiff and his cotenant gave a mortgage on the common property to secure a note which they failed to pay, whereupon a subsequent mortgagee of the cotenant's interest paid the note, obtained judgment thereon in another state, and in an action on the judgment in this state attached and sold plaintiff's undivided interest for the amount of the foreign judgment with interest and costs. It is held that plaintiff was entitled to be subrogated to the rights of the mortgagee in his cotenant's interest, as against the subsequent mortgagee and a grantee of the cotenant's interest, to the extent of one-half of the amount for which his interest was sold. Sprowls v. Sprowls (S. Dak.) 1917A-830. (Annotated.)
  - c. Accounting Between Cotenants.
- 9. Accounting Parties Effect of Assignment. The K. Co. and the C. Co. were equal owners and tenants in common of a mining right. The K. Co. secretly extracted ore therefrom, failed to account therefor, and conveyed its property to the M. Co., which, in consideration of that conveyance, assumed and agreed to pay all the debts and obligations of its grantor.

Held, a suit in equity can be maintained by the C. Co., or its assignee, against the M. Co., without the presence of the K. Co. to enforce the contract of the M. Co. to pay the obligation of its grantor to account to the C. Co. for the latter's share of the value of the ore the K. Co. extracted from the common property. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571.

10. Compensation for Services—Sale of Common Property. A tenant in common is not entitled to compensation for services in selling the common property in the absence of an agreement therefor, and no agreement to pay compensation will be implied from the fact that his cotenant had knowledge of the efforts to sell, acquiesced therein, and was benefited by the sale. Wall v. Focke (Hawaii) 1916C-677. (Annotated.)

#### Note.

Right of tenant in common to compensation for services in selling common property. 1916C-680.

- 3. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.
- 11. Action for Injury to Property—Necessity of Joinder. In case of tenancy in common, where there is a holding in severalty, each separate owner must sue for his share of the property. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.

(Annotated.)

12. A suit to recover the entire amount of damages for permanent injury to the freehold cannot be instituted by one of the tenants in common not in exclusive occupancy; and, where the land was partitioned in its damaged condition, the other tenants retained their right of action already accrued. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604. (Annotated.)

#### Note.

Right of one tenant in common to sue for damages for injury to premises. 1918A-608.

#### TENDER.

Effect of refusal as to accommodation maker, see Bills and Notes, 44.

Necessity of tender as condition precedent to commission, see Brokers, 7.

Waiver of tender, action for commission, see Brokers, 7.

Tender of amount equal to verdict as bar to recovery of interest, see Interest, 3. Option made binding by tender, see Vendor and Purchaser, 3.

1. Evidence Sufficient. The pleading and evidence required a finding on the issue of tender of payment by the judgment debtor under which plaintiffs affected redemption. If the findings in this case are to be construed to the effect that, by direct authority of the judgment debtor, a tender in lawful money of the full amount of plaintiffs' judgment was not made to them personally prior to the time when they could use the same for redemption purposes, they are not justified by the evidence. Orr v. Sutton (Minn.) 1916C-527.

TENEMENT HOUSE LAW. See Disorderly Houses, 3-5.

TENEMENT HOUSES. See Buildings, 3-5.

TEN HOUR DAY.

See Labor Laws, 6-9, 18.

TENT.

Defined, see Buildings, 1.

# TENURE OF OFFICE.

See Public Officers, 36-43.
Terms and conditions defined, see New Trial, 37.

TESTAMENT.

See Wills.

TESTAMENTARY CAPACITY. See Wills, 49-96.

TESTIMONY.

See Evidence.

TESTS FOR INSANITY.

See Insanity, 1, 2,

#### TERRITORIES.

1. Effect of Territorial Laws After Statehood—Prior Contracts. The laws of Arkansas, which were extended over the Indian Territory, are in force in this state as to rights arising under contracts entered into in the Indian Territory prior to statehood, and said laws of Arkansas need not be pleaded or proved. Marx v. Hefner (Okla.) 1917B-656.

#### THEATERS AND AMUSEMENTS.

- Statutory Regulation of Moving Pictures,
- 2. Rights of Purchaser of Ticket.

3. Injuries to Patrons,

Authority of manager to hire help, see Agency, 17.

Restriction by vendor patentee of film of use by vendee, see Patents, 1, 2.
Replevin for moving films, see Replevin, 2.

# 1. STATUTORY REGULATION OF MOVING PICTURES.

- 1. Importation of Prize Fight Films-Validity of Statute. The contention that Congress exceeded its power under the commerce clause of the federal constitution by enacting the provisions of the act of July 31, 1912 (37 Stat. at L. 240, c. 263, Fed. St. Ann. 1914 Supp. p. 326), § 1, making it unlawful to bring into or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight which is designed to be used, or may be used, for purposes of public exhibition, is so obviously devoid of merit that a bill which, on the ground of the unconstitutionality of such statute, sought to compel the collector of customs to permit the entry of photographic films of a foreign prize fight, states no cause of action, and is properly dismissed by a Federal district court. Weber v. Freed (U. S.) 1916C-317.
- 2. Censorship—Validity of Statute. The censorship by a state board of censors, conformably to 103 Obio Laws, 399, of motion picture films which are "to be publicly exhibited and displaced in the state

of Ohio," is not an unlawful burden on interstate commerce, even as applied to films which are brought in from another state, but which are in the hands of film exchanges, ready for rental to exhibitors, or have passed into the possession of the latter. Mutual Film Corp. v. Industrial Commission (U. S.) 19160-296.

(Annotated.)

- 3. The freedom of speech and publication guaranteed by Ohio Const. art. 1, § 11, with responsibility only for abuse, is not violated by the provisions of 103 Ohio Laws, 399, for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition, motion pictures films which are to be publicly exhibited and displayed in the state, and is to pass and approve only such films as are, in its judgment, of a moral, educational, or amusing and harmless character. Mutual Film Corp. v. Industrial Commission (U. S.) 1916C-296.
- 4. Legislative power is not unlawfully delegated by the provisions of 103 Ohio Laws, 399, for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition, motion picture films which are to be publicly exhibited and displayed in the state, and is to pass and approve only such films as are, in its judgment, of a moral, educational, or amusing and harmless character. Mutual Film Corp. v. Industrial Commission (U. S.) 1916C-296. (Annotated.)

Note.

Moving pictures. 1916C-301.

#### 2. RIGHTS OF PURCHASER OF TICKET.

5. A ticket of admission to a theater or show is not a license revocable at will but entitles the holder to remain throughout the entire performance unless his conduct affords reasonable ground for his ejection.

Hurst v. Picture Theaters (Eng.) 1916D-457.

Note.

Rights of purchaser of ticket of admission to place of amusement. 1916D-464.

# 3. INJURIES TO PATRONS.

6. Entertainment not for Profit-Personal Injury - Liability of Promoter. Where the court instructs the jury that those defendants who devised means to raise money for a celebration for a Fourth of July, and outlined the program which was advertised in the papers to secure the attendance of a crowd at such celebration, would not be liable for injury to the plaintiff in the absence of proof to connect them with the race itself on the day of the injury, and that only those so proved to be connected with it on such day would be liable, held, that such instruction was prejudicial to the plaintiff. The court should have instructed the jury under the facts in this case that the commercial club and its codefendants, at whose instance and under whose supervision the race was promoted and conducted, were liable to a traveler upon such street, who without fault on his part was struck and injured by one of the horses in the race, if at such time said defendants were the promoters of and had knowledge that the race in question was to be conducted as a part of the program. Marth v. Kingfisher Commercial Club (Okla.) 1917E-235. (Annotated.)

- 7. Scenic Railway—Liability for Personal Injury. The operator of a scenic railway in an amusement park is bound to exercise the highest degree of care and caution for the safety of its passengers, the same as would a common carrier; the danger of such amusement necessitating excessive care. Best Park etc. Co. v. Rollins (Ala.) 1917D-929. (Annotated.)
- 8. Personal Injury—Liability for Defective or Unsafe Device. The general concessionary as to amusement devices from a state fair association, who, for a percentage of the receipts, let privileges to operate particular devices to subconcessionaries, having control of the amusements on the grounds and the selection of the attractions and of their operators, was under duty to use reasonable care to see that a device for the carriage of passengers, simulating wave motion, called an "Ocean Wave," was reasonably safe. Hartman v. Tennessee State Fair Assoc. (Tenn.) 1917D-931. (Annotated.)
- 9. The immediate operator of an amusement device at a state fair carrying passengers, who leases the privilege to operate from the general concessionary from the fair for a share of the receipts, is charged with the duty to his patrons of maintaining the place and device in a safe condition. Hartman v. Tennessee State Fair Assoc. (Tenn.) 1917D-931. (Annotated.)

#### Note.

Liability of organizer or promoter of public entertainment not given for profit for personal injuries. 1917E-238.

# THEFT.

See Larceny.

#### THEN.

Meaning, see Indictments and Informations, 15.

#### THEN AND THERE.

Meaning, see Indictments and Informations, 15.

# THEORY OF TRIAL COURT.

Effect on appeal, see Appeal and Error, 159-165.

# THING IN ACTION.

Assignability, see Assignments, 11-16. Defined, see Assignments, 14.

#### THING OF VALUE.

Promissory note is, see False Pretenses, 2.

#### THREATS.

Threat to sue for trespass, lawful, see Extortion, 2.

Threats by deceased, admissibility, see Homicide, 38.

# TIDE LANDS.

See Public Lands, 2-6.

#### TIDES.

Judicial notice of, see Evidence, 18.

#### TIE VOTE.

See Elections, 75.

#### TIMBER.

Defined, see Trees and Timber, 1.

#### TIME.

Time of appeals, see Appeal and Error, 47-51.

Motion to dismiss appeal, see Appeal and Error, 82, 84.

When objections must be made for availability on appeal, see Appeal and Error, 420-424.

For suing on insurance contract, see Beneficial Associations, 3.

As essence of contract, see Contracts, 8, 16.

Reasonable time for termination implied, see Contracts, 18.

Waiver of time stipulation, see Contracts, 50, 93.

Time for rescission, see Contracts, 51, 52. Of death presumed from absence, see Death, 1, 2, 4.

For holding elections, see Elections, 19, 20. Contracts not to be performed within a year, see Frauds, Statute of, 1, 2.

When infant may disaffirm contract, see Infants, 9-11.

When relation of guest begins, see Innkeepers, 1.

When interest begins to run, see Interest,

For vacation of judgments, see Judgments, 33-35, 41.

Of entry of default, see Judgments, 46, 47. Purchaser's right to time for search of title, see Judicial Sales, 3.

Reasonable time for notice, see Landlord and Tenant, 46.

Of hiring, see Master and Servant, 1, 2.

When ordinance becomes effective, see Municipal Corporations, 100.

Time for moving for new trial, see New Trial, 26-28, 35.

Time for reconsidering order, see New Trial, 41.

When objection to pleading must be made, see Pleading, 15.

When pleading must be amended, see Pleading, 78.

Variance in date of contract, see Pleading, 101.

Publication of summons, see Process, 8-11. For suing to rescind, see Rescission, Cancellation and Reformation, 19.

Of taking effect of statutes, see Statutes, 95, 96.

Limiting time for filing claims, see Telegraphs and Telephones, 29.

Time for preparation as ground for continuance, see Trial, 3-5.

Date as essential to will, see Wills, 29.

#### TITLE.

See Quieting Title.

Abstract of, see Abstract of Title.

- 1. Computation-Exclusion of Intervening Sunday. Mass. Rev. Laws, c. 177, § 2, provides that judgments in municipal courts shall be entered at 10 A. M. on the Friday of each week, or on the preceding Thursday if Friday is a holiday. Rev. Laws, c. 173, § 97, as amended by St. 1910, c. 534, § 1, provides that an appeal from a municipal court may be taken within six days after entry of judgment. Judgment was entered in a municipal court on Friday at 10 A. M., and the appeal perfected the following Friday at 11:15 A. M. It is held that the appeal was duly perfected, since in computing the six-day period Sunday was to be excluded, under the general rule that, when a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited is less than a week, Sundays are excluded therefrom. Stevenson v. Donnelly (Mass.) 1917E-932. (Annotated.)
- 2. In computing the time allowed for filing a motion for new trial, an intervening Sunday must be included; and, where such motion is filed on the Wednesday next succeeding the Thursday on which the verdict was returned, it is not within the five days prescribed by subsection 160 of section 4226, N. Mex. Code 1915. Atchison, etc. R. Co. v. Solorzano (N. Mex.) 1917E-950. (Annotated.)
- 3. Where a contract for the hire of a steam shovel plant provides for a rental of a stipulated sum per day "to run each and every day until the work is complete," intervening Sundays are to be included in computing the number of days for which rental is to be paid. Perry v. Brandon (Ont.) 1917E-948. (Annotated.)

- 4. Meaning of "Days." Where an appeal from the municipal court must be taken within six days, the word "days" is used in the sense entire days. Stevenson v. Donnelly (Mass.) 1917E-932.
- 5. Computation—"From" as Word of Exclusion. When a period of time is to be reckoned from a certain day, the day from which the time is to be reckoned is excluded from the computation. Frey v. Rhode Island Co. (R. I.) 1918A-920.
- (Annotated.)
  6. "Reasonable Time." Reasonable time may be defined generally to be so much time as is necessary under the circumstances for a reasonably prudent and diligent man to do, conveniently, what the contract or duty requires should be done, having regard for the rights and possibility of loss, if any, to the other party to be affected. Citizens Bank Bldg. v. L. & E. Wertheimer (Ark.) 1917E-520.
- 7. "To" as Word of Exclusion. R. I. Gen. Laws 1909, c. 275, § 3, provides that there shall be a vacation of the superior court from the second Monday in July to the third Monday in September of each year, and section 11 provides that in vacation the superior court shall not hear jury trials. Chapter 32, § 12, provides that whenever time is to be reckoned from any day such day shall not be included in the computation. It is held that as the word "to," like the word "from," is generally a word of exclusion, and as chapter 275, § 2, requires the superior court to hold sessions at certain points on the third Monday in September, the superior court may hear jury trials on the second Monday in July. Frey v. Rhode Island Co. (R. I.) 1918A-920.

#### Note.

Exclusion or inclusion of Sunday or holiday in computation of time. 1917E-934.

#### TIPS.

As part of earnings, see Master and Servant, 277.

#### TITLE.

Nature of title acquired by condemnation, see Eminent Domain, 18-21. Proof of title to land, see Evidence, 48. As part of ordinance, see Municipal Cor-

porations, 53.
Of trustee in trust property, see Trusts

Of trustee in trust property, see Trusts and Trustees, 22.

TO.

Meaning, see Time, 7.

#### TOBACCO.

Not a food, see Food, 1.

TOBACCO PREMIUMS. See Licenses, 21.

# TORNADO INSURANCE.

See Insurance, 60.

#### TORTS.

See Conspiracy; Death by Wrongful Act; False Imprisonment; Libel and Slander; Malicious Prosecution; Negligence; Trespass.

Principal's liability for agent's tort, see Agency, 25, 26.

Assignability of cause of action, see Assignments, 11-14.

Attorney's lien on cause of action, see Attorneys, 39, 41.

Wilful and malicious injury, effect of defendant's bankruptcy, see Bankruptcy,

Order of superior as defense, see Militia,

Liability of cities, see Municipal Corporations, 167-187.

Tort counterclaim in tort action, see Setoff and Counterclaim, 1.

Liability of state for officers' torts, see States, 8.

- 1. Incidental Injury to Third Person. Where one is injured by the wrongful act of another, and a third person suffers an indirect loss because of some contract obligation to the injured party, such loss is not actionable; but where one is injured by the wrongful act of another, and a third person is indirectly and consequently injured in his business relations, the injury to the latter is actionable, though not directly committed on him, if it was maliciously and fraudulently done. Nieberg v. Cohen (Vt.) 1916C-476.
- 2. Malicious Act Defined. A "malicious" act is one injurious to another, intentional, and without legal justification, and is unlawful and actionable, but if an act, otherwise lawful, has a reasonable tendency to promote ends advantageous to the doer, malice in the doing does not bring it within the rule. Hutton v. Watters (Tenn.) 1916C-433. (Annotated.)
- 3. In an action for wrongful injury to plaintiff's business, the question of whether the acts complained of were within the rights of the defendant as being in the due course of competition for his own advantage, or actuated solely by malice and unjustifiable, must be determined upon the facts in each case, and no rule can be laid down for its determination. Hutton v. Watters (Tenn.) 1916C-433.

(Annotated.)

4. Lawful Act Committed With Malicious Motive. Plaintiff's petition alleged that she operated a boarding house near a school of which the defendant was president; that the defendant, having disagreed with one boarder at the plaintiff's house, demanded his ejection therefrom and was refused; that he, with others, then attempted to, and did, destroy the

plaintiff's business, by threats against students who boarded with the plaintiff, by deterring new arrivals from going to the plaintiff's house, and by other means; that the plaintiff was of good character, and operated a reputable house; and that the defendants acted from ill-will, and not by reason of business rivalry or competition. Held, that the declaration was not demurrable, the facts showing a cause of action, even though the act itself was lawful, if the defendant was actuated by malice and destroyed the plaintiff's business without reasonable advantage to himself, since every person has the right to conduct a lawful business and to have that right enforced or the wrong redressed if the right is infringed upon. Hutton v. Watters (Tenn.) 1916C-433. (Annotated.)

- 5. Unlawful Act. It is no defense to an action for injuries resulting from a violation of law that the actual breach of the law was committed by a contractor, if the employer knew of and sanctioned the illegal act. Prest-o-lite Co. v. Skeel (Ind.) 1917A-474.
- 6. Wrongfully Procuring Servant's Discharge. In an action by the employee of a manufacturing company against an insurance company for damages for wrongfully procuring plaintiff's discharge by his employer, evidence held not to sustain a finding that plaintiff was discharged because of defendant's suggestion or wrongful interference in plaintiff's employment. Johnson v. Aetna Life Ins. Co. (Wis.) 1916E-603. (Annotated.)
- 7. In an action against an insurance company for wrongfully procuring plaintiff's discharge by his employer, evidence for plaintiff held to make a prima facie case that defendant procured plaintiff's discharge to prevent him from earning money so as to enable him to maintain an action for damages for personal injuries. Johnson v. Aetna Life Ins. Co. (Wis.) 1916E-603. (Annotated.)
- 8. If defendant insurance company procured plaintiff's discharge by his employer in order to prevent plaintiff from earning money, to prosecute his suit for damages for personal injuries, defendant is liable to plaintiff in damages for wrongfully procuring his discharge. Johnson v. Aetna Life Ins. Co. (Wis.) 1916E-603.

(Annotated.)

- 9. If defendant was justified in procuring plaintiff's discharge by his employer, the fact that defendant acted from malicious motives will not make it liable to plaintiff. Johnson v. Aetna Life Ins. Co. (Wis.) 1916E-603. (Annotated.)
- 10. Persons Liable Aiding or Encouraging. One present at the commission of a tort encouraging or inciting the same by words, gestures, looks, or signs, or by any means countenancing or approving the act, is in law an "aider and

abettor." and liable as principal. Ratcliffe v. Walker (Va.) 1917E-1022.

11. Joint Tortfeasors-Unsatisfied Judgment Against One-Effect. A judgment in which execution has been returned nulla bona against one joint tortfeasor is not a bar to an action against the other tortfeasor. Ketelsen v. Stilz (Ind.) 1918A-

#### Notes.

Act lawful in itself not rendered unlawful by malicious motive. 1916C-438.

Civil liability for interference with contract relations. 1916E-608.

#### TOTAL DISABILITY.

Compensation for Workmen's Compensation Act, see Master and Servant, 281.

# TOTAL LOSS.

Of building, see Fire Insurance, 37. Abandonment on "restraint of princes," see Marine Insurance, 2.

#### TOWNS.

See Counties; Municipal Corporations. Appellate jurisdiction of action under rev-

enue act, see Appeal and Error, 10. Township organization of county, see Counties, 1-4.

Village within, separate entity for election, when, see Local Option, 3.

Permission to string wires, see Nuisances,

4. Recovery by town of money paid by mistake, see Payment, 11, 12.

Liability for pauper's medical aid, see

Poor and Poor Laws, 1.
Reimbursement for aid of nonresident pauper, see Poor and Poor Laws, 8, 11.

- 1. Right to Road and Bridge Tax. Under Mo. Const. art. 10, § 22, authorizing a township special levy of road and bridge taxes, and forbidding diversion to any other purpose, the road and bridge taxes levied and collected by a township from citizens living within the corporate limits of a city comprised within the township belong to the township, and not to the city. Lamar Township v. Lamar (Mo.) 1916D-740.
- 2. To construe Mo. Rev. St. 1909, § 11767, to authorize a township to pay over to a city road and bridge taxes collected from citizens living within the corporate limits of the city would render it violative of Const. art. 4, § 46, prohibiting the General Assembly from making a grant of public money to a municipal corporation. Lamar Township v. Lamar (Mo.) 1916D-740.

#### TOWNSHIP.

See Towns.

#### TRACTION ENGINE.

Use of streets by, see Streets and Highways, 19.

TRADE, BUSINESS OR PROFESSION. Derogatory statements concerning, see Libel and Slander, 28-32.

#### TRADE FIXTURES.

See Fixtures.

# TRADEMARKS AND TRADENAMES.

1. Acquisition.

2. Alienation.

- 3. Infringement and Unfair Competition.
  - a. What Constitutes Infringement. b. What Constitutes Unfair Competi
    - tion.
      - (1) Use of Geographical Name. (2) Use of Personal Name.
  - c. Actions.

Brands and labels, see Food, 6, 7.

# 1. ACQUISITION.

1. Acquisition of Tradename -- Necessity of Actual Use. One person cannot exclude another from using a particular name as a tradename, unless he has made actual prior use of such name as his own tradename. Rodseth v. Northwestern Marble Works (Minn.) 1917A-257.

#### 2. ALIENATION.

2. Transfer Apart from Business. One having the exclusive right to use a tradename can transfer such right to another only when coupled with a transfer of some property or business with which the name has become identified. Rodseth v. North-western Marble Works (Minn.) 1917A-(Annotated.)

Note. Assignability of trademarks and tradenames, 1917A-260,

#### AND INFRINGEMENT UNFAIR COMPETITION.

What Constitutes Infringement.

- 3. Use by Corporation of Own Name. If the name of a corporation has become established as the tradename of another before its use as such by the corporation, the corporation may be enjoined from using it as a tradename, except in such form as will fairly distinguish it from the name already in use. Rodseth v. North-western Marble Works (Minn.) 1917A-257.
- b. What Constitutes Unfair Competition.
  - (1) Use of Geographical Name.
- 4. Acquisition of Secondary Significance. No one can acquire the exclusive right to

use the name of the place where his business is located, nor the exclusive right to use words properly descriptive of the nature of the business, but where he establishes a tradename containing such geographical name and such descriptive words, if a competitor subsequently desires to use the same name and the same or similar descriptive words in his own tradename, he must put them in such form, or combine them with other words in such manner, that his tradename will be fairly distinguishable from the tradename first in use. Rodseth v. Northwestern Marble Works (Minn.) 1917A-257.

# (2) Use of Personal Name.

- 5. Unfair Competition—Use of Personal Name. While a natural person has an unqualified right to the use of his family name in conducting any business, though such use be detrimental to other individuals of the same name, he cannot combine his name with others for the purpose of working a fraud. Wood v. Wood (Ore.) 1918A-226. (Annotated.)
- 6. Plaintiffs formed the Wood Realty Company, a firm engaged in the real estate business. Defendant, who had no associate, started business under the name of the W. E. Wood Realty Company. There was some confusion of mails and business, some persons mistaking defendant for plaintiffs. It is held that as the word "tealty," which is used as a collective noun for real estate and when used in a firm title indicates brokers engaged in the purchase and sale of real estate, and as the word "company" indicates an associate or partnership, defendant will be restrained from continuing business under such title; the use of his name constituting unfair competition. Wood v. Wood (Ore.) 1918A-226. (Annotated.)

# Note.

Use of personal or corporate tradename as unfair competition. 1918A-229.

#### c. Actions.

7. Necessity of Fraudulent Intent. In a suit to enjoin the infringement of a tradename, it is not necessary to prove there was a fraudulent intent to deceive. Wood v. Wood (Ore.) 1918A-226.

### TRADENAMES.

See Trademarks and Tradenames.

TRADE UNIONS.

See Labor Unions.

### TRADING STAMPS.

See Licenses, 20-22.

TRADING WITH THE ENEMY ACT. See War, 15.

#### TRANSFER OF CAUSES.

Harmless error in denying, see Appeal and Error, 334.

# TRANSCRIPT.

Evidence on former trial, admissibility, see Evidence, 85, 88.

TRANSCRIPT ON APPEAL. See Appeal and Error, 53.

#### TRANSFER.

Meaning, see Vendor and Purchaser, 14.

TRANSFER OF STOCK. See Corporations, 10, 30, 78-84, 123, 125.

TRANSIENT MERCHANTS. See Licenses, 3-13,

#### TRANSITORY ACTIONS.

See Conflict of Laws, 4; Venue, 1, 2. Jurisdiction, see Courts, 5-7.

#### TRANSPORTATION.

Right to lien for delivering materials, see Mechanics' Liens, 12, 13.

TRAVELING EXPENSES. See Agency, 6, 7, 16.

#### TREASON.

Liability for extraterritorial acts, see War, 8, 9.

### TREATIES.

Right of consul to administer, see Executors and Administrators, 3, 4. Exclusion of aliens from hunting rights, see Fish and Game, 4.

- 1. Construction of Treaty. Treaties conferring rights upon the subjects of a foreign nation partake of the nature of municipal law, and will be treated and construed as a statute, if the right can be enforced by the courts, and the treaty prescribes a rule for its determination. Bondi v. MacKay (Vt.) 1916C-130.
- 2. A treaty provision should receive a reasonable construction with reference to the purpose of the treaty and the intention of the parties. Bondi v. MacKay (Vt.) 1916C-130.
- 3. The application of a treaty of the United States to any case, and its construction, are questions for the court.

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- Hamilton ▼. Erie R. Co. (N. Y.) 1918A-928.
- 4. In construing a treaty the general rules for the construction of statutes and written instruments are applicable, and the cognate rules of international law and of the legislation of the government may be considered. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 5. The general rule that treaties should be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them does not justify a state court in judicially legislating as against the right of the state and its taxing power, and in adding words to a treaty so as to make it applicable to the estate of citizens of the United States in the United States, when by its terms it is only applicable to the estates of aliens or to the estates of citizens of the United States who reside in a foreign country. Moody v. Hagen (N. Dak.) 1918A-933.
- 6. As Supreme Law. Under Const. U. S. art. 6, declaring a valid treaty the supreme law of the land, where a treaty affects the rights of litigants, it binds those rights and is as much to be regarded by the court as an act of Congress, being paramount to the constitution and statutes of the state, but not to acts of Congress. Hamilton v. Erie R. Co. (N. Y.) 1918A-928.
- 7. Conflict of State and Federal Laws. It is the policy of the federal government not to interfere by treaty with the laws of the states in the administration of estates of decedents. Estate of Servas (Cal.) 1916D-233.

### TREES AND TIMBER.

- 1. In General, 826.
- 2. Forest Laws, Validity and Construction, 826.
- 3. Acts and Duties of Forest Officers, 828.
- 4. National Forest Reserves, 828.
- 5. Logging, 828.

Overhanging trees, cutting to line, see Adjoining Landowners, 7, 8.

Condemnation of temporary logging road, see Eminent Domain, 9.

Testimony of expert, stumps, see Evidence,

### 1. IN GENERAL.

- 1. Timber—Definition. The word "timber" has a well-defined meaning and includes such trees as are suitable for building and allied purposes but does not include fruit trees. W. T. Smith Lumber Co. v. Jernigan (Ala.) 1916C-654.
- 2. FOREST LAWS. VALIDITY AND CONSTRUCTION.
- 2. Under Ill. Const. Schedule, § 18, providing that all laws of the state, all official

- writings, and executive, legislative, and judicial proceedings, shall be published in the English language, publication, as required by the Ill. Forest Preserve Act of June 27, 1913, of an ordinance of a forest preserve district authorizing the issuance of bonds in the sum of \$1,000,000, was insufficient when had in a newspaper published in german, since ordinances of a city or municipal corporation are local laws, and, in a sense, "laws of the state," and within the spirit of the constitutional inhibition, while the primary meaning of "publish" is to make known. Perkins v. Board of County Commissioners (Ill.) 1917A-27. (Annotated.)
- 3. Under III. Forest Preserve Act of June 27, 1913, \$ 13, authorizing the issuance of bonds by a preserve district, and section 11, providing that all ordinances appropriating money shall be published in the district in some newspaper published therein, etc., an ordinance of a forest preserve district authorizing the issuance of bonds in the sum of \$1,000,000 is required to be published. Perkins v. Board of County Commissioners (III.) 1917A-27.

  (Annotated.)
- 4. Where an ordinance of a forest preserve district, organized under the Ill. Forest Preserve Act of June 27, 1913, authorizing the issuance of bonds in the sum of \$1,000,000, provides that it should be in force from and after its passage, approval, and publication, publication of the ordinance is a condition precedent to its becoming effective. Perkins v. Board of County Commissioners (Ill.) 1917A-27.
- 5. Ill. Forest Preserve Act of June 27, 1913, § 13, providing that the board of commissioners of any forest preserve district organized under the act shall have power to raise money by general taxation for any of the purposes of the act, and power to borrow money upon the faith and credit of the district and to issue bonds, authorizes the issuance of bonds by the board of commissioners of a district, to create and manage the district, as provided by an ordinance of the board. Perkins v. Board of County Commissioners (Ill.) 1917A-27. (Annotated.)
- 6. The III. Forest Preserve Act of June 27, 1913, providing for the organization of forest preserve districts, the land taken to become the property of the district, and authorizing the levy of a tax to purchase and maintain the preserve, is not unconstitutional as authorizing the levy for a purpose not public, since the acquisition, preservation, and scientific care of forests and forest areas by the state, as well as the sale of timber therefrom for gain in accordance with the canons of forest culture, is a "public purpose." Perkins v. Board of County Commissioners (III.) 1917A-27. (Annotated.)

- 7. The Ill. Forest Preserve Act of June 27, 1913, providing for the submission of the question of the organization of forest preserve districts to the legal voters of the territory proposed to be embraced in such district and prescribing the manner of holding and conducting the election, is not unconstitutional as a special act regulating the opening and conducting of elections. Perkins v. Board of County Commissioners (Ill.) 1917A-27. (Annotated.)
- 8. The Ill. Forest Preserve Act of June 27, 1913, confining forest preserve districts to the territorial limits of counties in which a natural forest is situated, and prohibiting the organization of such districts unless they also contain a city, village, or town, is not unconstitutional as a local or special law, since the fact that a law may be or seem to be arbitrary and unreasonable in some of its provisions does not render it local or special, if it is a general law operating uniformly upon all persons and localities similarly situated. Perkins v. Board of County Commissioners (III.) 1917A-27. (Annotated.)
- 9. The Ill. Forest Preserve Act of June 27, 1913, entitled "An act to provide for the creation and management of forest preserve districts and repealing certain acts therein named," giving districts created thereunder power to create forest preserves within such districts and purchase land for the purpose, is not violative of Const. art. 4, § 13, providing that no act shall embrace more than one subject, expressed in its title, since the provision in the title for the creation and management of forest preserve districts necessarily includes as an incident the power to endow the districts with the powers necessary for the accomplishment of the purpose of their formation, while the "subject" of an act means the matter or thing forming its groundwork, which may include many parts or things, so long as all are germane to it and are such that, if traced back. will lead the mind to the subject as the generic head. Perkins v. Board of County Commissioners (Ill.) 1917A-27. (Annotated.)
- 10. The Ill. Forest Preserve Act of June 27, 1913, entitled "An act to provide for the creation and management of forest preserve districts and repealing certain acts therein named" touching, in sections 5 and 6, the powers of districts organized thereunder and those of the board of commissioners of any district, is not violative of Const. art. 4, \$ 13, providing that no act hereafter passed shall embrace more than one subject, which shall be expressed in the title. Perkins v. Board of County Commissioners (Ill.) 1917A-27.

  (Annotated.)
- 11. The Ill. Forest Preserve Act of June 27, 1913, entitled "An act to provide for the creation and management of forest preserve districts and repealing certain

- acts therein named," providing, in section 5, for the creation of forest preserves, and that preserve districts may acquire lands to protect and preserve the flora, fauna, and scenic beauties within the district for the education, pleasure, and recreation of the public, is not violative of Const. art. 4, \$13, providing that no act shall embrace more than one subject, expressed in the title. Perkins v. Board of County Commissioners (III.) 1917A-27.
- 12. The Ill. Forest Preserve Act of June 27, 1913, providing for the submission of the question of the organization of a preserve district to the legal voters of the proposed district, the proposed district referred to being the one named in the petition or petitions and fixed by the order of court, and the legal voters of the district those residing within its boundaries as fixed by the order of the court, is not invalid as vague, indefinite, and uncertain in its terms, and incapable of execution in respect to its providing for the submission of the question of the adoption of the act to the legal voters of the district before it is organized. Perkins v. Board County Commissioners (Ill.) 1917A-27. (Annotated.)
- 13. Forest Preserve Act—Validity. The Ili. Forest Preserve Act of June 27, 1913 (Hurd's Rev. St. 1913, c. 57a, §§ 1-15) authorizing the organization of a forest preserve district wherever any area of contiguous territory lying wholly within a county contains one or more natural for-ests or parts thereof and one or more cities, towns, or villages, upon petition of legal voters, is not unconstitutional as a local or special law regulating county affairs, since "counties" are involuntary municipal corporations organized to aid in the proper and more efficient administration of the affairs of state government, the powers and functions of whose officers are prescribed by law, while the conserva-tion of forests lying within their boundaries has not been included within their powers, duties, or functions, by Hurd's Rev. St. 1913, c. 34, §§ 24-26, prescribing the powers of counties and the powers and duties of county boards. Perkins v. Board of County Commissioners (Ill.) 1917A-27. (Annotated.)
- 14. Control of Shade Trees by Forestry Board. Under its police power, the state may make regulations to promote public safety on the highroad; hence Ill. Laws 1914, c. 824, giving the state board of forestry authority to plant roadside trees and to regulate the cutting and trimming of them, is valid. Chesapeake, etc. Tel. Co. v. Goldsborough (Md.) 1917A-1.

(Annotated.)

15. Nor is such act invalid as authorizing the taking of private property for a public purpose without compensation; no property rights being divested. Chesa-

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peake, etc. Tel. Co. v. Goldsborough (Md.) 1917A-1. (Annotated.)

16. Every person holds his property subject to the police power; hence Ill. Laws 1914, c. 824, giving the state board of forestry control over roadside trees and prescribing the conditions upon which they may be cut and trimmed, is not invalid as a deprivation of property without due process of law. Chesapeake, etc. Tel. Co. v. Goldsborough (Md.) 1917A-1.

(Annotated.)

17. It will be presumed that the state board of forestry to which the power to fix fees for inspecting roadside trees before licensing cutting and trimming them was delegated, by Ill. Laws 1914, c. 824, will be exercised fairly and justly. Chesapeake, etc. Tel. Co. v. Goldsborough (Md.) 1917A-1. (Annotated.)

18. III. Laws 1914, c. 824, delegating to the state board of forestry the power to fix the charges for inspection of roadside trees to determine the conditions under which permits for cutting and trimming them shall be issued, is not invalid; there being no constitutional prohibition against the delegation of such a function to a board or commission. Chesapeake, etc.

Tel. Co. v. Goldsborough (Md.) 1917A-1.

(Annotated.)

#### Note.

Validity and construction of forestry legislation. 1917A-5.

# 3. ACTS AND DUTIES OF FOREST OFFICERS.

19. Acts of State Forester — Work on Private Lands. Mass. Resolve of 1915, c. 2, authorizing the state forester to provide employment for needy persons in the improvement and protection of forests and of any other public work which may, in his opinion, be proper, does not authorize the prosecution of work upon private lands for the benefit of private owners. Burroughs v. Commonwealth (Mass.) 1917A-38. (Annotated.)

20. Under Mass. Acts 1904, c. 409, § 2, prescribing the duties of the state forester, and providing that it shall be his duty to promote the perpetuation, extension. and proper management of the forest lands of the commonwealth, both public and private, that he may, upon suitable request of owners of forest lands, give aid or advice, that he may publish the particulars and results of any examination and advice given, and that the recipient of such aid or advice shall be liable for necessary expenses of the state forester, the right to give "aid or advice" confers no authority to go into the business of clearing forest lands for individual owners, and the duty to "promote the perpetuation and management of forest lands both public and private," does not include the carrying out of the advice, as the stat-

ute contemplates encouragement of business of forestry in the hands of private owners, not the prosecution of it by the state forester in lands privately owned. Burroughs v. Commonwealth (Mass.) 1917A-38. (Annotated.)

#### 4. NATIONAL FOREST RESERVES.

21. Selection of Lieu Lands. The Land Department possesses no general discretionary power to reject entries on vacant public land selected, in entire conformity with the provisions of the act of June 4, 1897 (30 Stat. at L. 36, c. 2, 7 Fed. St. Ann. 314), and the departmental regulations, in lieu of lands relinquished in a forest reservation, or to award the lands to subsequent and subordinate applicants under the homestead, timber and stone, and other land laws, nor can such discretionary power be said to arise because of the primary mistake made by the local land officers, who, disregarding their plain duty, rejected the lien entries and allowed the filing of claims which were subsequent in date. Daniels v. Wagner (U.S.) 1917A-(Annotated.)

# 5. LOGGING.

22. Where logs driven in a navigable stream are washed upon adjoining land without the fault of those in charge, such persons are entitled to enter upon the lands to reclaim their property, and are not liable where they exercise proper care. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726. (Annotated.)

23. Where logs and flood wood are deposited upon the property of a riparian owner without fault of the one driving them in a navigable stream, the loss suffered by such owner is damnum absque injuria. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726. (Annotated.)

24. One driving logs in a boatable stream is not required to build embankments to protect the land of riparian owners. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726. (Annotated.)

25. One driving logs in a navigable stream is bound at all times to exercise ordinary care to prevent injuries to riparian property either by jams or creating other obstructions. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.

(Annotated.)

# TRESPASS.

- 1. What Constitutes.
- 2. Removal of Trespasser.
- 3. Actions.
  - a. In General,
  - b. Title to Sustain Action.
  - c. Pleading.
  - d. Burden of Proof.
  - e. Instructions.
  - f. Damages.

See Animals, 3; Limitation of Actions, 11.

Overhanging trees, see Adjoining Owners,

Ejection of trespasser, see Assault, 3-5,

Prevention of trespass, see Injunctions, 4. Duty toward trespassers, see Negligence, 26.

Liability for drowning trespassing child, see Negligence, 93.

Duty toward trespasser, see Railroads, 82-

84.
Reclamation of floated logs washed ashore,
See Trees and Timber. 22.

# 1. WHAT CONSTITUTES.

1. Where a county maintains a public dock for public use and convenience, a child entering on the dock is not a trespasser, but he has the same right to be on the dock as he has to be on a public road contiguous thereto. Gregg v. King County (Wash.) 1916C-135. (Annotated.)

#### 2. REMOVAL OF TRESPASSER.

- 2. One unlawfully in a dwelling must be warned to leave before the occupant may use force to eject him, but a person or persons entering such dwelling without right, as with violence, may be repelled or ejected with all necessary force, and without warning. State v. Cessna (Iowa) 1917D-289. (Annotated.)
- 3. The right to eject an intruder is not limited to one's dwelling house, but applies to any property of which he has lawful possession. State v. Flanagan (W. Va.) 1917D-305. (Annotated.)

#### 3. ACTIONS.

# a. In General.

4. One may be liable in a civil action for direct violence to the person without there having been malice or intent to injure. In re Grout (Vt.) 1917A-210.

(Annotated.)

# b. Title to Sustain Action.

5. Basis of Recovery—Possession Evidence of Title. Recovery is not allowed upon actual prior possession per se, but on the title which such prior possession evidences, and is a basis of recovery against a trespasser, not because of plaintiff's previous possession of the land, but because of the presumption of plaintiff's title from his possession, which is sufficient proof of title as against a bare trespasser. Widner v. Lloyd (Ala.) 1917A-576.

#### c. Pleading.

6. Sufficiency of Declaration—Failure to Identify Form of Action. Under Va. Code 1904, §§ 3246, 3272, providing respectively that no action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits and

that on a demurrer (unless it be to a plea in abatement) the court shall not regard any defect unless there be omitted something so essential to the action or defense that judgment cannot be given, a declaration describing itself as "of a plea of trespass," without stating whether it is trespass on the case or trespass vi et armis, is not for that reason open to demurrer. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

7. Effect of Default. A party charged with trespass by running into one on a sidewalk does not by default admit that he was guilty of malice. In re Grout (Vt.) 1917A-210. (Annotated.)

# d. Burden of Proof.

8. In an action of trespass for taking water from land, where defendant had a limited right and it was plaintiff's claim that the right was unfairly exercised to plaintiff's damage, plaintiff has the burden of proving her damages. Rollins v. Blackden (Me.) 1917A-875. (Annotated.)

#### e. Instructions.

9. Real Property—Action Held to Involve Title. Where a plaintiff seeks to enjoin a defendant from trespassing on land, on the ground that he has title to the premises, and the defendant in his answer asserts title to the premises, and both parties offer evidence to substantiate their respective claims, it is error to instruct the jury that their verdict would not determine the title to the premises. Bunger v. Grimm (Ga.) 1916C-173.

# f. Damages.

10. Where defendant, who was entitled to take only that water from a well on plaintiff's land which was not needed by plaintiff, prevented plaintiff from taking any water, only nominal damages can be awarded, where plaintiff did not show any actual damage, but merely asserted that she desired the water to irrigate her garden. Rollins v. Blackden (Me.) 1917A-875. (Annotated.)

11. Where plaintiff in an earlier real action established her title to a well from which defendant was taking water, but failed to recover damages for the taking of the water and the maintenance of pipes to the well, although such damages were claimed as rents and profits, plaintiff cannot in a subsequent action for trespass recover damages for the taking of the water before the institution of the real action. Rollins v. Blackden (Me.) 1917A-875.

12. Recovery for Waste. Under Me. Rev. St. c. 106, §§ 11, 12, providing that when a demandant recovers judgment in a real action he may recover damages for the mesne rents and profits, and for any destruction or waste of the buildings, the

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plaintiff cannot recover for a trespass not amounting to destruction or waste. lins v. Blackden (Me.) 1917A-875.

#### TRIAL.

1. Continuance, \$30.

a. In General, 830.

b. Grounds, 830.

(1) Want of Time to Prepare for Trial, 830.

(2) Absence of Witnesses, 831.

(3) Absence of Party, 831.

(4) Publication of Articles Prejudicing Jury, 831.

2. Proceedings Preliminary to Trial, 831.

3. Election Between Defenses, 831.

4. Reception of Evidence, 831.

a. Order of Proof, 831.

b. Offers of Evidence, 832.

- c. Admitting Evidence for Limited Purpose, 832.
  d. Putting Witnesses Under Rule,
- 832.

e. Striking Out Evidence, 832.

f. Reopening Case, 833.

g. Stopping Cross-examination, 833. h. Evidence Received Without Objection, 833.

- i. Time for Objections and Exceptions, 833.
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#### 1. CONTINUANCE.

#### a. In General.

- 1. Discretion of Court. A motion for a continuance is addressed to the discretion of the court, and its ruling will not be reversed, except for most potent reasons. Neven v. Neven (Nev.) 1918B-1083.
- Denial Held Proper. Under the facts of this case, there was no abuse of discretion in overruling the motion for a continuance. Bird v. State (Ga.) 1916C-205.

Continuances in divorce cases. 1918B-1087.

#### b. Grounds.

- (1) Want of Time to Prepare for Trial.
- 3. Time for Preparation. Where, on June 26th, the coroner's jury found that a person's death was caused by defendants, who were then held on the coroner's warrant as material witnesses, after a secret session to which defendants' attorney was denied admission, they were indicted for murder on July 7th, and the following day furnished the evidence and inquisition taken by the coroner, which was not filed, a motion for a continuance on July 9th, on which day the case was set for trial, is addressed to the discretion of the trial court, and the circumstances do not show that such discretion was erroneously exercised by denying the motion. State v. Griffin (S. Car.) 1916D-392.
- 4. Under Tex. Code Cr. Proc. 1911, art. 557, permitting a case to be called for trial two days after the defendant has been served with a copy of the indictment, and article 558, providing that a counsel appointed for the defendant shall be granted one day in which to prepare for trial, the refusal of the court to grant a continuance in a case set for trial thirteen days after a copy of the indictment was served, twelve days after an attorney had been appointed by the court to represent the defendant, and seven days after another attorney had been employed by the de-fendant in the case, is not an abuse of the court's discretion, where it is not shown that the defendant was deprived of any testimony of any witnesses, or that he had subsequently ascertained any additional facts that would have been beneficial to him. Mason v. State (Tex.) 1917D-1094.
- 5. Suspension of Trial to Permit Consultation With Witnesses. Where a homi-

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cide case went to trial Tuesday and the prosecution rested Saturday at noon, the refusal of the court to postpone the case to give defendant's counsel time to consult witnesses from that time until Monday morning because of the expense of the witnesses in attendance, is not erroncous, where the court granted each request of defendant's counsel for time to confer with witnesses. Mason v. State (Tex.) 1917D-1094.

# (2) Absence of Witnesses.

- 6. Facts Otherwise Proved. Where the affidavit on application for continuance was read as the depositions of the absent witnesses, and other witnesses testified to the same facts which it was claimed the absent witnesses would have testified to, there is no error in refusing the continuance. Belcher v. Commonwealth (Ky.) 1917B-238.
- 7. Diligence. A party who is a material witness in his own behalf is not entitled to a continuance because of his absence, unless he shows that he had his testimony ready for use at the trial, but was prevented from attending the trial by some obstacle which, by the exercise of reasonable diligence, he could not overcome, and which he did not create by his own voluntary act. Neven v. Neven (Nev.) 1918B-1083.

# (3) Absence of Party.

8. Divorce Case. Where defendant, in a suit for divorce, was present with his counsel in court on March 28th, when by his consent the case was set for trial April 4th, without then informing the court of necessity of his being absent so near before that date as to prevent his presence at the trial, and it did not appear that his absence before the trial, which prevented his presence at the trial, was due to a court proceeding, denial of continuance because of his absence, supported by a telegram merely announcing his inability to be present because of guardianship proceedings, is not an abuse of discretion. Neven v. Neven (Nev.) 1918B-1083.

(Annotated.)

- 9. Party Bound to Appear in Two Proceedings. A party in two court proceedings in different places is bound by the first notice of trial, and the requirement of his presence at that trial affords a ground for a continuance of the other proceeding. Neven v. Neven (Nev.) 1918B-1083.
- (4) Publication of Articles Prejudicing Jury.
- 10. In Criminal Case—Newspaper Publication. The appellate court will not hold that a trial judge abused his discretion in refusing a continuance in a criminal case

on account of the publication of newspaper articles which it is claimed may have affected the judgment of the jury, where it affirmatively appears from the evidence in the case that the jury could not have honestly or intelligently returned any other verdict than the one which it did return. State v. Gordon (N. Dak.) 1918A-442.

11. The remedy against public prejudice existing throughout a county or judicial district created by the publication of a newspaper article is a motion for a change of venue, and not for a continuance. State v. Gordon (N. Dak.) 1918A-442.

(Annotated.)

Prejudicial newspaper publication as ground for continuance of criminal case. 1918A-449.

# 2. PROCEEDINGS PRELIMINARY TO TRIAL.

12. Setting Case for Hearing. Where a petition for an injunction was presented to the circuit court on January 27, 1912, the cause could not have come on for final hearing until the succeeding term unless an appearance was entered, so that where none was entered, it could not be set for final hearing on February 3, 1912, so that an order setting it for hearing on that date must be interpreted as having been intended to determine only whether a temporary injunction should be issued operative until final hearing. Ex parte Zuccaro (Tex.) 1917B-121.

# 3. ELECTION BETWEEN DEFENSES.

- 13. The defendant claimed title by virtue of his purchase, and also claimed the right to possession by reason of having paid off certain incumbrances which had been placed thereon by the plaintiff. Upon motion of the plaintiff the defendant, over his protest, was required to elect between these defenses and elected to stand upon his claim of title. At a subsequent trial he was held bound by such previous election. Held, that the two defenses are not inconsistent and the election was improperly required, and for that reason as well as because it was compulsory the defendant should not have been held bound thereby. New v. Smith (Kan.) 1917B-362.
- 14. No question of rescission of a contract was involved, and the motion to require defendant to elect as to defenses was properly denied. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.

# 4. RECEPTION OF EVIDENCE.

#### a. Order of Proof.

15. Order of Disposition of Issues—Trial of Crucial Issue Singly. Where the answer

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charging fraud in the procurement of a guaranty sued on is sufficient to entitle defendants to complete relief without the cross-complaint raising the same issues, it is not error to submit the whole case to the jury before disposing of the equitable issues raised by the cross-complaint. American National Bank v. Donnellan (Cal.) 19170-744.

16. Number of Counsel Entitled to Participate. The statute declaring that but one counsel on each side shall examine the same witness does not apply to the interposition of objections by the state's attorneys to questions asked a witness by the attorney for accused. State v. Giudice (Iowa) 1917C-1160.

# b. Offers of Evidence.

- 17. Refusal to Allow Offer of Proof. For the court, when defendants' counsel made an offer of proof, to suggest to him that the proper way was to ask questions and let the court rule on them is right and proper, and not an act of partiality or unfairness. People v. Elliott (III.) 1918B-391.
- 18. Offer Partly Irrelevant. Where the evidence effered is relevant in part only, the court is not bound to separate the good from the bad, but may reject it as a whole. Hunter v. Bremer (Pa.) 1918A-152.

# c. Admitting Evidence for Limited Purpose.

- 19. Evidence Admissible for Single Purpose—Limitation. In an action for loss of growing crops, where the court admits evidence as to the probable maturity of the crops, the cost of harvesting, the climatic condition of the season, and the condition and yield of the adjacent lands for the same season, ruling that it is competent only to determine the reasonable value of the crops when they were destroyed, but not to show what kind of crops would have matured, and charges that all such evidence could be considered only for the purpose for which it was admitted, the ruling and instruction are sufficient to limit the evidence to its proper purpose. North Sterling Irrigation District v. Dickman (Colo.) 1916D-973.
- 20. Admission of Evidence for Restricted Purpose. Evidence may be restricted to a special purpose, instead of admitted generally, and evidence admitted for a particular purpose cannot be considered for other purposes. Schworm v. Fraternal Bankers Reserve Soc. (Iowa) 1917B—373.
- 21. In an action for the death of plaintiff's intestate while employed in handling switches at defendant's lighting station, nothing short of an exception to the court's failure to restrict plaintiff's declar-

- ation that only his intestate had been to blame to its conceded admissibility on the question of impeachment was sufficient to raise the claim that it was not admissible on the question of liability; and a mere failure to instruct limiting the use of the testimony will not reach back and affect its admissibility. McCarthy's Adm'r v. Northfield (Vt.) 1918A-943.
- 22. Such evidence was admissible on the question of the defendant's liability. McCarthy's Adm'r v. Northfield (Vt.) 1918A-943.
- 23. Evidence Admissible for Single Pur-In such action, where evidence that plaintiff, while at the lighting station shortly after the accident, had said that no one was to blame except the intestate, and that intestate had warned him several times when he was turning on the lights not to get his hands onto the metal or blades of the switch, was admitted "for all legitimate purposes," and the court was not asked to limit the testimony, and plaintiff did not except to the failure to limit it, and it did not appear what use was made of the testimony in argument, it will be presumed that the only use made of it was legitimate. McCarthy's Adm'r v. Northfield (Vt.) 1918A-943.
- 24. Admission of Evidence—Evidence Competent for One Purpose Only. If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose, although an instruction, limiting its effect, is proper. State v. Farnam (Ore.) 1918A-318.

# d. Putting Witnesses Under Rule.

25. Refusal to Order as Error. The separation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court, but, when requested, especially in a trial for felony, it is seldom denied. When the witnesses for the prosecution are near relatives, or are or have been recently so associated that it is not improbable that some of them may be under the influence of another witness who is interested in the prosecution, it is erroneous to allow such witnesses to be present and hear each other's testimony against the objection of the defendant. Roberts v. State (Neb.) 1971E-1040.

# e. Striking Out Evidence.

26. Motion to Strike Out—Motion Too Broad. In a prosecution for larceny of a cow it is not error to overrule a motion to strike all the testimony of a witness on the ground of irrelevancy, incompetency, and irresponsiveness to issues, where some portions of it were relevant and competent. Harris v. State (Wyo.) 1917A-1201.

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- 27. Motion to Strike Out—Necessity of Disclosing Ground. It is not error to overrule a motion to strike out evidence when the objection to it is not disclosed and when its impropriety or insufficiency is not apparent. Wideman v. Faivre (Kan.) 1918B-1168.
- 28. Time for Motion. The refusal to strike out testimony on a motion made after a witness has left the stand is not reversible error, and in such case the only course open is to ask that the jury be instructed to disregard objectionable evidence. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099.
- 29. Motion to Strike Embracing Competent Testimony. Where it appeared on cross-examination of plaintiff's witnesses and from defendant's evidence that certain sales relied on by plaintiff's witnesses in their estimate of the value of the property were sales to the defendant in the course of condemnation, the refusal to strike out such testimony is proper, where the motion is so comprehensive as to include all the testimony of the witnesses, and is not made until the close of defendant's case, when the issues are to be presented to the jury. Wadsworth v. Manufacturers' Water Co. (Pa.) 1917E-1099.
- 30. Necessity of Prior Objection. While a motion to strike out should be made after testimony is given, without objection, yet where the first answer after which objection was taken was unimportant, and the objection pointed out generally that defendant objected to all such testimony, such objection without motion to strike is sufficient to entitle defendant to review. Wightman v. Campbell (N. Y.) 1917E-673.

#### Note.

Withdrawal of unreasonable testimony from consideration of jury. 1917B-473.

#### f. Reopening Case.

- 31. Reopening for Further Proof. After all parties to a suit have announced that the testimony is closed, no party has a legal right to introduce further evidence; but the privilege of doing so may be granted by the court in its discretion and in furtherance of justice. The judgment of the court refusing to admit further evidence will not be reversed by this court unless it is manifestly erroneous and productive of injustice. Succession of Lefort (La.) 1917E-769.
- 32. Discretion of Court. Reopening the case to take additional testimony inadvertently omitted being within the trial court's discretion and not reviewable unless arbitrarily exercised, it is proper, in an action against a street railway for injuries to an automobile passenger, to permit the reopening of the passenger's case

to show the ownership of the street car which struck the automobile. Virginia B. etc. Co. v. Gorsuch (Va.) 1918B-838.

# g. Stopping Cross-examination.

33. Power of Court to Control. It is within the discretion of the court at any time to put a stop to irrelevant cross-examination. Taylor v. Moseley (Ky.) 1918B-1125.

# h. Evidence Received Without Objection.

34. Striking Out Testimony. Where the court refuses to strike the plaintiff's incompetent testimony, which came in without objection or exception, the action is proper. Simmons v. National Live Stock Ins. Co. (Mich.) 1917D-42.

# i. Time for Objections and Exceptions.

- 35. Failure to Object. Failure to object to evidence at the time it is offered is a waiver of the objection that it is not admissible under the pleadings, unless a motion is made during the trial to strike out such evidence. Douville v. Pacific Coast Casualty Co. (Idaho) 1917A-112.
- 36. In such case, the action of defendant's counsel, in stating that defendant did not dispute the fact that the daughter was ill and eventually died, does not constitute a waiver of his objection to the admission of evidence thereof, where the statement is made in an unsuccessful attempt to prevent the state from proving the details of the daughter's illness and death. People v. Buffon (N. Y.) 1916D-962.

# j. Sufficiency of Objections.

- 37. Objection to Evidence—General Objection—Sufficiency. A general objection to an offer of the record of the election in the town on the proposition of it becoming anti-saloon territory is insufficient. People v. Elliott (Ill.) 1918B-391.
- 38. Evidence Partly Admissible. Where the question put to a witness is competent, or not objected to by counsel, and the witness answers, a part of which answer is competent and a part incompetent, a general objection to the whole answer is properly overruled, even though there be some objectionable matter in the answer. To save the objector's rights he should clearly indicate the part of the answer to which he objects and move its exclusion. If the court overrules such motion, he should then save his exception. State v. Lasecki (Ohio) 1916C-1182.
- 39. Objection to Competency—Objection Insufficient. In a prosecution for polygamy, after the wife of accused had testified as to their marriage, where the counsel for accused objected to further questions.

tions as they were stated only on the ground of incompetency, irrelevancy, immateriality, and no foundation laid, the objection that the witness is incompetent because she is the wife of accused is waived. State v. Von Klein (Ore.) 1916C-1054.

- 40. Objection Too Broad. When evidence would be admissible for any purpose or under any circumstances, an objection should point out specifically what the objection is, and an objection that the question is incompetent, irrelevant, and immaterial is insufficient, though it would be sufficient if the evidence were not admissible for any purpose. State v. Von Klein (Ore.) 1916C-1054.
- 41. Objection to Evidence—Scope. The objection that the testimony "is not the best evidence, incompetent, as such, irrelevant, and immaterial," does not raise or suggest the objection that such testimony is not proper on rebuttal. State v. Bickford (N. Dak.) 1916D-140.
- 42. Sufficiency of Exception to Charge. Where one accused of crime submits 23 requests for charges, some of which are complied with, and excepts to the refusal to charge in accordance with each request and to the charge as given on the subjectmatter of each request, the exception is too general. State v. Lapoint (Vt.) 1916C-318.
- 43. General Objection to Evidence-Effect. When evidence is received under a general objection, the ruling will not be held erroneous, unless there is some ground which could not be obviated, though it had been specified or unless the evidence is generally incompetent, hence a general objection to testimony by a surveyor as to his use of field notes made by another will not present the question that such evidence was hearsay, for the objection might have been obviated by laying a proper foundation for the introduction of the notes. Wightman v. Campbell (N. Y.) 1917E-673.
- 44. Scope of General Objection. In an action against a railroad for death of its switchman in service, the general objection to the testimony of the fireman of the switching crew that it was incompetent, irrelevant, and immaterial, is insufficient to reserve the objection that there was no showing that the fireman had ever been with the crew under such circumstances that he might have heard their statement to decedent as to a post being dangerously near the track; the fireman having testified that no one had told decedent so far as he knew, about it. Devine v. Delano (III.) 1918A-689.
- 45. Necessity of Specific Objection— Evidence Admissible for Some Purpose. Receiving evidence, if admissible for any

purpose, cannot be held error, the exceptions not stating the ground of objection, and the purpose for which it was received not appearing. Comstock's Adm'r. v. Jacobs (Vt.) 1918A-465.

# k. Waiver of Objection.

- 46. Admission of Evidence—Waiver of Error by Cross-examination. Objection to improper evidence is not waived by cross-examination of the witness on the same subject. First State Bank v. Kelly (N. Dak.) 1917D-1044.
- 47. Failure to Object to Insufficient Withdrawal of Evidence. The insufficiency of an attempt to exclude evidence, erroneously admitted, so as to remove its prejudicial effect, is not waived by the excepting party's failure to deny its sufficiency, upon the party causing the admission of the evidence stating that, if the other was not satisfied with the exclusion, he would have the questions and answers read by the stenographer, since, the burden of removing the prejudicial effect being on the party causing the admission, the excepting party could not be required to affirm or deny the sufficiency of the attempted exclusion, and his mere silence did not amount to an affirmation. Watson Adams (Ala.) 1916E-565.
- 48. Objections Grounds not Urged. Where reasons are specified in a motion to exclude testimony, other reasons, not specified, are waived. St. Louis, etc. R. Co. v. Blaylock (Ark.) 1917A-563.
- 49. Objection to Evidence-Waiver. Where defendant objected to a surveyor's testimony based on the field notes of an earlier survey, which notes were unintelligible without explanation, the fact that defendant subsequently permitted notes to go into evidence without objection will not deprive defendant of his exception, for it was the obvious purpose of defendant to permit the notes to go into evidence to show that they were unintelligible. Wightman v. Čampbell (N. 1917E-673.
- 50. What Evidence Considered. In determining whether a demurrer to the evidence should have been sustained or overruled, defendant's evidence tending to show an absence of right to recover cannot be considered, and the demurrer must be tested by the strength of plaintiff's evidence aided by any of defendant's evidence that may help to make out plaintiff's case; plaintiff's evidence and every reasonable inference arising therefrom being taken as true. Hall v. Manufacturers' Coal, etc. Co. (Mo.) 1916C-375.

# 1. Demurrer to Evidence.

51. Taking Case from Jury-Undisputed Evidence. Under the procedure and prac-

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tice in this state in trials by jury, it is the well-established and settled law that, even though the testimony is undisputed, it should be so convincing that all reasonable men must draw the same conclusion from the facts proven, before the court is authorized to sustain a demurrer to the evidence, or direct a verdict. Rogers v. O. K. Bus, etc. Co. (Okla.) 1917B-581.

#### m. Restricting Evidence.

52. Restriction of Testimony—Discretion. It is within the court's power and discretion, for the purpose of keeping the examination of witnesses on collateral issues within the bounds of reason and convenience, to exclude questions asked expert witnesses, based on a state of facts finding no support in the evidence, though such questions are asked on cross-examination. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

# 5. CONDUCT AND REMARKS OF JUDGE.

#### a. In General.

53. Remark by Judge. In an action for the death of a street car passenger, it is not error for the court to advise defendant's attorney, in repeating a witness's statement, to give the witness an opportunity to say whether he so testified. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408

# b. Reading Pleadings to Jury.

54. It is not desirable for the trial judge to read the pleadings to the jury. Nashville, etc. Ry. v. Anderson (Tenn.) 1917D-902.

#### c. Recalling Jury for Instructions.

55. Necessity of Notice to Counsel. The action of the trial court, after the retirement of the jury, upon their request to know what the penalty is for the violation of the city ordinance in suit, in writing out an instruction on the point and sending it to the jury without the knowledge of counsel for either side, is improper. Kimmins v. Montrose (Colo.) 1917A-407. (Annotated.)

#### Notes.

Necessity that further instructions requested by jury be given in open court. 1917A-399.

Necessity that further instructions to jury, after retirement, be given in presence or with consent of counsel. 1917A-409.

# d. Time for Objection.

56. Conduct of Court. In a prosecution for crime, where defendant's counsel did not object until after verdict to the court's question whether they desired to address

the jury, the objection came too late. State v. Randall (N. Car.) 1918A-438.

#### Note.

Propriety of instruction or comment by court to effect that perjury has been committed at trial. 1917B-128.

# 6. EXHIBITIONS IN PRESENCE OF JURY.

57. Discretion of Court. The admission in evidence of material objects or allowing inspection of the same, whether offered in evidence or not, is within the discretion of the court. State v. Farnam (Ore.) 1918A-318.

58. The refusal six months after the homicide to allow the jury to inspect the feet of a horse upon whose tracks the prosecution relied is not an abuse of the court's discretion as to admitting in evidence material objects or allowing inspection of the same. State v. Farnam (Ore.) 1918A-318.

# 7. EFFECT OF TRIAL AMENDMENTS.

59. Necessity of Reimpaneling Jury. Such action, after amendment, is properly tried before the jury impaneled to try it under the original issues. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.

#### 8. VIEW BY JUDGE OR JURY.

60. View—Discretion of Court. Refusal to allow the jury to view the premises, such view not appearing necessary to a just decision, was a proper exercise of discretion. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

#### 9. CURING ERRORS IN TRIAL.

Misstatement of Fact—Necessity of Objection. In an action for damages sustained in an automobile collision, if the court's statement in the instructions that it was plaintiff's contention that defendant intentionally ran into plaintiff, and defendant's contention that plaintiff's car ran into defendant's car and that it was agreed by counsel that there was no evidence showing that the accident happened in any other way than in accordance with one of these two contentions, is incorrect in that counsel had not so agreed, it is counsel's duty to call the court's attention to this mistake of fact, in order that it might be corrected. Dishmaker v. Heck (Wis.) 1917A-400.

# 10. PROVINCE OF COURT AND JURY.

62. Agreed Statement — Inferences. Where a case is heard on an agreed statement of facts, the court may only draw inferences of law and of legal construction

and not inferences of fact. McGhee v. Cox (Va.) 1916E-842.

#### 11. FINDINGS.

- 63. Duty to Submit Issue-Necessity of Request. Under the express provision of Wis. St. 1913, § 2858m, the trial court, in the absence of any request to submit an issue to the jury, may find thereon in conformity with its judgment. Gist v. Johnson-Carey Co. (Wis.) 1916E-460.
- 64. Findings of Fact—General Conclusion Improper. Where, in an action on a note for money loaned, the evidence without dispute showed that the transaction was effected through agents of both parties, and plaintiff contended at the trial that she did not enter into a corrupt and usurious agreement, as claimed by defendant, knew nothing about it, received none of the fruits thereof, and never ratified the transaction, a finding that the agreement was entered into "between plaintiff and defendant" is not a finding of fact but a conclusion of law and improper; it being the duty of the court to specifically find the facts with regard to the matters and then draw his conclusion from the facts found. Brown v. Johnson (Utah) 1916C-
- 65. Necessity of Finding—Requests Covered by Findings Made. Under Pa. Act April 22, 1874 (P. L. 109), relative to trials without a jury, the court need not specifically answer on the record all requests for findings of fact, if the findings made cover the material facts stated in the request. Kuhn v. Buhl (Pa.) 1917D-415.
- 66. Form of Findings. A finding should contain the facts found, not the evidence from which they are to be found. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-
- 67. A finding that certain testimony is true is not the same thing as finding that some fact as testified to is true. Blanton v. Wheeler, etc. Co. (Conn.) 1918B-747.
- 68. Evidence-Weight-Conflicting Evidence. Duty of trial court or jury in determining the facts from conflicting testidiscussed. Wideman v. mony Faivre (Kan.) 1918B-1168.
- 69. Submitting Special Issues-Discretion of Court. The matter of submitting special issues to a jury in an action at law rests in the sound discretion of the trial court; and the discretion extends also to the form and substance of the special issues so submitted. There was no abuse of the discretion in this case. Jacobson v. Chicago, etc. R. Co. (Minn.) 1918A-
- 70. Special Interrogatories-As to Evidentiary Facts. Special interrogatories requested, which did not call for a finding

on the ultimate facts, were properly denied. Korab v. Chicago, etc. R. Co. (Iowa) 1916E-637.

71. Inconsistency of Findings—Effect. The court having found that the guaranty sued on was procured by fraud, contra-dictoriness in findings as to whether the debt secured was an individual debt, or that of a corporation through which the debtor conducted his business, is not material. American National Bank v. Donnellan (Cal.) 1917C-744.

#### TRIAL AMENDMENTS.

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#### TROVER.

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#### TRUSTS AND TRUSTEES.

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Testamentary trusts, construction, see Wills, 219-221, 238.

#### 1. EXPRESS TRUST.

- a. Contsruction and Requisites, in General.
- 1. Necessity of Assent of Beneficiary. No assent of any beneficiary is necessary to the validity of a trust voluntarily established. Thorp v. Lund (Mass.) 1918B-1204.
- 2. Creation. A testator owning chiefly real estate and some personal property of speculative value, who directs his executors to pay specified sums to trust companies, to pay specified sums in instalments to beneficiaries named, with gift over on their death, and who directs the executors to close up the estate as speedily as possible, creates a trust for the benefit of the beneficiaries named. Heiseman v. Lowenstein (Ark.) 1916C-601.
- 3. Certainty as to Beneficiaries. The objects of a trust, as expressed by a will, "my nephews and nieces," are not uncertain. In re Dewey's Estate (Utah) 1918A-475.

# b. Power to Revoke.

4. Right of Settlor to Revoke. A trust cannot be revoked or modified by the settlor, in the absence of a reservation to that effect, though it was voluntarily established. Thorp v. Lund (Mass.) 1918B-1204.

#### e. Proof of Trust.

5. Establishment by Parol. An express trust cannot be established by parol testimony. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143.

#### 2. SPENDTHRIFT TRUSTS.

6. Creation. The doctrine of "spendthrift trusts" approved by the majority of the American courts by which it is settled that it is lawful for a testator or grantor to create a trust estate for the life of the cestui que trust, with the provision that the latter shall receive and enjoy the income at times and in amounts either fixed by the instrument or left to the discretion of the trustee, and that such income shall not be subject to alienation by the beneficiary, nor liable for his debts, accords with the general policy which this state has always followed rethe right of creditors and specting the right of creditors and debtors. It deprives the creditor of no security to which he has the right to look, and it recognizes the right which the owner of property has to dispose of it,

either by an absolute gift or by a conditional one, and to make provision for the object of his bounty, provided he gives the use only without the absolute title, and therefore the testator's intention in this respect, when clearly expressed, will be carried out. Sherman v. Havens (Kan.) 1917B-394. (Annotated.)

- 7. A spendthrift trust attempted to be created in the settlor's own favor is invalid, though he has no fraudulent intent toward his creditors. McColgan v. Walter Magee (Cal.) 1917D-1050. (Annotated.)
- 8. Spendthrift Trust in Favor of Donor. In view of Cal. Civ. Code, §§ 669, 688, 693, providing that a future contingent interest is property, where a father executed a deed of trust conveying property to two sons as trustees for themselves and two others, providing that at any time after his death any three of the beneficiaries might terminate the trust by acknowledging and recording a declaration to that effect, and that on such termination the property should belong to the beneficiaries, share and share alike, one-fourth each, and after the father's death the four beneficiaries executed an agreement whereby the trust was to be terminated and a distribution of the property made according to its appraised value, giving each beneficiary one-fourth, except that there should be set aside as the fourth share of one son certain shares of stock and cash, equaling one-fourth of the trust property, which share should not go directly to the particular beneficiary, but be transferred to two of his brothers, to be held in trust for him, the agreement further declaring that the beneficiary's interest was inalienable, non-transferable, and exempt from the claims of his creditors, such second trust was invalid, and the property subject to the claims of creditors as in effect an attempt to create a spendthrift trust by the beneficiary in his own favor, which is contrary to the policy of the law, since the beneficiary's interest in the original trust, though a future and not a vested interest, was his disposable property, subject to the demands of creditors. McColgan v. Walter Magee (Cal.) 1917D-1050. (Annotated.)
- 9. Validity of Spendthrift Trust. The general doctrine that spendthrift trusts, inalienable by the beneficiary, and inaccessible to his creditors during his life or for a term of years, are valid in California, is well established. McColgan v. Walter Magee (Cal.) 1917D-1050.
- 10. Spendthrift Trust—Rights as to Surplus Income. By direct provision of Cal. Civ. Code, § 867, a spendthrift trust may be created in the rents and profits of realty if the beneficiary is restrained from disposing of his interest only during life or a term of years; but, by section 859, where a trust is created to receive rents

and profits, and no valid direction for accumulation is given, the surplus, beyond what is necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of his creditors. McColgan v. Walter Magee (Cal.) 1917D-1050.

11. Sufficiency of Proof Established. Without deciding that a letter written by the testator three years after the execution of the will was admissible in evidence for the purpose of showing the circumstances under which the will was executed, it is held that nothing contained in either the will or the letter shows that it was the testator's intention to protect the income from waste or dissipation, or to prevent the legacy from being subject to payment of the brother's debts. Sherman v. Havens (Kan.) 1917B-394. (Annotated.)

12. A will contained the following clause: "To my brother, Arthur B. Havens, should he survive me, an annuity of one thousand dollars, and I direct my said executor trustees to pay him two hundred and fifty dollars quarterly in advance from my death until his; but should he predecease me, and in any event after his death, such annuity fund to be added to the trust estate hereinafter created for my said daughter Elizabeth and her issue."

Held, that proper construction of the will does not disclose an intention on the part of the testator to secure to his brother the life enjoyment of the income of the trust estate exempt from his brother's creditors. Sherman v. Havens (Kan.) 1917B-394. (Annotated.)

# Note.

Sufficiency of instrument to create spendthrift trust. 1917B-400.

#### 3. IMPLIED OR RESULTING TRUST.

# a. In General.

- 13. Improperly Obtaining Legal Title to Property. Where a party obtains the legal title to property, not only by fraud or by violation of confidence, or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain it against the rightful owner, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner. Hayden v. Dannenberg (Okla.) 1916D—1191.
- 14. Creation of Testamentary Trust—Express Words Unnecessary. Where a trust is intended to be created, the courts will honor it and create an implied trust, although words of devise in trust are lacking. Sherlock v. Thompson (Iowa) 1917A-1216.

- b. Breached Contract to Devise.
- 15. Effect of Breach of Contract to Devise. If the promisor, in such a case makes a will, which is probated, devising the specific property to another person in violation of the terms of the contract, equity will impress a trust upon the property, which will follow it into the hands of the personal representative or devisee of the promisor. Gordon v. Spellman (Ga.) 1918A-852.
- c. Consideration Furnished for Conveyance to Another.

# (1) In General.

- 16. Furnishing Purchase Money. A trust results by operation of law in favor of one who furnishes to another, not as a loan, the purchase price of land bought by such other, who takes title in his own name. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143.
- (2) Purchase by One Spouse in Name of Other.
- 17. Purchase by Husband in Name of Wife—Intent to Defraud Creditors. Equity will not decree a resulting trust in favor of a husband with respect to property purchased by him in the name of his wife when his purpose in thus taking the title was to hinder and delay his creditors. Scheuerman v. Scheuerman (Can.) 1917B—219. (Annotated.)

### d. Proof of Trust.

- (1) Parol Evidence Generally.
- 18. Parol to Vary Writing—Proof of Trust. An express trust cannot be grafted upon a deed absolute in form by oral testimony. Queen v. Queen (Ark.) 1917A—1101.
- 19. A resulting trust can be established by parol, as it results by operation of law, and not from the contract of the parties. Home Land, etc. Co. v. Routh (Ark.) 1917C-1143.

#### (2) Sufficiency of Evidence.

- 20. A constructive trust may be established by parol evidence, but the law for the safety of titles requires that the proof should be of the most satisfactory and trustworthy kind. The onus of establishing a constructive trust rests upon him who seeks its enforcement, and before a court of equity will be warranted in making a decree therefor, the evidence must be clear, unequivocal, and decisive. Hayden v. Dannenberg (Okla.) 1916D—1191. (Annotated.)
- 21. Provision Held to Create Trust. Testatrix bequeathed to her husband and to

her son the income from the remainder of her property in equal shares for life, the survivor succeeding to the ownership of the whole of the income on the decease of the other: that the husband should be trustee while he lived, and on his decease the son should succeed to the trusteeship, the trustee to take care of the property with no power of sale, unless under order of court to carry out the terms of the will, nor should title to the property (other than its income) vest in either of such persons, and, on the death of the survivor of the husband and son, the title should pass in equal shares to testatrix's nieces and nephews. Held, that the legal title to the property vested in the husband, and after his death, leaving the son surviving, in the son, as trustee to carry out the provisions of the will, and for the benefit of whoever will take on the death of the last trustee. Sherlock v. Thompson (Iowa) 1917A-1216.

#### Note.

Sufficiency of evidence to establish constructive or resulting trust. 1916D-1194.

# 4. RIGHTS, POWERS AND LIABILITIES OF TRUSTEE.

#### a. In General.

22. Title to Trust Property. The exclusive legal title to trust property is vested in the trustee. Welch v. Boston (Mass.) 1917D-946.

#### b. Sale of Property.

23. Where a suit to recover property conveyed by a testamentary trustee was not commenced until nearly 50 years after the conveyance was made, during which time the purchaser and its successor had acquired rights by the making of improvements and otherwise in reliance on the validity of the conveyance, such facts may properly incline the court, in case of doubtful language in the will, to a construction which will sustain the power of the trustee to convey. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443.

(Annotated.)

- 24. Diversion of Proceeds by Trustee—Effect on Conveyance. A bona fide purchaser from a trustee empowered to sell, who pays the purchase money, is not required to look to its application. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443.
- 25. Trustee's Deed Presumptions. Where a grantor had apparently no title to the land conveyed, except by virtue of a will creating a testamentary trust in such grantor, the presumption is justified that the deed was made in reliance upon the power conferred thereby, although such power is not invoked nor expressly

mentioned in the deed. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443.

#### Note.

Power of trustee to mortgage trust property. 1916C-606.

#### c. Personal Interest of Trustee.

26. Interest of Trustee in Subject-matter. In the absence of clear and express terms permitting it, a nephew, to whom testatrix gives property in trust to distribute among her nephews and nieces, cannot participate in the distribution, though he is given discretion as to selecting the beneficiaries, and elects in favor of himself. In re Dewey's Estate (Utah) 1918A-475.

(Annotated.)

#### Note.

Effect of trustee having interest in subject-matter of trust. 1918A-481.

## d. Removal.

- 27. Inherent Power of Court to Remove. A court of equity has inherent jurisdiction to remove a trustee, independent of statutory provisions, for good cause shown. Maydwell v. Maydwell (Tenn.) 1918B-1043.
- 28. Grounds for Removal. The chancery court has jurisdiction, under Shannon's Tenn. Code, §§ 5414, 5422, to remove a trustee for the cause enumerated in the statute and "for other good cause" at suit of the beneficiary. Maydwell v. Maydwell (Tenn.) 1918B-1043.
- 29. Ill Feeling Between Trustee and Beneficiary. Where testator's will directed his widow as trustee to apply the income from a daughter's share of the state to the best interest of the latter and for her comfort, maintenance, and support, and friction developed between mother and daughter resulting in litigation and bad feeling, the mother will be removed as trustee on the daughter's application, irrespective of the merits of the dispute. Maydwell v. Maydwell (Tenn.) 1918B-1043. (Annotated.)

Note.

Antagonism or ill feeling between trustee and beneficiary as ground for removal of trustee. 1918B-1044.

#### e. Settlement of Accounts.

30. The basic principle of an accounting by a trustee in equity is that the account should be so stated that the trustee shall make no profit by his use of the property of the cestui que trust and the latter shall receive the value of his property and its income.

A cotenant has the right to extract ore from the common property and sell it, accounting for the proceeds, less the reasonable expense of mining and marketing.

Where the fundamental rule of an accounting can be complied with by allowing to the cotenant, who is a trustee for his fellow, the expenses of mining and marketing the ore, the measure of damages for a wilful trespass is not necessarily applicable to the case, although the cotenant who extracted the ore intended to appropriate all of it to himself, concealed his acts, kept no accounts, caved the stope, and made it difficult and expensive to ascertain the volume and value of the ore taken. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (Fed.) 1918B-571. (Annotated.)

- 31. Evidence of Disbursement Sufficient. In a suit by a wife against her insane husband to foreclose a mortgage, in which the husband's guardian asked for an accounting as to money received by the wife while managing the mortgaged property during the husband's absence in Canada, evidence held to show that after supporting herself and her children she accumulated no reserve fund beyond what was sent the husband. Stevens v. Stevens (Mich.) 1916E-1259.
- 32. Reimbursement of Trustee for Expenses—Trustee Removed for Malfeasance. A faithful trustee may be indemnified out of the trust property for his expenses in rendering and proving his accounts, but where he was removed for malfeasance and found indebted to the trust estate, he was in the position of an unsuccessful litigant, and not entitled to costs, expenses, or commissions, but was chargeable personally with costs. Matter of Howell (N. Y.) 1917A-527.

#### 5. ADMINISTRATION OF TRUST.

a. Equitable Jurisdiction.

33. Asking Instruction of Court. When in doubt, the trustee of a fund may ask the instructions of the court as to the validity of a proposed exercise of the power of appointment. Thorp v. Lund (Mass.) 1918B-1204.

# b. Enforcement Generally.

- 34. Discriminatory Trust Manner of Enforcement—Failure of Trustee to Exercise Discretion. The trustee not having exercised the discretion, given by the will to determine to which of the testatrix's nephews and nieces, and in what proportion, the property should be distributed, it will be distributed among them equally; no rule being laid down by the will to govern the trustee. In re Dewey's Estate (Utah) 1918A-475.
  - c. Court Appointment of Trustee.
- 35. Failure for Lack of Trustee. Equity will not allow a trust to fail for lack of

- a trustee holding legal title. Sherlock v. Thompson (Iowa) 1917A-1216.
- d. Change of Purpose or Terms of Trust.
- 36. Joinder of Trustee in Action—Passive Trust. Where the trust created by a deed has become passive and the statute has executed the use, the trustee is not a necessary party to a suit to reinvest the land upon the uses declared by the deed. Lee v. Oates (N. Car.) 1917A-514.

#### TRUTH.

As defense in defamation, see Libel and Slander, 49, 50, 76, 78, 102, 106, 117, 139, 142.

#### TURNTABLE DOCTRINE.

Essentials of complaint, see Negligence, 62.

#### TWICE IN JEOPARDY.

Meaning, see Former Jeopardy. 2.

#### TYPEWRITING.

Comparison of, see Evidence, 110. Forgery by insertion of, see Forgery, 1-3.

#### TYPHOID.

As accident within Workmen's Compensation Act, see Master and Servant, 193, 194.

#### ULTRA VIRES.

Guaranty contracts, see Banks and Banking, 2.

#### ULTRA VIRES ACTS.

See Corporations, 13.

# UNCHASTITY.

Imputation of, to male, see Libel and Slander, 36.

#### UNCERTAINTY.

Effect on negotiability, see Bills and Notes, 20, 23, 25, 26. In description, see Deeds, 45-47.

# UNDERTAKINGS.

See Bonds; Suretyship.

#### UNDISCLOSED AGENCY.

See Agency, 31-34.

#### UNDUE INFLUENCE.

See Deeds, 24, 25; Wills, 97-101. In gift causa mortis, see Gifts, 15, 17. No presumption in gift to child, see Parent and Child, 6. UNFAIR TREATMENT OF LABOR.

Imputation of, see Libel and Slander, 18,

UNFAIR COMPETITION.

See Monopolies, 2, 3, 4, 6.

UNFAIR LIST.

See Libel and Slander, 18.

UNIFORMITY OF TAXATION.

See Taxation, 6-9.

UNIFORM WAREHOUSE RECEIPTS

See Warehouses, 6-9.

UNINCORPORATED ASSOCIATIONS. See Societies and Clubs.

UNIONS.

See Labor Combinations.

#### UNITED STATES.

Distribution of governmental powers, see Constitutional Law, 4-13.

Power to regulate commerce between states, see Interstate Commerce, 5. Calling militia into U. S. service, see Mili-

Mailable matter, see Postoffice, 1, 2. Relation of states inter se, see States, 12.

UNITED STATES COURTS.

See Courts, 8-11; Removal of Causes.

UNIVERSITIES

See Colleges and Universities.

UNLAWFUL ASSEMBLY.

See Mobs.

1. What Constitutes-Audience at Sunday Moving Picture Show. Defendant, who ran a moving picture show on Sunday, in assumed violation of Mich. Comp. Laws 1897, § 5912, forbidding the opening of shops or any business or work or presence at any public show or entertainment on Sunday under a fine of not more than \$10, can only be prosecuted under such provision, and, in the absence of any overt act or violence or disorder, cannot be summarily arrested under section 11334 et seq., authorizing the arrest of persons unlawfully assembled who refuse to disperse on command of the mayor, etc. People v. Dixon (Mich.) 1918B-385. (Annotated.)

UNMARRIED PERSONS,

Adultery by, see Adultery, 1.

UNPROFESSIONAL CONDUCT.

Imputation of, see Libel and Slander, 32.

UNRECORDED INSTRUMENTS.

See Chattel Mortgages, 14; Recording Acts, 12, 13,

## USAGES AND CUSTOMS.

Power to determine existence, see Arbitration and Award, 1.

Judicial notice of customs, see Evidence,

1. Local Significance of Word. Complainant conveyed certain land to defendant's predecessors in title by deed, reserving all timber suitable for sawlogs, 12 inches and over in diameter three feet above ground. Held that, while the word "timber suitable for sawlogs," standing alone, included any and every sort of sawlog, without reference to the character of the wood, yet, the contract having been made 20 years before, defendants were entitled to show that, according to the custom of the locality when the deed was made, "sawlogs" had a well-defined local meaning which was limited to pine logs. W. T. Smith Lumber Co. v. Jernigan (Ala.) (Annotated.)

2. When the usage of a locality in which an instrument is executed has given certain words therein a peculiar signification, the parties to the instrument will be presumed to have used the words in their peculiar local sense. W. T. Smith Lumber Co. v. Jernigan (Ala.) 1916C-654.

(Annotated.)

#### Note.

Admissibility of evidence of peculiar signification of word in locality where instrument was executed. 1916C-655.

USE AND OCCUPATION.

See Landlord and Tenant, 32, 36.

USUAL PLACE OF RESIDENCE.

See Process, 12.

#### USURY.

- 1. Definitions and General Considerations, 842.
- 2. Statutes, Construction and Validity, 842.
- 3. Consideration of Particular Contracts. 842.
- 4. Effect on Renewal of Contract, 843.
- 5. Remedies, 843.
  - a. Availability as Defense, 843. b. Recovery of Payment, 844. c. Equitable Relief, 844.

  - d. Recovery of Penalty, 844.

Principal's liability for agent's usurious transaction, see Agency, 25.

Exemption from usury laws, see Building and Loan Associations, 1.

- Action to recover usurious payments, when cause accrues, see Limitation of Actions, 30, 31.
- 1. DEFINITIONS AND GENERAL CON-SIDERATIONS.
- 1. Purging Transaction of Usury—Power of Court. The parties to an usurious contract themselves by agreement may purge it of usury, but a court of law or equity cannot do so after suit brought and after a defense of usury is interposed. Person v. Mattson (N. Dak.) 1918A-747.
- What Constitutes Usury—Exaction of Bonus. Where the parties to a mortgage stipulated expressly for six per cent interest, and incorporated a bonus in the principal, the mortgage was usurious, because the mere fact that seven per cent was a legal rate while the bonus would not amount to more than one per cent on the principal without the bonus for the time the loan was to run, thus rendering the total paid for the loan less than seven per cent, the highest legal rate, on the principal, could not operate to sustain the mortgage, on the ground that the parties intended the interest rate to be seven and not six per cent, since there was an express contract for such latter rate. Leach v. Dolese (Mich.) 1917A-1182.

# 2. STATUTES, CONSTRUCTION AND VALIDITY.

- 3. Penalty. All usurious interest stipulated for should be forfeited. The usurious contract rate cannot be treated as invalid and not a contract for an interest rate, and interest at the noncontract rate of six per cent be allowed. To do so would be to ignore and override the statutory penalty requiring forfeiture of all interest "agreed to be paid" on the notes. Person v. Mattson (N. Dak.) 1918A-747.
- 4. Construction of Adopted Act. Our usury statute was adopted from the National Banking Act governing taking of interest and discount by national banks, exempt in such respect from state laws, and was adopted to secure uniformity as to all banks, state and national, as to usury and penalty therefor. Federal decisions on usury are followed. Person v. Mattson (N. Dak.) 1918A-747.
- 5. Effect Forfeiture of All Interest. Under Mich. Comp. Laws 1897, § 4857, providing that, in any action on a usurious contract, if it shall appear that a greater rate of interest has been directly or indirectly reserved than allowed by law, the defendant shall not be compelled to pay any interest thereon, forfeiture of interest on a usurious mortgage is operative, although the cross bill seeking to enforce such mortgage in a suit of the mortgagors to redeem does not ask for the payment of usurious interest. Leach v. Dolese (Mich.) 1917A-1182.

- 6. Proof of Usury—Clear Proof Essential. Under the usury statute, providing that, whenever it shall satisfactorily appear by admission of the party or by proof that any bond, bill, etc., has been taken or received in violation of the provisions of the act, then, and not otherwise, shall the lender forfeit the whole sum expressed in the contract to the borrower, a forfeiture for usury will not be declared except on evidence clear and convincing that the lender participated in or benefited by the transaction. Brown v. Johnson (Utah) 1916C-321.
- 7. What is Usurious Rate—Monthly Interest. Under the statute permitting any rate of interest not exceeding 12 per cent per annum, a note calling for interest at the rate of 1 per cent per month is not usurious. Brown v. Johnson (Utah) 1916C—321.
- 8. Forfeiture of Interest—When Penalty Attaches—Attempt to Enforce Contract. Under Mich. Comp. Laws 1897, § 4857, providing that no contract reserving a usurious interest shall be rendered void, but that in any action on such contract the defendant shall not be compelled to pay any interest thereon, and under section 4858, that where it shall appear that any contract violates the preceding section, the court shall declare the interest thereon to be void, where a mortgagee by cross bill in suit to redeem a usurious mortgage affirmatively seeks its enforcement, he can recover no interest. Leach v. Dolese (Mich.) 1917A-1182.

# 3. CONSIDERATION OF PARTICULAR CONTRACTS.

- 9. Effect on Renewal Note. Suit to foreclose a mortgage securing notes for \$4,000 bearing interest at twelve per cent, non-usurious on their face. In part these two notes were renewals of two prior notes of \$356 and \$966 with cash advanced sufficient to aggregate \$4,000 for which the two notes were taken with security as one transaction. The \$356 note contained a usurious charge of bonus of \$45, and drew twelve per cent interest. No deduction for or purging of said usury was made by the parties when the \$4,000 in notes were taken, but the usurious amount was included in them. Defendant pleads usury and demands that all the interest on the \$4,000 be forfeited and remitted under the usury statute. The trial court deducted the interest on and bonus in the \$356 note, but allowed interest on the balance of the \$4,000. The principal of two notes aggregating \$4,000 is tainted with usury through that contained in the \$356 note entering into them as a portion of the purported principal of said notes. Person v. Mattson (N. Dak.) 1918A-747. (Annotated.)
- 10. What Constitutes—Provision for Acceleration of Maturity. Where a series of

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notes given for a loan do not reserve a usurious rate of interest if paid when due, but contain stipulations to the effect that default in payment shall accelerate maturity of the entire debt, which will render the interest, for the time the borrower had the use of the money under the acceleration clause, usurious, such notes are not void for usury; the excessive rate of interest after maturity of the debt being in the nature of liquidated damages, to be enforced only to the extent not unconscionable. Cissna Loan Co. v. Gawley (Wash.) 1917D-722. (Annotated.)

11. Provision for Payment Before Maturity. Instalment notes carrying a legal rate of interest, but which would carry a usurious rate of interest if paid before maturity at borrower's option, are not void for usury, since the borrower is not obligated to pay before maturity. Cissna Loan Co. v. Gawley (Wash.) 1917D-722.

#### Notes.

Provision for acceleration of maturity of debt on default in payment of interest or instalment of principal as usurious. 1917D-725.

Renewal contract as affected by usury in original contract. 1918A-753.

# 4. EFFECT ON RENEWAL OF CONTRACT.

- 12. Effect of Usury on Renewal Note. With usury proved in a note sued upon, a court cannot and should not separate the nonusurious from the usurious transactions incorporated by renewal into an usurious note, so as to allow interest on the nonusurious portion. Person v. Mattson (N. Dak.) 1918A-747.
- 13. Where an innocent party, without knowledge that an obligation contains usury, purchases it for valuable consideration, and the obligor discharges it by executing a new note payable to the holder, a new debt is thereby created and the consideration for the new note is valid, although the usury from the old debt was carried over into it without the payee's knowledge, so that the obligor cannot have any action or defense on the ground of usury. Taulbee v. Hargis (Ky.) 1918A-762. (Annotated.)
- obligation takes it knowing that it embraces usury, and thereafter the obligor discharges it by executing a new note to the assignee for the old note, the obligor is not estopped nor precluded from complaining of the usury as against the payee in the new note, when it is attempted to be collected. Taulbee v. Hargis (Ky.) 1918A-762. (Annotated.)
- 15. Ky. St. § 2219, subsec. 2, provides that the excess of interest over the legal rate paid for the loan of money may be

recovered from the lender, although paid to his assignee. A petition, in an action to recover an amount alleged to have been paid as usury, alleged the amounts of the money borrowed, which was the consideration of the original notes: that interest was calculated upon such amounts at ten per cent and included in the notes, and that on each renewal the interest at that rate was ascertained upon the amount of the old note and included in the new note; that a note to defendant, including such interest, was assigned by him to a bank, and was thereafter renewed at his request, including ten per cent interest, and was again renewed, and that upon payment of such note plaintiff was compelled to pay usurious interest to secure the release of his property from a mortgage executed to secure the note. It is held, on demurrer to the vetition, that it stated a good cause of action against the lender. Taulbee v. Hargis (Ky.) 1918A-762. (Annotated.) Hargis (Ky.) 1918A-762.

- 16. Although the obligation given in renewal of a debt containing usury is signed by obligors other than those originally bound, all usury may be purged from the transaction so long as the original obligor remains bound. Taulbee v. Hargis (Ky.) 1918A-762. (Annotated.)
- 17. Where usury was included in original notes secured by a mortgage on the debtor's realty, and in the renewals thereof, and the lender sold and indorsed the renewal note to a bank, and another bank, of which the original lender had become president, purchased it, and the original debtor executed to it a note for the unpaid part of the note it had purchased, with usurious interest thereon included in the note, the debtor is entitled to judgment against the bank for that sum. Taulbee v. Hargis (Ky.) 1918A-762.

(Annotated.)

18. Where a party in good faith, for value, and without knowledge, purchases a usurious obligation, and the debtor obtains an extension of time in which to pay it, and induces the holder to accept a new note and thereby obtains his old note, and the assignor thereof is released from liability, the debtor, on payment of the new note, cannot recover the usury brought forward from the old note into it, but must look to the lender. Taulbee v. Hargis' (Ky.) 1918A-762. (Annotated.)

## 5. REMEDIES.

## a. Availability as Defense.

19. Effect of Usury—Mandatory Statute. The usury statute, section 6070, N. Dak. Comp. Laws 1913, providing that the taking of usury "shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon," mandatorily requires the penalizing of usury and the forfeiture of

all the interest "agreed to be maid" on these two notes. Person v. Mattson (N. Dak.) 1918A-747.

20. Estoppel to Allege—Inducing Transfer to Bona Fide Purchaser. Where an innocent purchaser for value and without notice of the usury in a note has been induced to purchase it by the obligor, the obligor is estopped to set up a claim of usury as against the assignee, either before or after he executes a new note to the assignee. Taulbee v. Hargis (Ky.) 1918A-762.

# b. Recovery of Payment.

21. Rights Against Original Creditor After Assignment. Ky. St. § 2219, authorizing the recovery of usurious interest from the lender, where it has been paid to the assignee, contemplates the existence of transactions in which it is not recoverable against the assignee. Taulbee v. Hargis (Ky.) 1918A-762.

22. Recovery of Usurious Payments—Rights Against Original Creditor After Assignment. Where the obligor in a note tainted with usury executes a new note to an innocent purchaser for value and without notice and thereby discharges the old debt, he can reclaim the usury in it from the lender by an action for its recovery. Taulbee v. Hargis (Ky.) 1918A-762.

# c. Equitable Relief.

23. Relief in Equity from Penalty for Usury. A court of equity should not relieve the usurer from the results of his contract for usury, but should enforce the statutory penalty for exacting usury. Person v. Mattson (N. Dak.) 1918A-747.

## d. Recovery of Penalty.

24. National Banks-Rate of Interest-Penalty for Taking Usurious Interest. Under sections 5197 and 5198, Revised Statutes of the United States (5 Fed. St. Ann. 130, 133), a national bank may charge and receive on a loan the same rate of interest allowed to be charged by the laws of the state in which such national bank is located, and, when such national bank shall knowingly charge and receive a greater rate than that prescribed by the laws of the state in which such bank is located, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid, provided such action is commenced within two years from the date of the usurious transaction. Farmers' National Bank v. McCoy (Okla.) 1916D-243.

25. Sufficiency of Petition. In an action to recover the amount of interest paid in an usurious transaction, where the peti-tion states facts showing the date of the note, by whom it was executed, and to whom it was made payable, and shows the amount of interest charged, and that such interest was paid and when paid, by whom it was paid, and to whom it was paid, and shows the amount of interest thus paid to have been in excess of the rate allowed by law to be charged and received, and attaches copy of the note to the petition and makes it a part thereof, and further alleges that the defendant bank "did corruptly, knowingly, wrongfully, and illegally charge, take, and receive from plaintiff the amount of interest so usuriously charged," it states facts sufficient to constitute a cause of action. Farmers' National Bank v. McCoy (Okla.) 1916D-1243.

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# VENDOR AND PURCHASER.

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# 1. REQUISITES AND VALIDITY OF CONTRACT.

## a. Offer and Acceptance.

1. Withdrawal of Offer. An offer to convey realty until accepted is subject to withdrawal without prejudice to the party making it, and where the alleged purchaser knows nothing of the offer there is no prejudice in its withdrawal, and the vendor is not under obligation to renew the offer. Brown v. Farmers', etc. National Bank (Ore.) 1917B-1041.

# b. Options.

- An "option" is a unilat-2. Definition. eral agreement binding upon the optioner from the date of its execution, but it does not become a contract inter partes, in the sense of an absolute contract to convey and purchase until exercised by the optionee. Barton v. Thaw (Pa.) 1916D-570.
- 3. Acceptance. An option to purchase real estate is made a contract mutual and binding on the parties by a tender of the money agreed on within the time limited. Agar v. Streeter (Mich.) 1916E-518.

4. Mutuality of Contract - Conditional Option to Rescind. A contract for the purchase of land, providing that, unless a road running through the land should be closed within a week, the purchaser should be "in ne way obliged," is not lacking in the mutuality essential to the right to enforce specific performance, though it gives the purchaser the option to rescind if the road was not closed, or to waive the condition, at least not from the time waiver was announced by the purchaser, since from that time the remedy was mutual. Catholic Foreign Mission Soc. v. Oussani (N. Y.) 1917A-479.

# c. Description.

5. Description of Property. A contract whereby defendant sold to plaintiff 1,760 acres of land, known as the "Williams ranch, in Washington county, Colorado," known as state school land, and whereby plaintiff sold an eighty-acre tract located one and one-half miles west of Ft. Morgan, a tract located half a mile south of Ft. Morgan, and several lots in Ft. Morgan, is not void upon its face because of the defective description of the property. Drenpen v. Williams (Colo.) 1917A-664.

## 2. CONSTRUCTION OF CONTRACT.

- 6. Default in the payment of any instalment of the price called for in a contract of sale of real estate is a distinct breach, and gives the vendor a right to declare a forfeiture, as stipulated for in the contract; but the right must be promptly exercised, or the vendor will be presumed to treat the contract as valid. Suburban Homes Co. v. North (Mont.) 1917C-81.
- 7. Waiver of Forfeiture. Where a contract for the purchase of realty entitles the purchaser to waive a condition of the contract with which the vendor failed to comply, it is not essential to the effectiveness of such waiver, when made by the purchaser, that it be approved by the vendor. Catholic Foreign Mission Soc. v. Oussani (N. Y.) 1917A-479.

#### MUTUAL RIGHTS AND LIABIL-ITIES OF PARTIES.

- Estoppel of Purchaser to Deny Vendor's Title.
- 8. Where an owner of land filed a map describing a strip thereof as a street, and sold lots abutting on such street, and the successor in title of a purchaser of such lots who was in possession thereof only through tenants permitted the successor in title of the original owner to erect valuable improvements on the strip of land: described in the recorded map as a street, the successor in title of the buyer is not estopped to claim a right of way over the strip, she having no notice of the erection. of the improvements, save through her ten-

ants, being a resident of a foreign state, since there is no principle of law charging a landlord with the knowledge of his tenants in such case, while, had knowledge of the erection of the buildings been imputable to her, she could not have forfeited her rights by failing to protest against the erection of the improvements, since her own rights depended on matters of record, equally open both to her and the party pleading an estoppel, which cannot exist where the knowledge of both parties is equal, and nothing is done by one to mislead the other. Eltinge v. Santos (Cal.) 1917A-1143.

#### b. Rescission of Contract.

- 9. A vendor who grants time to the purchaser to pay instalments of the price, though the contract makes time of the essence and stipulates for a forfeiture for non-payment of any instalment at maturity, may, on the default continuing, demand payment of the balance of the price, and give notice of his purpose to terminate the contract in the event of further default; and where the purchaser after such notice does not pay within a reasonable time, the vendor may terminate the contract. Suburban Homes Co. v. North (Mont.) 1917C-81.
- 10. Right to Rescind—Time as Essence of Contract—Waiver of Delay. A stipulation in a contract of sale of real estate making time of the essence, and reserving an option to the vendor to terminate the contract for the failure of the purchaser to pay any required instalments of the price, may be waived by the vendor. Suburban Homes Co. v. North (Mont.) 1917C—81
- 11. Necessity of Returning Consideration. Purchasers of mining property, the title to a part of which failed or proved defective, who took possession, cannot, while retaining the whole property, resist payment of the purchase price. Carter v. Butler (Mo.) 1917A-483.
- 12. Tender of Consideration Partial Rescission. A grantor conveying two parcels of real estate may recover one of the parcels without tendering the consideration paid him for the other parcel. Anheier v. De Long (Ky.) 1917A-1239.
- 13. Slight Deficiency in Quantity. In an action to recover payments under a contract for the purchase of a house and lot which the purchaser had attempted to rescind, where it appeared that the contract covered the land up to a line a short distance west of two large shade trees, but that the vendor had conveyed land west of that in question and made the center of the trees the boundary line, and, while the width and length of the strip involved did not appear, it appeared that it had some value, it is a question for the jury

whether the shortage is too inconsequential to justify a rescission. Brown v. Aitken (Vt.) 1916D-1152. (Annotated.)

## c. Purchase Price.

14. Action for Price—Proof of Delivery of Possession. In an action on a note, which the answer admitted was given in consideration of the transfer to defendants of certain mining property, with a warranty of title, the burden is on defendants to show that possession of the property had not been delivered, or that they had been deprived of a part thereof on account of a failure or defect of title, since the note imports a consideration throwing the burden upon defendants to prove affirmatively that it was lacking or had failed, while the word "transfer" implies a delivery of possession. Carter v. Butler (Mo.) 1917A—483.

# d. Damages for Breach by Vendor.

15. Vendor and Purchaser — Breach of Contract—Inability to Make Title—Measure of Damages. A vendor who, without fault on his part, is unable to make title is not liable in damages to the vendee for the loss of his bargain though the contract to sell is part of a lease to the vendee which binds him to make extensive improvements. Ontario Asphalt Block Co. v. Montreuil (Can.) 1917B-852. (Annotated.)

# Note.

Measure of damages for breach of contract to sell land due to vendor's inability to make title. 1917B-858.

# e. Vendor's Lien.

- 16. Conveyance in Consideration of Future Support. A recital that grantees "agree to care for and support" grantors "with money and other necessaries for their support their natural life," though such agreement was the sole consideration for the grant, will not alone create a lien or charge on the land conveyed. To operate as such, an intent to impose such burden must definitely appear, or be directly inferable from the grant when properly construed. Grant v. Swank (W. Va.) 1917C-286. (Annotated.)
- 17. Implied Vendor's Lien—Priority as Against Judgment. In this state the vendor's implied lien is a mere capacity in the vendor to acquire a lien by filing a bill to fix and enforce his claim on the land, and, until he does this, any creditor of the grantee may attach or cause execution to be levied on the land and prevail upon the lien thereof over the vendor. Hood v. Hogue (Tenn.) 1916D-383.

18. Where a deed retains no lien for the purchase price, the vendor, upon a subse-

(Annotated.)

quent reconveyance to him in satisfaction of the unpaid balance of the purchase price, does not stand in the same position as though he had brought a suit for the enforcement of his implied lien, and, until his deed is registered, a creditor, by levying upon the land under an execution on a judgment against the vendee, can acquire rights superior to the vendor. Hood v. Hogue (Tenn.) 1916D-383. (Annotated.)

19. Nature and Origin. In English and American law a vendor's lien is exceptional in character, and is an importation from the civil law, which found its recognition through courts of chancery, on the equitable principle that the person who had secured the estate of another ought not in conscience to be allowed to keep it and not pay full consideration money, and that to enforce that payment it was just that the vendor should have a lien upon the property. Martin v. Becker (Cal.) 1916D-171.

#### Notes.

Priority as between implied vendor's lien and judgment against purchaser. 1916D-384.

Existence of implied vendor's lien where consideration for conveyance is agreement to support vendor for life. 1917C-288.

# f. Right to Recover for Improvements.

20. In the absence of a provision in a contract of sale fixing a different measure of compensation for improvements by the purchaser, the amount recoverable for improvements is the enhanced value of the property, not exceeding the cost of the improvements, less the fair rental value of the premises recovered by the vendor forfeiting the contract for the purchaser's failure to pay required instalments; and in the absence of any evidence of the value of improvements, or of any enhanced value of the property, the court cannot award any relief to the purchaser for improve-Homes Co. v. North ments. Suburban (Annotated.) (Mont.) 1917C-81.

## Note.

Right of defaulting purchaser under contract for sale of land to reimbursement for improvements. 1917C-85.

# 4. RIGHTS OF BONA FIDE PUR-CHASER.

21. Consideration — Pre-existing Debt. The surrender and satisfaction of an existing debt, if done bona fide, operates as a present consideration; and, if one who obtained a title by fraud conveys it to a third person in extinguishment and discharge of a pre-existing debt, the latter will stand as a "purchaser for value." The questions of bona fides and notice are open to consideration as in other cases of purchase from one alleged to have procured title by fraud.

(a) This does not conflict with the previous rulings of this court, that, if the title to property has been procured from a person by fraud, the right of the seller to rescind the sale is superior to the right of a mortgagee who receives from the person committing the fraud a mortgage as security for an antecedent debt, without more. Sutton v. Ford (Ga.) 1918A-106.

(Annotated.)

#### Note.

Person taking conveyance of realty in payment of pre-existing debt as purchaser for value. 1918A-112.

# 5. BUILDING RESTRICTIONS.

# a. Nature and Validity.

- 22. Validity. Restrictive building covenants are not invalid as against public policy. Flynn v. New York, etc. R. Co. (N. Y.) 1918B-588.
- 23. Effect of Restriction Subsequent Purchaser. Restrictive building covenants are valid and enforceable in law and in equity, and all the lots covered thereby are subject to an incumbrance, requiring occupation in accordance therewith, binding upon every subsequent purchaser having notice of the plan, even though his legal title is unrestricted. Flynn v. New York, etc. R. Co. (N. Y.) 1918B-588.

# b. Against Whom Enforceable.

- 24. Enforcement Against Subpurchaser. A restrictive covenant which does not run with the land will not be enforced in equity against a purchaser from the covenantor, though he bought with notice of the covenant, if the covenantee owns no land adjoining that to which the covenant relates. London County Council v. Allen (Eng.) 1916C-932. (Annotated.)
- 25. The owner of a tract of land laid it out on a map in lots fronting on streets, and, as an inducement to purchasers, sold them by deeds, covenanting that no building or structure for any business purpose whatsoever should be erected on the premises. Defendant railroad purchased lots running across the entire southern part of the tract subject to such restrictions opposite the lots of one of the plaintiffs and adjacent to the premises of the other, and built its railway across such lands partly on an embankment and partly in an open cut, and operated on its track many fast electric trains daily. It is held, in an action to restrain the maintenance of such structure and the operation of the road. that defendant had violated the covenant. and that plaintiffs were entitled to damages, a "building or structure" being in the widest sense anything constructed that is erected by art and fixed upon or in the soil composed of different pieces connected together and designed for permanent use in the position in which it is so fixed, and

to "erect," meaning not only to raise, but also to build or construct. Flynn v. New York, etc. R. Co. (N. Y.) 1918B-588.

(Annotated.)

26. In such case, the plaintiffs' right is measured by the depreciation in the value of their land, including such depreciation as will be sustained by reason of the use to which the defendant puts its property; the difference in value between their land with and without the railroad. Flynn v. New York, etc. R. Co. (N. Y.) 1918B-588. (Annotated.)

## Note.

Enforcement in equity against subpurchaser of restrictive covenant not running with land, where covenantee has no interest in adjoining land. 1916C-942.

## VENDOR'S LIEN.

See Sales, 49; Vendor and Purchaser, 16-

## VENUE.

Transitory Actions.
 Change of Venue.

a. Grounds.

b. Procedure.

(1) Jurisdiction.

(2) Affidavits.

(3) Determination of Motion.

Appeal.

(5) Withdrawal of Application.

Comment on change, see Argument and Conduct of Counsel, 28. Stockholder's suit, see Corporations, 138.

Change in divorce suit, see Divorce, 7. Of bill of review, see Equity, 37.

Action in wrong county as ground for vacating judgment, see Judgments, 39. Of motion to vacate judgment, see Judgments, 40.

Sufficient on margin of complaint, see Pleading, 41/2.

# 1. TRANSITORY ACTIONS.

- 1. Transitory Causes of Action. Transitory causes of action are enforceable wherever a defendant may be found. Bagdon v. Philadelphia, etc. Coal, etc. Co. (N. Y.) 1918A-389.
- 2. Residence of Plaintiff—Distinction Between Residence and Place of Business. Mass. Rev. Laws, c. 167, § 6, as amended by St. 1904, c. 320, provides that an action to recover for injury received by reason of negligence shall be brought in the county in which the plaintiff lives or has his usual place of business, or in the county in which the injury was received. Such an injury was received by plaintiff's intes-tate in Essex county, the plaintiff lived in Norfolk county, and was employed as assistant manager of a department store in Suffolk county, and the action was brought in Suffolk county. It is held that the

venue was improperly laid, it being a rule in the interpretation of statutes that where reasonably possible full effect should be given all the words used, while "usual place of business" as used in St. 1854, c. 322, first permitting transitory actions to be brought in the county where either party had such place of business, had a more restricted signification than the words "in which he principally transacts his busi ness or follows his trade or calling,' in St. 1856, c. 70, providing that where the plaintiff in a transitory action was a non-resident, the action might be brought in the county, in which the defendant lived or principally transacted his business or followed his trade of calling if he resided in the commonwealth, the language of Rev. Laws, c. 167, § 6, as amended, being taken from the earlier act, or that a "usual place of business" does not include where one pursues a "trade or calling," the work of the plaintiff, as a department store manager, being a "trade or calling" or employment by another, as distinguished from working for oneself. Hanley v. Eastern Steamship Corporation (Mass.) 1917D-1034.

## 2. CHANGE OF VENUE.

## a. Grounds.

- 3. In order to justify a change of venue on account of the excitement of public prejudice, it must be shown that such excitement or public prejudice is such that its natural tendency will be to intimidate or swerve the jury, and as the court in which the case is pending can much better determine the propriety of a postponement on this ground than the appellate court it requires a very strong showing to induce the upper court to interfere. State v. Gordon (N. Dak.) 1918A-442.
- 4. Newspaper Publication. Proof that prejudice exists, or that a derogatory article has been published in one of the cities of a county, is not proof that a fair trial cannot be had in the county at large, or that such county as a whole is prejudiced, and is not therefore sufficient to entitle one to a change of venue. State v. Gordon (N. Dak.) 1918A-442.

# Note.

Application for change of judge or venue on ground of bias of judge as ousting judge of jurisdiction. 1916D-1281.

# b. Procedure.

#### (1) Jurisdiction.

5. Bias of Justice of Peace-Application for Change as Ousting Justices of Juris-diction. Under Utah Comp. Laws 1907, § 5132, relative to criminal cases before justices, providing that, where a defendant files an affidavit that he cannot have a fair trial before the justice, because of his b as or prejudice, the case must be transferred

to another justice, the filing of a sufficient affidavit does not deprive the justice of jurisdiction, but his refusal of the change and proceeding with the trial is only error; so that, on appeal, the district court has jurisdiction, and, under sections 5165, 5167, should try the case de novo. State v. Morgan (Utah) 1916D-1278.

(Annotated.)

# (2) Affidavits.

6. Affidavits-Effect of Failure to Contradict. In the absence of counter affidavits, the contents of the affidavits filed in support of a motion for a change of venue must be taken by the court on appeal as admitted. Rugenstein v. Ottenheimer (Ore.) 1917E-953.

# Determination of Motion.

7. Habeas Corpus-Discretion of Court. Iowa Code 1897, § 3494, regulating the place of bringing actions, provides that actions against a public officer for an act done in virtue of his office must be brought in the county where the cause or some part thereof arose. Section 3504 provides that, if an action is brought in the wrong county, it may be prosecuted to termination, unless the defendant, before answer, demands change of venue to the proper county. Section 4420 provides that application for habeas corpus must be made to the court or judge most convenient in point of distance to the applicant, and the most remote court or judge, if applied to, may refuse the writ, unless a sufficient reason be stated for not making the application to the more convenient judge. A patient confined in a state hospital for female inebriates applied for habeas corpus to the judge of a district court for a remote county, alleging that upon hearing in such county she could produce her witnesses most conveniently. The superintendent of the hospital to whom the writ issued applied for change of venue to the county in which the hospital was situated, alleging that the entire detention by him had been in such county. It is held that denial of such change of venue was proper, since the judge to whom application was made, though having the right to refuse the writ, was not under obligation to do so; there being invested in him by section 4420 a judicial discretion, in the exercise of which an error of judgment on his part as to the existence of conditions militating against the propriety of hearing the writ would not deprive him of his right Addis v. Applegate (Iowa) to do so. 1917E-332.

# (4) Appeal.

8. Denial of Change—Prejudice of Judge -Effect of Impartial Trial of Case. Where before the trial of a cause the judge makes statements amounting to a prejudgment of the case in favor of the plaintiff, the defendant is entitled to a change of venue, and for the error in refusing to grant the change, the judgment will be reversed on appeal, though the record fails to disclose any prejudice in the trial. Rugenstein v. Ottenheimer (Ore.) 1917E-(Annotated.)

# Withdrawal of Application.

Withdrawal of Application After Granting Thereof - Transfer of Papers. Where in a criminal case an application for a change of venue was made under the Ga. Act of 1911 (Acts 1911, p. 74), on the ground that there was a probability or danger of violence to the defendant, and a judgment refusing such change was brought to the court and reversed, and the change accordingly granted, the accused could not then withdraw his application, object to being tried in the county to which the change had been made, and demand a trial in the county where the

indictment had been found.

(a) Where a person accused of crime applied for a change of venue under the act above mentioned, which was denied, and he excepted and obtained a reversal of the judgment; and where, on the return of the remittitur, the judgment of the supreme court was made the judgment of the superior court, and a county was named in the order as the place for the trial, and the clerk of the superior court of the county where the case was then pending was directed, in terms of the statute, to transmit the papers to the county so selected, this was in substance a judgment changing the venue, although it was

not expressly so stated.
(b) Where in a criminal case a change of venue is granted, a certified copy of the order for that purpose is required to be transmitted to the clerk of the superior court of the county to which the change is made; but the original indictment and other papers in the case are required to be sent to that county. Graham v. State

(Ga.) 1917A-595.

#### VERDICTS.

1. Severance in Verdict, 850.

2. Validity of Verdict, 850. a. In General, 850.

b. Formal Validity, 850.

- Judgment on Verdict, 850.
   Correction of General Verdict, 851. 5. Impeachment of Verdict, 851.
- 6. Directing Verdict, 851. a. In General, 851.

b. Power of Court, 851.

- c. Direction of Conviction, 852.d. Form of Motion, 852.
- e. Presumption Against Motion, 852.
- f. Effect of Motion by Both Parties. 852.
- g. Questions Raised, 852. h. Order of Court, 852.
- See Damages, 26-55; Homicide, 73; Negligence, 122, 123.

Conclusiveness on appeal, see Appeal and Error, 106, 115-135.

In criminal cases, see Appeal and Error, 133-135.

Direction of verdict, review, see Appeal and Error, 155.

Presumptions on appeal, see Appeal and Error, 199, 200.

Reading newspapers as ground for reversal, see Appeal and Error, 208. Erroneous exclusion of evidence cured by

verdict, see Appeal and Error, 273. Necessity of exception, see Appeal and Error, 386.

Directed verdict on note, see Bills and

Notes, 95.

Judgment non obstante, see Judgments, 18-20.

As res adjudicata, see Judgments, 67. In proceedings under Employers' Liability Act, see Master and Servant, 95-97.

Of coroner's jury, admissibility in pro-ceedings under Workmen's Compensation Act, see Master and Servant, 289.

In proceedings under Workmen's Compensation Acts, see Master and Servant, 362, 363.

No direction of verdict for nonjoinder of party, see Parties to Actions, 11.

# 1. SEVERANCE IN VERDICT.

 Special Verdict — Rule in Federal A federal court may refuse to re-Courts. quire a jury, in addition to a general verdict, to answer special questions at the request of a party. Parsons v. Trowbridge (Fed.) 1917C-750.

# 2. VALIDITY OF VERDICT.

#### a. In General.

2. Quotient Verdict. A verdict, in an action for conversion of a horse, is not invalid as a quotient verdict, if the result obtained is merely used as a basis for further discussion as to what was the reasonable value of the horse, though a verdict is rendered for that amount. Sales v. Maupin (S. Dak.) 1917C-1222.

(Annotated.)

- 3. Where a jury determine the value of a horse by dividing the whole amount each juror believes is the value by 12, the finding of the court on conflicting affi-davits of jurors that the result obtained was merely used as a basis for further discussion, and hence not a quotient verdict, will not be disturbed on appeal. Sales.v. Maupin (S. Dak.) 1917C-1222. (Annotated.)
- 4. A "quotient verdict," reached by the jurors adding their several amounts of recovery and dividing the sum by their number, is illegal. Spain v. Oregon-Washington R. etc. Co. (Ore.) 1917E-1104.
- 5. Verdict by Less Than Whole Number -Construction of Statute - Actions In-

cluded. Under Ariz. Civ. Code 1901, par. 1413, providing that in civil cases, except those cognizable at common law, 9 of the 12 jurors may return a verdict, in an action by the state for the penalty under Laws 1912, c. 50, forbidding any electric light or power concern to work the employees in its plant more than 8 hours in each 24, a verdict by 9 jurors is bad, the suit being one cognizable at common law. Miami Copper Co. v. State (Ariz.) 1916E-494. (Annotated.)

- 6. Although action is begun, and issue joined, before the adoption of a law authorizing nine jurors in a civil case to render a verdict, such verdict is valid, since there is no vested right in the modes of procedure. Miami Copper Co. v. State (Ariz.) 1916E-494. (Annotated.)
- 7. Verdict Sustained. There is nothing in this case to indicate that the verdict was given under mistake, or the influence of passion or prejudice, nor that the verdict and judgment are contrary to the evidence. Stewart v. Murphy (Kan.) 1917C-

#### Notes.

Validity and construction of constitutional or statutory provision for verdict by less than whole number of jurors. 1916E-500.

Validity of chance or quotient verdict. 1917C-1224.

# b. Formal Validity.

- 8. Sufficiency-Conviction of Embezzlement. A verdict of "guilty of embezzlement as charged in the information" is sufficient in a prosecution for having committed the crime of embezzlement condemned by section 9205, N. Dak. Rev. Codes 1905, in the different manners described in said section. Such a verdict is a general verdict and has the same effect as the verdict of "guilty" provided for in section 10044, Rev. Codes 1905. State v. Bickford (N. Dak.) 1916D-140.
- Verdict Sufficient—Guilty as Charged in Information. Where an information only charged the offense of assault with intent to kill with malice, a verdict finding accused guilty as charged is sufficient. State v. Gould (Mo.) 1916E-855.

## 3. JUDGMENT ON VERDICT.

10. It is not sufficient to warrant such judgment that the evidence was such that the trial court ought to have granted either a motion for a directed verdict or a new trial on the ground of insufficiency of the evidence to sustain the verdict, but it must also appear that there is no reasonable probability that the defects in or objections to the proof necessary to support the verdict may be remedied upon another trial. First State Bank v. Kelly (N. Dak.) 1917D-1044.

## 4. CORRECTION OF GENERAL VER-DICT.

11. Reassembling Jury. After the jury had been discharged in the afternoon with the consent of counsel, the court instructed them that if they should agree upon a verdict after the court took a recess for the day, it could be written and signed by the foreman, and kept by him, and the jury could return it into court the next morning. When the court assembled the next morning, all of the jury being present, a verdict was returned in the following form: "We, the jury, find in favor of the plaintiff, with seven per cent interest, less expense," signed by the foreman. The court directed them to return to their room and correct their verdict by inserting therein the amount which they intended to find for the plaintiff. They retired, and later returned with a verdict expressing the amount found in the plaintiff's favor. Held, that this was not error, and furnished no ground to arrest the judgment or for granting a new trial. Mitchell v. Langley (Ga.) 1917A-469.

# 5. IMPEACHMENT OF VERDICT.

- 12. In an action in which the jury, being unable to decipher the word "punitive" in a special question, sent the foreman to ask the judge what the word was, a verdict for punitive damages cannot be impeached by the affidavits of jurors that they would not have awarded such damages if they had known that they would go to plaintiff, and that they understood that the foreman, in arguing that such damages would be paid to the county, was repeating what he had been told by the judge; there having been no representation by the foreman that the judge made any such statement. Dishmaker v. Heck (Wis.) 1917A-400. (Annotated.)
- 13. Affidavit of Juror to Impeach Verdict. Affidavits of jurors will not be received to impeach a quotient verdict, whether made by members of a unanimous jury or by nonconcurring jurors under the statute allowing three-fourths of the jurors to return a verdict. Spain v. Oregon-Washington R., etc. Co. (Ore.) 1917E-1104.

# 6. DIRECTING VERDICT.

#### a. In General.

- 14. Verdict Properly Directed. The evidence examined, and held, that it was not erroneous to direct a verdict. Central Georgia Power Co. v. Cornwell (Ga.) 1916D-1020.
- 15. Evidence Held for Jury. Under the conflicting testimony as to issues material to the case, the court should have submitted them to the jury under proper instructions, and erred in directing a verdict for the claimant. Brown v. Caylor (Ga.) 1916D-715.

- 16. When Direction Improper. If there is any credible evidence which, if undisputed, would entitle the jury to find for the plaintiff, a verdict should not be directed for the defendant. Marinette v. Goodrich Transit Co. (Wis.) 1917B-935.
- 17. When Direction Proper—Sufficiency of Evidence. Where the record contains evidence from which, standing alone, the jury, without acting unreasonably, could find all the material averments of the declaration to have been proven, a verdict should not be directed for defendant. Devine v. Delano (Ill.) 1918A-689.
- 18. In an action for breach of contract in failing to furnish the variety of cucumber seed purchased, testimony by some of plaintiff's witnesses that they had not known the name of the brand ordered to be used to designate a certain variety of seed does not make plaintiff's evidence so uncertain as to render the direction of a verdict in his favor erroneous, where numerous witnesses sustained plaintiff's contention as to the designation. Buckbee v. P. Hohenadel, Jr., Co. (Fed.) 1918B-88. (Annotated.)
- 19. Direction of Verdict—Consideration of Entire Evidence. On motion for peremptory instruction, the entire evidence is to be considered, and, if it fails to show a cause of action, the motion should be granted. Southern Ice Co. v. Black (Tenn.) 1917E-695.
- 20. Uncontradicted Evidence. The giving of a peremptory instruction where an issue is made upon the pleadings is always predicated upon the fact that all the evidence tends to support the contention of the party in whose favor the verdict is directed. Tennis Coal Co. v. Sackett (Ky.) 1917E-629.
- 21. Insufficient Evidence. An instruction seeking to take the case from the jury for the want of legally sufficient evidence will not be granted, if there is any evidence, however slight, legally sufficient as tending to prove it. Hodges v. Baltimore Engine Co. (Md.) 1917C-766.
- 22. Evidence Permitting More Than One Conclusion. Refusal of a directed verdict is proper where it cannot be said that all reasonable men must draw from the evidence the same conclusion. Parsons v. Trowbridge (Fed.) 1917C-750.
- 23. Evidence considered and held sufficient to go to the jury on an issue whether money, the receipt of which by the defendant was admitted, was a loan or was pail under a contract for the future support of the payor. Chalvet v. Huston (D. C.) 1916C-1180.

## b. Power of Court.

24. Insufficincy of Evidence. A verdict for the defendant should never be di-

rected by the court, unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the plaintiff. If there is evidence tending to prove the issue, and sufficient to show liability, it should be submitted to the jury as a question of fact to be determined by them, and not taken from the jury and passed upon by the court as matter of law. King v. Cooney-Eckstein Co. (Fla.) 1916C-163.

25. Weight of Evidence. Chapter 6220, Fla. Laws of 1911, amending section 1496, Gen. St. of 1906, does not authorize a trial judge to pass upon the preponderance of evidence, except where the evidence of all the parties shall have been submitted, and it is apparent to the judge that no sufficient evidence has been submitted upon which the jury could legally find a verdict for one party, the judge may direct a verdict for the opposite party. Florida East Coast B. Co. v. Carter (Fla.) 1916E—1299.

26. The court should direct a verdict, when the evidence is not controverted, and the law as applied to that evidence produces but one legal result; but when a case involves an issue of fact, on which the evidence is conflicting and would support a verdict for either party, such issue should be left to the jury. Philadelphia, etc. R. Co. v. Gatta (Del.) 1916E-1227.

## c. Direction of Conviction.

27. What Constitutes. Where the undisputed evidence showed that defendants signed an agreement to raise the price of milk, that they controlled 60 per cent of the output necessary in a city, and it was admitted by defendants that, in consequence of the agreement, they raised the price, a charge that on the agreement and the evidence defendants were guilty, and directing the jury to take the case and return a verdict, is not objectionable as directing a verdict, but merely informs the jury that the agreement and the admission made defendants guilty. State v. Craft (N. Car.) 1917B-1013.

# d. Form of Motion.

28. Motion for Directed Verdict—Right to Move Orally. One moving for peremptory instruction is not required to formulate the evidence and sign a statement, as under a demurrer to the evidence, but the motion can be made orally upon the evidence as delivered before the court and jury. Southern Ice Co. v. Black (Tenn.) 1917E-695.

## e. Presumption Against Motion.

29. Presumption in Favor of Verdict—One Good Count—Exception to Rule. It being impossible to say under what count of the declaration verdict was returned for

plaintiff, submitting an issue under a count abandoned under the state of the pleadings is prejudicial, though the evidence under another count is sufficient to sustain a verdict. Wende v. Chicago City R. Co. (III.) 1918A-222.

30. Inferences Against Motion to Direct. On motion to direct a verdict for defendant, all that the evidence tends to prove, and all just inferences to be drawn from it in plaintiff's favor, must be conceded to him. Devine v. Delano (III.) 1918A-689.

31. Presumptions. On motion for directed verdict, the evidence of the adverse party must be taken as true, and every reasonable inference fairly deducible therefrom indulged. Louisville, etc. R. Co. v. Chambers (Ky.) 1917B-471.

## f. Effect of Motion by Both Parties.

32. In an action for breach of contract in failing to furnish the variety of cucumber seed ordered, a request by both parties for a directed verdict at the conclusion of all the evidence operates as a request that the court find the facts, and the facts as found are conclusive upon the parties; the reviewing court being limited to the correctness of the conclusions of law thereon. Buckbee v. P. Hohenadel, Jr., Co. (Fed.) 1918B-88.

33. Upon a jury trial in district court, if each party asks an instructed verdict in his favor, the decision of the court for plaintiff will be sustained if a verdict could be sustained for plaintiff upon the evidence with proper instructions. Hamilton v. North American Accident Ins. Co. (Neb.) 1917C-409.

# g. Questions Raised.

34. Insufficiency of Pleading. Where the complaint does not contain allegations sufficient to constitute a cause of action, the proper remedy is by demurrer, and not by motion to direct a verdict. Greenwood Cotton Mill v. Tolbert (S. Car.) 1917C-338.

## h. Order of Court.

35. Instruction Amounting to Direction. The court at the close of the testimony denied a motion to direct judgment against the News Printing Company, codefendant, but instead, in its instructions, required the jury to find in any event for the plaintiff and against the News Printing Company for the amount claimed. This action did not prejudice plaintiff's rights, and is the equivalent of the granting of a motion for a directed verdict. Northern Trust Co. v. Bruegger (N. Dak.) 1917E-447.

## VERIFICATION.

See Pleading, 107.
Of indictment, see Indictments and Informations, 3, 7.

Of complaint in juvenile court, see Infants,

Of notice of claim of lien, see Mechanics' Liens, 28.

## VESTED ESTATE.

Option creates a vested estate when, see Perpetuities, 3.

#### VESTED REMAINDER.

See Remainders and Reversions, 6, 7, 12,

#### VESTED RIGHTS.

No vested rights in rules of procedure, see Constitutional Law, 52.

No vested right in rules of evidence, see Stare Decisis, 7.

#### VETERANS.

See Pensions.

VETERANS' PREFERENCE ACTS. See Public Officers, 10.

## VETO POWER.

See Statutes, 23, 24, 27.

## VOLUNTEER.

Defined, see Master and Servant, 217-219.

## WAGES.

Assignability, see Assignments, 1, 2, 20. Meaning, see Judges, 4.

#### WAGON.

A "tool or instrument," see Landlord and Tenant, 35.

## WAIVER.

See Estoppel.

Of notice of injury held waived, see Accident Insurance, 20-22.

Of defense of alteration, see Alteration of Instruments, 10-11, 13-14.

Of right to appeal, see Appeal and Error,

Of error, see Appeal and Error, 168-184.

Of special appearance, see Appearances, 3. Defective service, see Appearances, 4.

Of non-payment of assessment, see Beneficial Associations, 23.

Of tender of deed in suit for commission, see Brokers, 7.

Of mortgage lien by attachment, see Chattel Mortgages, 25.

Objection to unconstitutionality, see Constitutional Law, 128.

Of non-performance, see Contracts, 81-83.

Of invalidity, see Contracts, 94. Of tort, implied contract, see Conversion, 16.

Of notice of meeting of stockholders, see Corporations, 87, 88, 91.

preliminary examination, see Criminal Law, 19.

Of arraignment, see Criminal Law, 32.

Of right to counsel, see Criminal Law, 36.

Of compensation, see Eminent Domain, 53-55.

Of conditions of escrow, see Escrow, 12.

Of jury trial, on accounting, see Executors and Administrators, 55.

Of provisions of policy, see Fire Insurance, 23-24.

Of former jeopardy by failure to plead it, see Former Jeopardy, 9.

policy provisions, see Insurance, 27-29.

Of interest by accepting principal, see Interest, 6.

Of interest on damage claim by delay in demand, see Interest, 7.

Of jury, see Jury, 11, 12.

Of right to challenge for cause, see Jury, 26.

Of duty to repair, see Landlord and Tenant. 14.

Of breach of condition against assignment of lease, see Landlord and Tenant, 23,

Of notice of termination of lease, see Landlord and Tenant, 45.

Of proof of death, see Life Insurance, 44. Of right to lien, see Mechanics' Liens, 29-37.

Of nonjoinder of parties on foreclosure, see Mechanics' Liens, 55.

How pleaded, see Pleading, 95. Objection for failure to serve co-party, see Process, 1.

Objection to misconduct of counsel, see Prosecuting Attorneys, 2.

Objection not made at hearing, see Public Service Commission, 31.

Right to sue for rescission, by delay, see Rescission, Cancellation and Reformation, 18.

Of warranty, see Sales, 29, 31.

Of defense on bond by surety, see Suretyship, 7.

Of principal's signature on bond, see Suretyship, 2, 5.

Of objection to special assessment, see Taxation, 128-130.

Of objections, see Trial, 46-50.

Of privilege, see Witnesses, 25, 26, 29, 44-46, 86-88.

## WANT OF PROSECUTION.

Dismissal for, see Dismissal and Nonsuit, 4-9.

#### WAR.

See Contraband of War; Militia.

Effect of war on dual allegiance, see Aliens, 2.

Courts-martial, see Courts, 1, 19, 20.

Taking for war, not a condemnation, see Eminent Domain, 28.

Engineer killed by mine as within Workmen's Compensation Act, see Master and Servant, 224,

- 1916C-1918B.
- 1. Judicial Notice of Existence. The existence of a condition of war must be determined by the political department of the government, and the courts will take judicial notice of such determination and are bound thereby. In re Wulzen (Fed.) 1917A-274.
- 2. Prize—Right to Bring into Neutral Port. The neutrality of the United States, under the principles of international law, is violated by the action of a belligerent in bringing a prize captured at sea into a port of the United States under a prize crew, for the purpose of laying her up there indefinitely. The Steamship Appam (U. S.) 1917D-442. (Annotated.)
- 3. The bringing of a prize captured at sea by a German cruiser into a neutral port of the United States under a prize crew, for the purpose of laying her up there indefinitely, is not justified by the provision of art. 19 of the Treaty of July 11, 1799 (8 Stat. L. 172), with Prussia, that vessels of war, public and private, of both parties, shall carry freely wheresoever they please the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to offi-cers of admiralty, of the customs, or any others, and that such prizes shall not be arrested, searched, or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. The Steamship Appam (U. S.) 1917D-442. (Annotated.)
- 4. The failure of the United States to proclaim that its ports are not open to the reception of captured prizes does not warrant the attempted use of one of its ports by a belligerent as a place in which to store a prize indefinitely, especially where no means of taking it out are shown except by augmentation of the crew, which would be a clear violation of established rules of neutrality. The Steamship Appam (U. S.) 1917D-442. (Annotated.)
- 5. Right to Requisition Neutral Property. A belligerent power has by international law the right to requisition vessels or goods in the custody of its prize court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate And, thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the

- case, the right is exercisable. The Zamora (Eng.) 1916E-233. (Annotated.)
- 6. Prize—Effect of Orders in Council. A prize court is required to administer the rules of international law, and royal orders in council cannot be accepted as a binding declaration of that law. The Zamora (Eng.) 1916E-233.
- 7. Alien Enemy Expatriated Person. A person of German birth domiciled in England but who has acquired no nationality there, is, during the existence of war between England and Germany, an alien enemy subject to internment, though by reason of his continued absence from Germany he has lost his German nationality. Ex parte Weber (Eng.) 1916D-304.

(Annotated.)

- 8. Treason. It is immaterial to liability for treason in adhering to the enemy that the acts of adherence were committed outside the realm of the sovereign of the accused. Rex v. Casement (Eng.) 1917D-468.

  (Annotated.)
- 9. For a citizen to visit a country with which his nation is at war and there endeavor to persuade prisoners of war to join the enemy's forces, and to obtain from the enemy arms and ammunition and endeavor to land the same in a political division of his own country in aid of a revolt there constitutes adhering to the enemy and giving him aid and comfort within the meaning of the Treason Act. Rex v. Casement (Eng.) 1917D-468. (Annotated.)
- 10. "Alien Enemy." The term "alien enemy" includes not only a subject of enemy nationality, but also a domestic or neutral subject who is voluntarily resident in hostile territory or is carrying on business therein. Porter v. Freudenberg (Eng.) 1917C-215. (Annotated.)
- 11. Suits by and Against. An alien enemy may be sued within the realm but cannot sue therein. He may appear and defend in an action against him or appeal from a judgment against him as defendant, but cannot appeal in an action brought by him before the outbreak of hostilities. Porter v. Freudenberg (Eng.) 1917C-215. (Annotated.)
- 12. Service of Notice. Substituted service of notice of a writ against an alien enemy domiciled abroad may be ordered to be made on a local agent maintained by him. Porter v. Freudenberg (Eng.) 1917C-215. (Annotated.)
- 13. Alien Enemies—Domestic Corporation. Where an action by a domestic corporation can be authorized only by its directors, no action can be authorized during the continuance of war where the directors are all alien enemies domiciled in hostile territory. Daimler Co. v. Continental Tyre, etc. Co. (Eng.) 1917C-170.

(Annotated.)

- 14. Whether a domestic corporation is, during the continuance of war, an alien enemy depends on its control, the company being an alien enemy despite its domestic incorporation if its actual control and management are vested in individuals who are citizens and residents of an enemy country or who adhere to the enemy. Daimler Co. v. Continental Tyre, etc. Co. (Eng.) 1917C-170. (Annotated.)
- 15. Intercourse With Alien Enemy. The Trading With the Enemy Act of 1914 (4 & 5 Geo. V. c. 87) and the Proclamation of September 9, 1914, are not exclusive, and intercourse with an alien enemy which was illegal at common law is none the less illegal because not in terms prohibited by the Act or Proclamation. Robson v. Premier Oil, etc. Co. (Eng.) 1917C-227.

(Annotated.)

- 16. By the common law not only commercial intercourse but all intercourse with an alien enemy which could possibly operate to the detriment of the country is forbidden; accordingly an alien enemy is not during the continuance of war entitled to vote stock owned by him in a local corporation. Robson v. Premier Oil, etc. Co. (Eng.) 1917C-227. (Annotated.)
- 17. Internment—Person of Enemy Origin or Association. A regulation empowering the secretary of state to order the internment of any person of "enemy origin or association" is authorized by the Defense of the Realm Act and is valid. Rex v. Halliday (Eng.) 1917D-389. (Annotated.)
- 18. As Excusing Breach of Contract-Express Stipulation. A continuing contract for the delivery of magnesium chloride provided that "deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lockouts or the like) causing a short supply of labor, fuel, raw materials or manufactured produce or otherwise preventing or hindering the manufacture or delivery of the article." The major part of the supply of magnesium chloride previously available to the seller came from Germany and was cut off by the war. The seller obtained a certain amount of the chemical, enough to have filled the contracts in suit, but not enough to fill all its contracts. It is held that the seller was justified in suspending delivery. Tennants (Lancashire) v. C. S. Wilson & Co. (Eng.) 1918A-1.

(Annotated.)

19. Espionage Act—Construction—Nonmailable Matter. The Espionage Act (Fed. St. Ann. Pamph. Supp. No. 11, p. 16) is not intended to repress legitimate criticism of Congress or of the officers of the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted, but only to prevent the dissemination and distribution through the mails of publications

intended to embarrass and defeat the government in the successful prosecution of the war. Masses Pub. Co. v. Patten (U. S.) 1918B-999.

- 20. The postmaster general is to determine whether a particular publication is non-mailable under the Espionage Act (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), and in so determining is required to use judgment and discretion; and his decision is conclusive on the courts, unless clearly wrong. Masses Pub. Co. v. Patten (U. S.) 1918B-999.
- 21. A cartoon published by complainant in its magazine, representing the Liberty Bell in a broken form, whatever its meaning, does not by itself afford any ground for exclusion of the magazine from the mails. Masses Pub. Co. v. Patten (Ü. S.) 1918B-999.
- 22. Certain articles and cartoons, published by complainant in its magazine concerning the war, conscription, etc., are held to warrant the postmaster general's determination that is was non-mailable under the Espionage Act, as calculated and intended to obstruct recruiting or enlistment, in violation of title 1, § 3 (Fed. St. Ann. Pamph. Supp. No. 11, p 10), but not unmailable, as advocating or urging treason, insurrection, or forcible resistance to any law of the United States in violation of title 12, § 2 (Fed. St. Ann. Pamph. Supp. No. 11, p 16). Masses Pub. Ço. v. Patten (U. S.) 1918B-999.
- 23. Validity of Act—War Power. Espionage Act June 15, 1917, tit. 12. §§ 1, 2 (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), declaring certain matter non-mailable, do not violate Const. Amend. 1 (9 Fed. St. Ann. 244), declaring that Congress shall make no law abridging the freedom of speech or of the press, as the statute imposes no restraint on the matter prior to publication, and no restraint afterwards except as it restricts circulation through the mails, and while liberty of circulating may be essential to freedom of the press, liberty of circulating through the mails is not essential, so long as transportation in any other way is not forbidden. Masses Pub. Co. v. Patten (U. S.) 1918B-999.
- (Annotated.)
  24. Espionage Act, tit. 12, §§ 1, 2 (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), declaring certain matter non-mailable, do not violate Const. Amend. 5 (9 Fed. St. Ann. 288), providing that no person shall be deprived of life, liberty, or property without due process of law, though by the exclusion of complainant's magazine from the mails its business was practically ruined. Masses Pub. Co. v. Patten (U. S.) 1918B-999. (Annotated.)
- 25. Espionage Act—Non-mailable Matter—Scope of Enactment. Espionage Act-June 15, 1917, tit. 12, § 1 (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), declaring

every letter, newspaper, or other publication, matter, or thing in violation of any of the provisions of that act to be nonmailable and section 2, declaring nonmailable every letter, newspaper, etc., containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, excludes from the mails any letters or literature in furtherance of any acts prohibited under the other titles of the statute. Masses Pub. Co. v. Patten (U. S.) 1918B-999.

## Notes.

Nature and scope of war power. 1918B-1009.

War as excuse for breach of contract. 1918A-14.

Internment of person of hostile origin or association, 1917D-409.

Alien enemies, 1917C-189.

What constitutes "adherence to enemies," etc., within law of treason. 1917D-479.

Expatriated person as alien enemy. 1916D-306.

Right of belligerent power to requisition goods of neutral. 1916E-245.

Right to bring prize into neutral port. 1917D-448.

#### WARDEN.

Duty on release of pardoned convict, see Pardons, 2.

#### WARDS.

See Guardians and Wards.

# WAREHOUSES.

- 1. Duties and Liabilities of Warehousemen.
- 2. Warehouse Receipts.
- 3. Actions.

Carrier as warehouseman, see Carriers of Goods, 8-10.

# 1. DUTIES AND LIABILITIES OF WAREHOUSEMEN.

- 1. Duty of Warehouseman—Effect of Previous Dealings. The acceptance for storage of wool by a warehouseman places him under a liability to the bailors for safe-keeping, which is not altered by any previous long course of such dealings between the parties with the conditions of nature likely to render the storage unsafe under the circumstances known to both. Hecht v. Boston Wharf Co. (Mass.) 1917A-445.
- 2. Recovery Against Warehouseman—Sale of Goods by Bailor. Where plaintiffs sell a portion of stored wool before injury to it, they cannot recover against the warehouseman for damage to such part, since it may be assumed. under all the circumstances, that defendant assented to the

sale, such an assent having a favorable effect on its liability by passing title out of plaintiffs under the Mass. Sales Act (St. 1908, c. 237, § 19, rule 1), which by direct provision vests title to specific goods in a deliverable state in the buyer upon the making of the contract of sale, and under section 22 of the act providing that such goods are at buyer's risk, whether or not delivery is made, and since the right of action for injury always rests in the general or special owner of chattels, which plaintiffs no longer were of the wool sold. Hecht v. Boston Wharf Co. (Mass.) 1917A-445.

- 3. Tide as Act of God. Tides, in their physical aspect, being wholly an act of God, the question of a warehouseman's liability for damage caused by them is dependent upon whether the injury was caused wholly by the tide, or whether the defendant's negligence gave such physical force an opportunity to operate, the measure of due care being reasonable prudence and foresight and the adoption of precautions by careful persons in the same line of business, and such provisions as to the probable state of the tide as an ordinarily intelligent man might have gained from observation of general climatic conditions. Hecht v. Boston Wharf Co. (Mass.) 1917A-445. (Annotated.)
- 4. Degree of Care Required. The legal obligation of a warehouseman, bailee of wool, is to use the ordinary care of a man of common prudence in keeping that sort of goods, in view of the fact regarding danger of injury accessible to and likely to be considered and acted upon by a rational person before the event complained of. Hecht v. Boston Wharf Co. (Mass.) 1917A-445.
- 5. Accounting for Proceeds of Damaged Property Conclusiveness of Receipt in Full. Plantiff is entitled to an accounting with a warehouseman for proceeds of damaged poultry sold, even though he has settled with him in full for loss by fire, the warehouseman being trustee for collection under policy, where he did not understand that by the terms of settlement the warehouseman was to have the proceeds from damaged poultry, a receipt in full not being conclusive, the parties standing in a fiduciary relation, and transactions between them being prima facie voidable. Hobbs v. Monarch Refrigerating Co. (Ill.) 1918A-743.

## Notes.

Loss resulting from rise or fall of tide as due to act of God. 1917A-450.

Construction of Uniform Warehouse Receipts Act. 1917E-29.

# 2. WAREHOUSE RECEIPTS.

6. The rights of a pledgee of warehouse receipts under the uniform warehouse re-

ceipts Act (La Acts. 1908, No. 221, §§ 40, 41, 47), as a bona fide purchaser, where the pledgors had been clothed with apparent ownership by the real owner, are not lost by permitting the pledgors to withdraw such receipts under an agreement to hold for the pledgee's account, where this did not result in a subsequent negotiation of them to a purchaser in good faith for value. Commercial Nat. Bank v. Canal-Louisiana Bank, etc. Co. (U. S.) 1917E-25. (Annotated.)

- 7. What Law Governs—Warehouse Receipts Act—Necessity of Showing Applicability. Where the bill of exceptions does not refer to the Mass. Warehouse Receipts Act (St. 1907, c. 582) nor to what kind of receipts a warehouseman issued for stored goods, the latter's liability must be determined by common-law principles. Hecht v. Boston Wharf Co. (Mass.) 1917A-445
- 8. Uniform Warehouse Receipts Act-Construction. A pledgee of bills of lading for cotton, who permits the pledgor to withdraw such bills of lading under an agreement to hold for the pledgee's account, and thus enables the pledgor to negotiable warehouse receipts which they pledge to a bank as security for their notes, cannot question the title of the latter, having clothed the pledgor with the indicia of ownership, within the meaning of the doctrine established by the uniform warehouse receipts act (La. Acts 1908, No. 221, §§ 40, 41, 47), that if the owner of goods permits another to have possession or custody of negotiable warehouse receipts running to the order of the latter or to bearer, it is a representation of title upon which bona fide negotiators for value are entitled to rely, despite breaches of trust or violations of agree-ment on the part of the apparent owner. Commercial Nat. Bank v. Canal-Louisiana Bank, etc. Co. (U. S.) 1917E-25. (Annotated.)
- 9. The rule of construction established by the uniform warehouse receipts act (La. Acts 1908, No. 221, § 57), viz., "this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it," requires that the cardinal principle of the act, which is to give effect to the mercantile view of documents of title shall have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it. Commercial Nat. Bank v. Canal-Louisiana Bank, etc. Co. (U. S.) 1917E-25. (Annotated.)

## 3. ACTIONS..

10. Evidence of Negligence Sufficient. Evidence held to go to the jury on the question whether the warehouseman's negligence was the cause of damage by a high

tide to wool stored. Hecht v. Boston Wharf Co. (Mass.) 1917A-445.

11. Evidence of Negligence—Practice of Other Warehousemen. In an action for damages to wool injured by negligence, evidence of the practice of wool warehousemen as to the elevation at which it was generally considered safe to store wool to escape the action of extraordinarily high tides is admissible as bearing upon the main issue. Heeht v. Boston Wharf Co. (Mass.) 1917A-445.

# WAREHOUSE RECEIPTS.

See Warehouses, 6-9.

#### WARRANT.

Arrest without warrant, see Arrest, 3-8. Warrant of arrest, see Arrest, 1, 2. Search warrant, see Searches and Seizures, 1, 3, 4.

# WARRANTIES.

Representations in application for accident policy, see Accident Insurance, 10-12.

Proof by parol, see Accident Insurance, 23.

#### WARRANTS.

City warrants, see Municipal Corporations, 36, 120-128.

## WARRANTY.

See Sales, 12-45.

Covenants of warranty, see Deeds, 77–81. In insurance policy, see Insurance, 26.

No warrant to cure, see Physicians and Surgeons, 18.

In sale of ship, see Ships and Shipping, 4, 5.

## WATCHMAN.

As within Federal Employers' Liability Act, see Master and Servant, 55. Killing by wilful act, as accident within Workmen's Compensation Act, see Master and Servant, 202, 263.

#### WASTE.

Recovery for in real action, see Trespass, 12.

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# WATERS AND WATERCOURSES.

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#### 1. CONTROL AND REGULATION.

- 1. Right to Take Sand from Bed of Stream. That sand in the bed of a navigable stream is migratory, or liable to be shifted, does not change its character while at rest upon the river bed, as respects the rights of the state to require payment from persons taking sand from the bed of the stream. Wear v. Kansas (U. S.) 1918B-586. (Annotated.)
- 2. That there is a public right to take sand from a navigable stream does not hinder the state from collecting for the good of the whole public a charge from those individuals taking sand and thereby withdrawing it from public access. Wear v. Kansas (U. S.) 1918B-586. (Annotated.)

# 2. FEDERAL GRANTS OF RIPARIAN LANDS.

3. Construction. Grants by the United States of lands bordering on streams and other waters, without reservation or restrictions, are to be construed as to their effect according to the law of the state in which the lands lie; the United States as-

suming the position of a private owner, subject to the general law of the state, so far as its conveyances are concerned. Bernot v. Morrison (Wash.) 1916D-280.

## 3. RIGHTS OF RIPARIAN OWNERS.

## a. Title to Shore and Bed.

- 4. Riparian Rights—Ownership of Bed of Stream. A territorial statute enacted in 1859 (Laws 1859, c. 121), adopting the common law of England, did not give a subsequent patent from the United States covering riparian lands the effect of a grant to the thread of the stream, and created no constitutional obstacle to a subsequent decision of the state court that the fact of navigability, rather than the ebb and flow of the tide, excluded riparian ownership of river beds. Wear v. Kansas (U. S.) 1918B-586.
- Title to Bed of Non-navigable Lake. Under Rem. & Bal. Wash. Code, § 143, providing that the common law, so far as not inconsistent with the constitution and laws of the United States or of the state, nor incompatible with the institutions and conditions of society in the state, shall be the rule of decision in all the courts of the state, the bed of unnavigable lakes is in the littoral proprietors, as Const. art. 21, § 1, providing that the use of the waters of the state for irrigation, mining, and manufacturing purposes shall be deemed a public use, was not intended to destroy riparian rights, but only to remove any doubt as to the power of the legislature to authorize the taking of such rights under the power of eminent domain, and Laws 1890, p. 706, providing for the use of water for irrigation purposes and for the condemnation of rights of way for ditches to carry such water, and the federal Desert Land Act of March 3, 1877, c. 108, 19 Stat. 377, authorizing the filing of a declaration with the register and receiver of the land district in which any desert land is situated, that the person filing it intends to reclaim a tract of desert land by conducting water thereupon, and providing that the right to the use of water by such person shall depend upon bona fide prior appropriations, do not abrogate the commonlaw rule as to riparian and littoral rights in unnavigable waters. Bernot v. Morrison (Wash.) 1916D-280. (Annotated.)

#### Note.

Title to bed of non-navigable lake. 1916D-299.

# b. Grant of Water Rights.

6. A grant of water power is not a grant of property in the corpus of the water, or a grant of water for anything else than the propulsion of machinery. Eastern Pa. Power Co. v. Lehigh Coal etc. Co. (Pa.) 1916D-1000. (Annotated.)

- 7. Grant of Water Power—Construction. The grantor owned two tracts of land. She conveyed the fee in one of them and "the water rights and water power privileges" in the other. The habendum clause was: "To have and to hold the said above granted and described property, with all and singular the rights, members, and appurtenances thereunto appertaining," to the grantee in fee simple. The easement of water rights and water power privileges passing under the deed was that appurtenant to the property conveyed, and not to other property of the grantee. Central Georgia Power Co. v. Cornwell (Ga.) 1916D-1020. (Annotated.)
- 8. The restriction, following the granting of right to use "at all times" 100 square inches of water, "when the water is lower than . . I restrict myself . . . from using . . . an amount of water greater than that herein deeded, . . . viz.: One hundred square inches"—is only on the grantor, and does not affect right of the grantee to use 100 inches when there is less than twice that quantity. Wilton Woolen Co. v. G. H. Bass & Co. (Me.) 1916D-1023. (Annotated.)
- 9. Though all the real estate of the grantor, except the dam, the head gates, and the land on which they rest is included in the conveyance by a company owning water rights, a dam and real estate about it, of certain described real estate, "with the following water power and privilege and none other, to wit: The right to draw . . . water sufficient to furnish forty horse power," till the water falls to a certain point below the top of the dam, when the grantee's right is limited to 100 square inches, reserving to the grantor the right to draw through its own private waste gate any of said 100 inches not used at such times, and providing that the grantee is to bear half the expense for maintaining and repairing the canal on the conveyed land, and the head gates and dam-all water rights of the grantor in excess of 40-horse power remain in the grantor, and do not pass to the grantee ex necessitate rei. Wilton Woolen Co. v. G. H. Bass & Co. (Me.) 1916D-1023. (Annotated.)
- 10. Under the grant of right to draw water sufficient to furnish 40-horse power, with limitation of the grantee's right to 100 square inches, when the water falls to a certain point below the top of the dam, the dam is the place of measurement of the 100 square inches, as well as of the 40-horse power. Wilton Woolen Co. v. G. H. Bass & Co. (Me.) 1916D-1023.

  (Annotated.)
- 11. No limitation as to time being stated in a grant of right to draw water sufficient to furnish 40-horse power, the grantees may use the water as many hours a day

as they deem proper. Wilton Woolen Co. v. G. H. Bass & Co. (Me.) 1916D-1023. (Annotated.)

#### Note.

Construction of grant of water power. 1916D-1002.

## c. Appropriation.

12. Subterranean Waters—Appropriation. As between appropriators of subterranean waters, the first in time is the first in right. Bower v. Moorman (Idaho) 1917C-99.

# d. Rights to Ice.

13. As Between Riparian Proprietor and Owner of Easement of Flowage. A riparian owner on a mill dam has a fixed right to take ice from the stream where it flows over his land, and the owners of the mill dam cannot avail themselves of such right, although they have a right to an undiminished amount of water. Valentino v. Schantz (N. Y.) 1917C-780. (Annotated.)

## Note.

Right to harvest ice as between person having right of flowage and riparian proprietor. 1917C-782.

## e. Diversion.

# (1) In General.

14. Should it become necessary to change the method or means of diverting water by a prior appropriator of subterranean waters, that, in and of itself, should not deprive a subsequent appropriator from acquiring unappropriated subterranean water, unless it further appeared that it would be impossible to deliver said water to the diverting works of the prior appropriator. Bower v. Moorman (Idaho) 1917C-99.

(Annotated.)

- 15. Decrees entered in proceedings to establish water rights, though not final, are prima facie correct, and can only be attacked in a direct proceeding instituted for that purpose. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.
- 16. Existence of Substantial Injury—Diminution of Flow. Senior appropriators, requiring water, are substantially damaged by the acts of junior appropriators, whose use retarded the return of water to the natural stream for several days, and reduced the amount taken by 25 per cent. Rogers v. Nevada Canal Co. (Colo.) 1917C-669.

Note.

Right of landowner to sink well and intercept subterranean waters supplying neighbor's well or spring. 1917C-106.

## (2) Action to Enjoin.

17. Right to Sue—Interest. Where it appears that the respondents are the own-

ers in fee of the land upon which artesian wells are located and retain the right to the control and management of water flowing from said wells to the place of distribution, and where it further appears that said respondents are the owners of virtually all of the capital stock of a private corporation to which the right to the use of said waters has been conveyed by deed, a motion for a nonsuit in an action by them to enjoin interference with the flow of water from said wells, on the ground that they are not parties in interest, will not be entertained. Bower v. Moorman (Idaho) 1917C-99.

18. If, in the sinking of a well, the flow from a well of an adjoining landowner and prior appropriator of subterranean water is lessened, before a permanent injunction should issue, it must be conclusively established that the water so lost cannot be returned from the well of the subsequent appropriator to the diversion works of the prior appropriator. Bower v. Moorman (Idaho) 1917C-99. (Annotated.)

19. It is held that the findings of fact are not sufficient to support the judgment, and it is accordingly ordered that the case be remanded to the district court. with directions to suspend the injunction, permitting appellants to continue the construction of the well on said lot 5 until it is established that by reason of the sinking of appellants' well the respondents' well will sustain a material and permanent loss of water supply; and if it shall later appear to the satisfaction of the district court that said actual loss of water has been sustained in respondents' well due to the construction of appellants' well, and such water cannot be returned to the diversion works of respondents, said injunction should be reinstated, permanently closing the well of appellants. Bower v. Moorman (Idaho) 1917C-99. (Annotated.)

20. The fact that the sinking of a well will endanger the supply of water flowing from a well on adjoining land owned by a prior appropriator of subterranean waters does not justify the issuance of a permanent injunction, unless it is conclusively shown that the water supply of the first appropriator will be actually and permanently diminished. Bower v. Moorman (Idaho) 1917C-99. (Annotated.)

21. Although it may be found that in the sinking of a well by a landowner direct communication was made with the same artesian belt or basin tapped by an adjoining landowner, who was a prior appropriator of subterranean water, the court is not justified in issuing a perpetual injunction prohibiting the completion of the well of a junior appropriator of subterranean waters, unless it further conclusively appears that the prior appropriator will suffer permanent loss of water by reason of

the tapping of said artesian belt or basin. Bower v. Moorman (Idaho) 1917C-99. (Annotated.)

22. If the sinking of M's well to the depth that B's large well has been sunk, or to a greater depth, will not interfere with the flow of the water in B's well, or if there is a loss of water in B's well occasioned by the sinking of M's well, which, in like quantity, can be returned to B's well without material damage, and at the same time water secured in M's well, the court will not be justified in issuing a permanent injunction preventing the completion of M's well. Bower v. Moorman (Idaho) 1917C-99. (Annotated.)

23. Wells—Diminution of Flow in Prior Wells. Before a permanent injunction should issue in a case of this character, the evidence should clearly and conclusively establish that the real cause of the loss of water flowing from the well of a prior appropriator of subterranean water is the construction of the well of a junior appropriator of said subterranean water. Bower v. Moorman (Idaho) 1917C-99.

(Annotated.)

## f. Obstruction.

24. Liability—Extraordinary Flood. A municipality diverting and obstructing the course of a stream, whereby it is rendered incapable of carrying away an extraordinary rainfall, is liable where as a result of such a rainfall a flood occurs and adjacent property is damaged. Greenock Corporation v. Caledonian R. Co. (Eng.) 1918A-1103.

Note.

Duty of one obstructing natural watercourse to anticipate extraordinary freshets or floods. 1918A-1114.

# g. Damage by Floating Logs.

25. Remedy of Riparian Owner—Adequacy of Legal Remedy. Where defendants were entitled to float logs in a stream, riparian owners have an adequate remedy at law to recover for injuries resulting from defendants' negligence in allowing the logs to jam, so that the water, logs, and flood wood were thrown on their land; hence they cannot maintain a bill in equity. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.

#### Note.

Liability of one using stream to float timber for resulting injuries to riparian owner. 1918A-732.

## 4. NAVIGABLE WATERS.

#### State Regulation.

26. Regulation as to Navigable Waters—Power of State. Where Congress has not acted, the state legislature may provide

for the development of a stream emptying into one of the great rivers, where such stream is in fact navigable. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.

# Power of State to Declare Navigability.

27. Legislative Power to Determine Navigability. The legislature cannot by declaring it navigable make navigable a stream which is not so in fact. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.

# c. Presumption as to Navigability.

28. Waters above the flow of the tide are prima facie private in use as well as ownership, and the burden of showing that a particular stream is boatable is on a person seeking to use it as such. Boutwell v. Champlain Realty Co. (Vt.) 1918A-726.

# d. Ownership.

29. Title to Bed of Non-navigable Lake. The state does not own and never owned the bed of unnavigable lakes, especially in view of Wash. Const. art. 26, providing that the people of the state forever dis-claim all right and title to the unappropriated public lands lying within the boundaries of the state and the Wash. Enabling Act of February 22, 1889, c. 180, 25 Stat. 676, which, in specifying the lands which shall pass to the state upon its admission into the Union, neither expressly nor by implication refers to unnavigable lakes, and which provides that the states provided for in such act shall not be entitled to any further or other grants of land for any purpose than as expressly therein. Bernot v. provided Morrison (Wash.) 1916D-280. (Annotated.)

# 5. SURFACE AND PERCOLATING WATERS.

- 30. Relative Rights of Adjoining Owners to Subterranean Waters. Where subterranean water exists in a state of nature throughout a tract of land, the ownership of which is held in different proprietors, it would seem to be impossible to adopt a rule giving each proprietor the absolute right to withdraw all of the subterranean waters from his tract of land, and thus destroy the benefits made possible by the proper regulation of subterranean waters. And an injunction will issue to restrain any permanent interference by an adjoining landowner with the right to the use of subterranean water acquired by a prior appropriator. Bower v. Moorman (Idaho) 1917C-99.
- 31. Deflection by Railroad Embankment. Defendant railroad, whose occupancy of a public highway for its tracks was entirely permissive, is liable for any damage to adjacent owners caused by its embankment,

- regardless of whether the water so diverted was surface water or was flowing through a natural drainway, and regardless of negligence in its construction, under the constitutional guaranty that private property shall not be taken or damaged for public use without due compensation. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 32. In such case, the railroad, having no control over any other part of the street except that occupied by its tracks, is not excused from liability for damages from surface water consequent upon the raising of an embankment because the city failed to afford additional facilities for carrying off the surface water. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 33. In an action for damages to real property from an embankment by defendant railroad changing the flow of water and causing it to accumulate on plaintiff's property, where there was no evidence that the injury was caused by a failure of the city to maintain and repair the street, an instruction that the railroad had no control over the street adjoining plaintiff's premises, except that actually occupied by its roadbed and that any damage from surface water from the failure of the city to use reasonable care in the maintenance of the street did not make it liable, is properly refused. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 34. Surface water is a common enemy which any landowner may defend against with such measures as he may deem expedient without laying himself liable to any other owner upon whose land the water is caused to flow. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 35. On evidence in an action for damages from the raising of a railroad embankment which changed the flow of water and caused it to accumulate on plaintiff's property, it is held that whether the accumulation was caused by the raising of the embankment is a question for the jury. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 36. In such case, the plaintiff, if not the owner of the property mentioned in his complaint at the time the alleged permanent injury from its acts of negligence were committed by defendant railroad, cannot recover. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 37. In such case, defendant is liable if the gutters as they existed at the time its embankment was raised were sufficient to take care of the water, because they were subsequently allowed to fill up so that they could not take care of the water. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.
- 38. In an action by an owner for damages to his property from surface water

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from defendant railroad's change in its roadbed, where defendant's evidence showed that the flow of water was not sufficient to overflow the gutters and that if it rose above the curbing and under plaintiff's storehouse it was due to the fact that the gutters were not cleaned, the refusal of its instruction, that it had no duty to clean the gutters in front of plaintiff's property, and that if the damage was caused by the failure of the city or any other person to keep them cleaned it was not liable, is error. Louisville, etc. R. Co. v. Jackson (Ark.) 1918A-604.

#### AND WATER COM-WATERWORKS PANIES.

1. Municipal Water Supply, 862.

- a. Construction of Contract, 862. b. Meters and Connections, 862. c. Extension of Mains, 862.

- d. Rules of Company, 863. e. Liabilities Arising from Manner of Performance of Duties, 863.

Condemnation of stream, see Eminent Domain, 31.

City's power over streams outside city, see Municipal Corporations, 45.

# 1. MUNICIPAL WATER SUPPLY.

#### Construction of Contract.

1. Contracts for Public Utility-Practical Construction. Where a contract is entered into between a city and a water supply company, for the benefit of the people of the city, and under which the people are entitled to certain rights, benefits and privileges, a construction of the meaning of ambiguous and doubtful provisions of the contract by one consumer or bene-ficiary is not binding upon other consumers, or beneficiaries, not shown to have acquiesced in or assented to such construction. State v. Water Supply Co. (N. Mex.) 1916E-1290.

## Meters and Connections.

- 2. Construction by Municipality. Where a franchise granted to a water company provides that the company shall have the right "to make rules and regulations, to be approved by the city council," and the company contends that it has adopted and enforced a rule which required the consumer to pay the cost of making connection with its mains, before the question can arise as to whether the rule in question amounted to a construction of the contract by the city, it is incumbent upon the company to show that the city council gave its approval to the same. State v. Water Supply Co. (N. Mex.) 1916E-1290.
- Public Supply—Right to Charge Consumer With Cost of Service Pipe. Where a franchise, under which a water supply company operates, requires it to furnish

water to private consumers at fixed rates, it must provide the necessary service pipe from the main line in an abutting street to the consumer's property line, at its own expense, unless the franchise imposes this burden upon the consumer. State v. Water Supply Co. (N. Mex.) 1916E-1290.

(Annotated.) 4. Where a municipality operates its own water supply system, it is not under contractual obligations to lay the service pipes from the curb to its main, hence a rule which requires the consumer to assume the burden is reasonable. But where, under a contract and franchise, this duty devolves upon the holder of the franchise, such a rule is unreasonable. State v. Water Sup-

(Annotated.)

Note.

ply Co. (N. Mex.) 1916E-1290.

Duty of water company to lay service pipe without charge to consumer. 1916E-1297.

# c. Extension of Mains.

- 5. Compelling Extension. A waterworks company, defendant's predecessor, was organized under Cal. St. 1858, p. 218, providing that all corporations formed or claiming any privileges thereunder should furnish pure, fresh water to the inhabitants of the city and county for family use so long as the supply permitted, at reasonable rates and without distinction of persons, on proper demand therefor, vesting it with the right of eminent domain, and granting an irrevocable easement in the streets of the city for laying its pipes, etc. Civ. Code, § 549, imposed the obligations expressly enumerated in the act of 1858, and Const. art. 11, § 19, as amended February 12, 1885 (St. 1885, p. 228), provided that any duly incorporated company engaged in municipal water supply might use the public streets for its pipes and connections, so far as necessary. Held that, when the company accepted the franchise offered by the state, it assumed a contractual duty to be discharged for the public benefit; a community service commensurate with the privileges of its franchise requiring it to provide a system reasonably adequate to meet the wants of the inhabitants at îts commencement, and also to extend its system as the reasonable wants of the growing community might require, so that, when in a position to make reasonable extensions of its mains bounding a populous part of the city, it was bound to and might be compelled to do so. Lukrawka v. Spring Valley Water Co. (Cal.) 1916D-(Annotated.)
- 6. Where defendant's predecessor accepted a franchise requiring it to supply the inhabitants of a city and county with water, and, in the absence of any showing that the primary and exclusive right to initiate proceedings to compel it to extend its water mains to a growing part of the

community was conferred on the board of supervisors or the state railroad commission, mandamus is the proper remedy of the inhabitants of the part of the city clearly entitled to compel the company to extend its pipes and furnish water service to them. Lukrawka v. Spring Valley Water Co. (Cal.) 1916D-277. (Annotated.)

7. Such right to compel an extension to serve inhabitants of a particular section is not an absolute and unqualified right, but only to do so where there is a reasonable demand and a reasonable extension of service can be made to meet the demand, depending on the particular facts of the case; but the expenditure in extending the service is not controlling in determining the reasonableness of a demand for it, because the water rates established by the municipality must be sufficient to yield a fair and reasonable income on the property devoted to the public use, which will include such necessary expenses. Lukrawka v. Spring Valley Water Co. (Cal.) 1916D-277. (Annotated.)

## Note.

Power to compel extension of water system, 1916D-285.

# d. Rules of Company.

- 8. Reasonableness. Public utility companies have a right to adopt and enforce reasonable rules and regulations, for their security and convenience and enforce compliance therewith by refusing or discontinuing the service; but such rules must be reasonable, just, lawful and not discriminatory. State v. Water Supply Co. (N. Mex.) 1916E-1290.
- 9. Power to Shift Burden Imposed by Franchise. Where a franchise, under which a public utility company operates, imposes a burden upon the company, any rule or regulation adopted by the company, by which it attempts to shift the burden upon the consumer, is unreasonable and unjust, and will not be enforced. State v. Water Supply Co. (N. Mex.) 1916-1290.
- e. Liabilities Arising from Manner of Performance of Duties.
- 10. Failure to Furnish Water—Liability for Loss by Fire. Where a waterworks company contracts with a city to furnish it and its inhabitants water, citizens whose property is destroyed through fire owing to the company's negligent failure to furnish water may recover against it. Powell & Powell v. Wake Water Co. (N. Car.) 1917A-1302.
- 11. Underground Water Pipes—Liability for Injuries. A person conveying water in underground pipes, by virtue of a license to use a public street for that purpose, is liable irrespective of negligence for injuries caused by the bursting of a pipe.

Charing Cross Elec. Supply Co. v. Hydraulic Supply Co. (Eng.) 1916C-1045.

# (Annotated.)

Liability for injuries caused by underground water pipes. 1916C-1050.

# WATER POWER.

Nature of grant, see Waters and Water-courses, 6-11.

WAYS.

See Easements.

#### WEALTH.

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# WEAPONS.

Soldier's pledge of arms, see Army and Navy, 10-12. Assault with deadly weapon, see Assault, 2.

- 1. Set-gun—Conviction Sustained. In a prosecution for homicide resulting from a gun set by defendant in his orchard to protect it against apple thieves, evidence held to sustain a conviction for manslaughter in the second degree. Schmidt v. State (Wis.) 1916E-107.
- 2. Razor as Deadly Weapon. A "razor" is defined as a sharp instrument or tool used for shaving purposes. Brown v. State (Miss.) 1916E-307. (Annotated.)
- 3. A razor is not a "deadly weapon," within Miss. Code 1906, § 1103, making any person guilty of a misdemeanor who carries concealed any bowie knife, dirk knife, butcher knife, pistol, brass or metallic knuckles, slungshot, sword, or deadly weapon of like kind or description. Brown v. State (Miss.) 1916E-307. (Annotated.)

# Note.

What constitutes "deadly weapon." 1916E-308.

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# WEEKLY REST DAY.

See Labor Laws, 24-32.

## WEIGHT OF EVIDENCE.

See Evidence, 149-164.

# WEIGHTS AND MEASURES.

1. Requirement of Public Weighing—Validity. Mo. Laws 1913, p. 354, relative to the inspection of hay and grain, including the provisions relative to the weighing and grading of grain by state inspectors,

and section 63 (p. 372), prohibiting the issuance of weight certificates except by a bonded state weigher, etc., are valid as a proper exercise of the police powers of the state. State v. Merchants' Exchange (Mo.) 1917E-871. (Annotated.)

- 2. Mo. Laws 1913, p. 354, relative to weighing and grading of grain by state inspectors and the issuing of certificates therefor, does not interfere in a material sense with interstate commerce. State v. Merchants' Exchange (Mo.) 1917E-871. (Annotated.)
- 3. Mo. laws 1913, p. 354, relative to the inspection of hay and grain, does not permit the weighing and certifying of weights of grain both by the state's bonded weigher and a private warehouseman. State v. Merchants' Exchange (Mo.) 1917E-871. (Annotated.)

## WELLS.

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# 1. POWER OF DISPOSITION.

1. Injudicious Disposition by Will. The right to dispose of property by will is assured by the law, and does not depend upon its judicious use. Points v. Nier (Wash.) 1918A-1046.

- 2. Right to Limit. The right to dispose of property by will is a creature of statute; and hence such right may be limited. Porter v. Union Trust Co. (Ind.) 1917D-
- 3. As Natural Right. The right to dispose of property by will is not a natural right protected by the constitution, but is one conferred and regulated by statute. Peace v. Edwards (N. Car.) 1918A-778.

## ESTATES DIVISIBLE.

4. Contingent Remainder as "Interest" in Land. A contingent remainder is, if the person who is to take is certain, such an "interest in real estate" as to be subject to devise by the remainderman. Hill v. Purdy (D. C.) 1918B-847. (Annotated.)

# CONTRACT TO MAKE WILL.

Oral Contract to Devise — Validity. An alleged oral contract by a person since deceased to will property to the plaintiff is void as within the statute of frauds. Brown v. Golightly (S. Car.) 1918A-1185. (Annotated.)

6. An oral contract by which one of the parties-agrees to make a will with a devise of specific property to the other, as compensation for services rendered and to be rendered to the former during his life, is valid and enforceable. Gordon v. Spellman (Ga.) 1918A-852.

7. Contract not to Change-Validity. A contract whereby one party thereto agreed that his will disposing of property, already made, in favor of the other party to the contract, may be specifically enforced, shall remain unchanged, and he may not avoid the agreement of devising his property by subsequent will to others, unless there are circumstances making it inequitable to enforce the agreement. Winchester (Md.) 1916D-1156.

(Annotated.)

## FORMAL REQUISITES TO VALID-ITY.

## a. Signature.

- 8. Definition of Term "Sign." To "sign" a document is to affix a signature thereto. to ratify by hand or seal, or to subscribe in one's own handwriting. Estate of Manchester (Cal.) 1918B-227.
- 9. To "sign" a document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation, and the "signature" is the sign thus made, and, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the document's face. Estate of Manchester (Cal.) 1918B-227.
- 10. Place of Signature-Intent. Where a signature is at the end of a will, universal custom creates the conclusion that

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it was appended as an execution; if elsewhere, it is for the court to say from inspection of the whole document, as to language as well as form and relative position of parts, whether that was the intention. Estate of Manchester (Cal.) 1918B-227.

- 11. Signing by Another Person. Under Miss. Code 1906, \$5078, permitting signing of a will for testator by another in testator's presence and by his express direction, J. A., unable to read or write, to the knowledge of W., having requested W. to fill out his will, the writing by W. of the name of J. A. at the beginning of it, "I, J. A., . . . give and bequeath," it then being properly attested, and handed back to J. A., all parties understanding it to be a completed instrument, will be considered a sufficient signing. Armstrong v. Walton (Miss.) 1916E-137. (Annotated.)
- 12. Necessity of Signature at End. Under Miss. Code 1906, \$ 5078, providing a will must be signed, without stating where, it is unnecessary that the signing be at the end. Armstrong v. Walton (Miss.) 1916E-137. (Annotated.)
- 13. Necessity of Signature at End—Olographic Will. An olographic will containing testatrix's name at beginning of document, and closing with, "whereunto I hereby set my hand, etc.," but not subscribed, is not "signed," as required by Cal. Civ. Code, § 1277, in view of section 13, which provides that words are to be construed as ordinarily used and according to context. Estate of Manchester (Cal.) 1918B-227. (Annotated.)
- 14. Signature by Mark. A testator who signs his will by mark, while another has written his name, signs and executes the will himself, within Rem. & Bal. Wash. Code, § 1320, providing that every will shall be in writing, "signed" by testator, and section 1321, providing that every person who shall sign testator's name to any will by his direction shall subscribe his own name as a witness and state that he subscribed testator's name at his request, applies only to a case in which the name of testator is subscribed by another at testator's request and testator himself does no act, by making his mark or otherwise, to sign the will. Wilson v. Craig (Wash.) 1917B-871. (Annotated.)
- 15. Name in Body of Will. Under N. Car. Revisal 1905, § 3113, requiring that a will be signed, the name of the testator appearing in his handwriting in the body of the will is a signing, and it is not necessary that it be subscribed. Peace v. Edwards (N. Car.) 1918A-778.
- 16. Mark by Testator. Rem. & Bal. Wash. Code, § 1321, providing that every person who shall sign testator's name to any will by his direction shall subscribe his own name as witness, and state that he subscribed testator's name at his request,

- does not apply to the case of a nurse who wrote testatrix's name, by direction of her physician, on the will, and then assisted testatrix to make her mark after the name, the signature being by mark and made by testatrix herself. Points v. Nier (Wash.) 1918A-1046.
- 17. A last will and testament can be signed by mark. Points v. Nier (Wash.) 1918A-1046.
- 18. Where a competent testatrix signs her will by mark, but only with assistance, the mark is nevertheless her signature. Points v. Nier (Wash.) 1918A-1046.
- 19. The evidence is held to be sufficient to show that testatrix subscribed, signed, or authorized signature of her name or mark to the purported will, that if any person did sign testatrix's name or mark, such person subscribed as a witness, and that the subscribing witness, testatrix's physicians, subscribed at the request of testatrix or in her presence. Points v. Nier (Wash.) 1918A-1046.

#### Notes.

Sufficiency of signature of testator to will with respect to manner of signing. 1917B-874.

Necessity that will be signed by testator at end thereof in absence of statute so requiring. 1916E-140.

## b. Attestation.

- 20. What Law Governs. Under Colo. Rev. St. 1908, § 7071, requiring a will to be attested by two or more credible witnesses, the competency of attesting witnesses must be determined by the statute law relating to competency of witnesses and not by the common law. White v. Bower (Colo.) 1917A-835.
- 21. Wife of Beneficiary as Competent Witness. In view of Me. Rev. St. c. 77, under which a wife takes one-half of all the real estate of which the husband was seised during coverture upon his death without issue, and one-third upon his death with issue, and the husband is powerless to alienate or in any way dispose of her statutory interest without her consent, or without paying her the appraised value thereof, the wife of a person to whom a will gave personal property and real estate in fee was "beneficially interested" within Rev. St. c. 76, § 1, requiring a will to be subscribed by three credible attesting witnesses not beneficially interested under such will, as her interest was not remote and uncertain, but direct and fixed, and the fact that it was contingent was immaterial. Clark's Appeal (Me.) 1917A-(Annotated.)
- 22. Colo. Laws 1883, p. 289, expressly and entirely removes all disability in witnesses from testifying on account of interest, so that, if the wife of a beneficiary

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under a will has any interest, it does not disqualify her. White v. Bower (Colo.) 1917A-835. (Annotated.)

23. Under Colo. Rev. St. 1908, § 7071, requiring wills to be attested by two or more credible witnesses, "credible" meaning competent to testify to its execution, and section 7074, declaring that a bequest to a subscribing witness void unless attested by a sufficient number of other competent witnesses, the wife of a beneficiary under a will is competent to witness its execution. White v. Bower (Colo.) 1917A-835. (Annotated.)

24. Competency of Husband of Devisee as Witness. Burns' Ind. Ann. St. 1914, § 525, providing that when the husband or wife is a party to an action and not a competent witness in his or her own behalf the other shall also be excluded, and section 522, providing that in suits by or against heirs or devisees founded on a contract with or demand against the ancestor to obtain title to or possession of property, neither party shall be a competent witness as to any matter which occurred prior to the death of the ancestor, do not make the husband of one of the devisees named in a will an incompetent witness under section 3132, requiring wills to be attested and subscribed in the presence of the testator by two or more competent witnesses, in view of section 3144, providing that a witness beneficially interested may be compelled to testify when necessary, but may not take any property of the decedent other than what he would have taken by the law of descent. Kaufman v. Murray (Ind.) 1917A-832. (Annotated.)

25. "Credible Witness." As construed by the common law, a "credible witness" to a will means a "competent witness." Clark's Appeal (Me.) 1917A-837.

26. Competency of Witness for One Purpose Only. The witnesses to a will cannot be competent for one purpose and incompetent for another. Clark's Appeal (Me.) 1917A-837.

27. Time of Determination. Under Me. Rev. St. c. 76, § 2, providing that, when the witnesses to a will are competent at the time of attestation, their subsequent incompetency will not prevent the probate of the will, the witnesses must be competent at the time of the execution of the will. Clark's Appeal (Me.) 1917A-837.

28. Will of Blind Man—Sufficiency of Execution. The will of a blind man, signed by the witnesses only four feet from him, while he had opportunity to know by the sense of hearing that they were signing the paper which he had signed, the witnesses testifying that he knew they signed the will in his presence, was not invalid, as having been signed by the witnesses out of testator's presence, since an attestation in the same room

where a blind testator is, while his intellect and hearing remain unimpaired, and he is conscious of what is going on about him, is a sufficient signing in his presence. In re Allred's Will (N. Car.) 1916D-788.

#### Note.

(Annotated.)

Competency, as attesting witness to will, of husband or wife of beneficiary. 1917A-833.

## c. Date.

29. Necessity of Date. In view of N. Car. Revisal 1905, § 3113, prescribing the formalities necessary to the execution of a valid will, but not requiring that it shall be dated or subscribed, a will without a date is valid. Peace v. Edwards (N. Car.) 1918A-778.

#### d. Publication.

30. Without due publication, an instrument is not a valid will. In re Williams' Estate (Mont.) 1917E-126.

# e. Residuary Clause.

31. Form and Requisites. No particular mode of expression is necessary to constitute a residuary clause in a will, all that is necessary being an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called a residuary clause is immaterial, since "residue" means that which remains. Faison v. Middleton (N. Car.) 1917E-72.

# f. Nuncupative Will.

37. Attempt to Make Formal Will as Nuncupative Will. Under Rem. & Bal. Wash. Code, § 1330, providing that no nun-cupative will shall be good when the tate bequeathed exceeds the value of \$200, unless proved by two witnesses present at the making thereof, unless there is proof that testator, when pronouncing it, bade some person present to bear witness that it was his will, and unless it was made at the last sickness and at the dwelling house of decedent or where he had been residing for ten days or more, it is not only necessary that decedent should intend to make a will, but he must intend to make an oral will, and words spoken at the time of the signing of a writing actually intended by decedent as a written will, and reduced to writing by witnesses and filed in court, do not constitute a nun-cupative will. Brown v. State (Wash.) 1917D-604. (Annotated.)

38. The evidence, in a proceeding for the probate of an alleged nuncupative will, is held to show that decedent's intention was to make a written will, which fact was not changed by the failure of his attempt to make a written will because of defective attestation. Brown v. State (Wash.) 1917D-604. (Annotated.)

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39. Nuncupative Wills not Favored. Nuncupative wills are not favored in law, because of the great opportunities for fraud and nerjury attending the probating of such wills. Brown v. State (Wash.) 1917D-604.

#### Note.

Attempt to make formal will as constituting nuncupative will. 1917D-608.

# g. Holographic Will.

- 40. Where a holographic will was not signed as required by Cal. Civ. Code, § 1277, indorsement "my will," with decedent's signature, on the envelope containing it, does not cure the defect, merely showing her belief that it was a valid will, and the envelope not being a part of the will. Estate of Manchester (Cal.) 1918B-227. (Annotated.)
  - h. Evidence and Questions for Jury.
- 41. Manner of Execution Intent of Testator. The power and method of testamentary disposition is within legislative control, and, in determining whether a will is properly executed, testator's intention cannot be considered. Estate of Manchester (Cal.) 1918B-227.
- 42. Wife of Beneficiary as Witness. Under Colo. Rev. St. 1908, § 7274, providing that a wife shall not be examined for or against her husband without his consent, a married woman who attested a will under which her husband was a beneficiary, and which he was seeking to establish, may testify for the will. White v. Bower (Colo.) 1917A-835. (Annotated.)
- 43. Conclusiveness of Testimony of Subscribing Witnesses. Where a will is contested, neither party is limited to the testimony of the subscribing witnesses, and either party may present other evidence to overcome the adverse testimony of such witnesses. The questions in controversy are to be determined from all the evidence bearing thereon, and not from the testimony of the subscribing witnesses only.

  Madson v. Christenson (Minn.) 1916D—1101.

  (Annotated.)
- 44. Necessity of Calling Subscribing Witnesses. The statute requires that all subscribing witnesses, "who are within the state and are competent and able to testify, shall be produced and examined." Where the proponent called a subscribing witness and examined him as to the manner in which the will was executed, the failure to examine him as to the sanity of the testator will not defeat the will, if such sanity be proven by other evidence. By calling him as a witness, his testimony was made available, and, if contestants desired his testimony upon matters emitted by proponent, it was incumbent

- unon them to examine him in respect thereto. Madson v. Christenson (Minn.) 1916D-1101.
- 45. Proof of Nuncupative Will. To sustain a will as a nuncupative will, it must be proved that decedent, while uttering the words offered as a will, had a present testamentary intention, and that he intended that the very words, then uttered, and no others, should constitute his will; if he gives instructions for a will which is subsequently to be drawn up and executed in writing, and it is not done, or if he gives oral directions which are taken down in the form of a will, which he fails to execute as a formal written will because of his death before he can do so, the writing cannot be sustained as nuncupative will. Brown v. State (Wash.) 1917D-604. (Annotated.)
- 46. Holographic Will Sufficiency of Evidence to Establish. In a will contest where the jury were instructed that a holographic will must be established by the unimpeachable evidence of at least three disinterested witnesses that the entire body of the will and the signature were in the handwriting of the testator, the evidence is held to be sufficient to warrant a finding for the contestee. Mason v. Bowen (Ark.) 1917D-713.
- 47. In a will contest, the evidence is held to be sufficient to warrant a jury finding that the will was attested by two witnesses in the manner required by the statute. Mason v. Bowen (Ark.) 1917D-713.
- 48. Proof of Genuineness of Signature—Weight of Evidence. The declaration of two credible witnesses who attest that they recognize a testament as being entirely written, dated, and signed in the testator's handwriting, corroborated by the testimony of an expert in handwriting, and by the recitals of the will, and by other various extraneous facts, will prevail over the testimony of two witnesses, who swear that a part of the date was not written by the testator, unsupported by any other circumstances. Succession of Lefort (La.) 1917E-769.

# Note.

Conclusiveness of testimony of subscribing witnesses with respect to execution of will. 1916D-1104.

## 5. TESTAMENTARY CAPACITY.

# a. Who May Make Will.

49. Age and Infirmity. Infirmity from old age does not render a person, incapable of making a will unless it has so far impaired the testator's mind that he is incapable of understanding his business at the time he is engaged in making the will. Carnahan v. Hamilton (Ill.) 1916C-21.

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## Note.

Validity of will made by blind person. 1916D-792.

# b. Mental Capacity.

# (1) In General.

- 50. Test of Testamentary Capacity. While sufficient mind and memory to attend to the ordinary business affairs of life makes one competent to make a will, such test is higher than the law requires. Ravenscroft v. Stull (III.) 1918B-1130.
- 51. The quantum of mental capacity requisite to the valid execution of a will is that the testator shall, at the time of executing the will, know and understand what he is about. Points v. Nier (Wash.) 1918A-1046.
- 52. The test of "testamentary capacity" is that the testator shall remember without prompting the extent and condition of his property, comprehend to whom he is giving it, and be capable of appreciating the claims of others whom he is excluding from participation in the estate. Mason v. Bowen (Ark.) 1917D-713.
- 53. A person who is capable of transacting ordinary business is capable of making a valid will.. Carnahan v. Hamilton (III.) 1916C-21.
- 54. It is not a rule of law that testator should have sufficient strength of mind to know what property he owned "without prompting." Carnahan v. Hamilton (Ill.) 1916C-21.
- 55. To incapacitate the person from making a will, the derangement must be of that character which renders him incapable of understanding the effect and consequences of his act; it must be a want of capacity which prevents him from understanding the relation of cause and effect in ordinary business matters. Carnahan v. Hamilton (III.) 1916C-21.
- 56. Ancestral Insanity Presumption. It cannot be presumed that the testator is insane merely because his father was insane, as, until the disease manifests its presence, its existence cannot be inferred in the mind of the person in question. Carnahan v. Hamilton (Ill.) 1916C-21.
- 57. Person Partly Paralyzed. One who knows his property, his relatives and heirs at law, and what disposition he desires to make of his estate and informs the scrivener of his wishes has testamentary capacity, though he is suffering from a paralytic stroke depriving him of the use of part of his body, and so affecting his speech as to cause him to speak with difficulty, though he can be understood. Wilson v. Craig (Wash.) 1917B-871.
- 58. Belief in Spiritualism and Witchcraft. The fact that a person believes in witcheraft, clairvoyance, spiritual influences, presentments of the occurrences of

future events, dreams, mind-reading, and the like does not show testamentary incapacity as a man's belief cannot be made a test of sanity. Carnahan v. Hamilton (Ill.) 1916C-21.

# (2) Insane Delusion or Religious Belief.

- 59. "Monomania," within Ga. Civ. Code 1910, § 3840, providing that a monomaniac may make a will in no way resulting from the mania, is a mental disease; not merely the unreasonable conduct of a sane person. It is a species of insanity. "Mania" is a form of insanity accompanied by more or less excitement which sometimes amounts to fury. An "insane delusion," such as will deprive a person of testamentary capacity, is the delusion which exists when a person conceives something extravagant to exist which has no existence whatever, and is incapable of being permanently reasoned out of that conception. Dibble v. Currier (Ga.) 1916C-L.
- (Annotated.)
  60. Insane Delusion. An "insane delusion" which will render one incapable of making a will is a belief in a state or condition of things in the existence of which no rational person would believe, or a belief in something impossible in the nature of things, or impossible under circumstances surrounding the individual, and which refuses to yield either to evidence or reason. Carnahan v. Hamilton (Ill.) 1916C-21. (Annotated.)
- 61. Prejudice of the testator against a relative is not ground for setting aside a will unless it can be explained upon no other ground than that of an insane delusion. Carnahan v. Hamilton (III.) 1916C—21. (Annotated.)
- 62. A "delusion" of a testator, such as will invalidate a will, is an insane belief or a mere figment of the imagination. In re Alexander's Estate (Pa.) 1916C-33.

  (Annotated.)
- 63. An "insane delusion" is an idea or belief which springs spontaneously from a diseased or perverted mind without reason or without foundation in fact. It is founded upon prejudice or aversion, no matter how unreasonable or unfounded the prejudice or aversion may be, and if it is the product of a reasoning mind, no matter how slight the evidence on which it is based, it cannot be classed as an insane delusion. Coffey v. Miller (Ky.) 1916C-30.

  Note.

Insane delusion with respect to relative as affecting testamentary capacity. 1916C-4.

# (3) Evidence.

# (a) Burden of Proof.

64. The burden is on a party, relying on the existence of a delusion to invalidate a will, to prove that such delusion controlled the testator's volition and destroyed his freedom of action in disposing of his estate. In re Alexander's Estate (Pa.) 1916C-33. (Annotated.)

(b) Admissibility.

- 65. Opinion Evidence. Where the proponents produced witnesses who stated that testator had capacity to make a will, the contestant, to meet the opinions of such witnesses, may introduce witnesses who will state their opinion that testator did not have such capacity. Ravenscroft v. Stull (Ill.) 1918B-1130.
- 66. Evidence as to Capacity. A party to a will contest has a right to ascertain and present to the jury any fact in relation to the mental capacity of the testator and the strength of his mental powers. Ravenscroft v. Stull (III.) 1918B-1130.
- 67. General Business Capacity of Testator. Witnesses may be asked as to the ability of testator to transact ordinary business. Ravenscroft v. Stull (III.) 1918-1130.
- 68. Remote Statements of Testator. Statements imputed to testator, four or five years previous to his death, concerning his intention to give his property to a certain person, are inadmissible as too remote. Ravenscroft v. Stull (III.) 1918B-1130.
- 69. Use of Intoxicants by Testator. Evidence of testator's habit of drinking intoxicating liquors is admissible. Ravenscroft v. Stull (III.) 1918B-1130.
- 70. No Change in Testator's Condition Observed. In a will contest in which it was claimed that testator did not have testamentary capacity, a witness may state that he had observed no change in testator, and that he was, on the day the will was executed, the same as he was any other day the witness ever saw him. Carnahan v. Hamilton (III.) 1916C-21.
- 71. Inequality of Disposition. Unequal disposition of property is a circumstance which the jury may consider in connection with other evidence in passing on the mental capacity of the testator. Carnahan v. Hamilton (III.) 1916C-21.
- 72. Declarations of Testator. Statements and declarations of a testator, whether made a reasonable time before or after the execution of a will, are admissible to show his mental capacity when that issue is raised, being external manifestations of his mental condition. Mason v. Bowen (Ark.) 1917D-713.
- 73. In a will contest, evidence of a statement by the testator that the contestee owed him money, and that he was going

to live with him for the purpose of collecting this debt, is inadmissible upon the question of undue influence, since statements and declarations of a testator, whether made before or after the execution of a will, are not competent as direct or substantive evidence of undue influence, and are merely hearsay. Mason v. Bowen (Ark.) 1917D-713.

(Annotated.)

74. In a will contest, statements of the testator, made more than two years prior to making his will, and before going to live with the contestee, that he intended his property to go to his relatives on his death are inadmissible as too remote to have any value in proving the mental capacity of the testator, since declarations of a testator, made prior to the execution of a will, are entitled to probative force, according to the nearness or remoteness of the time at which they were made; the time to be covered being left to the discretion of the trial court. Mason v. Bowen (Ark.) 1917D-713.

75. Unnatural Disposition of Property. Where a will was attacked for incapacity of the testatrix and undue influence, evidence of the great wealth of the principal beneficiary is admissible on the question of the unnaturalness of the will; it appearing that testatrix practically disinherited her grandchild, who was her only near blood relation; such evidence being material on the question of capacity and undue influence. In re Williams' Estate (Mont.) 1917E-126. (Annotated.)

- 76. Declaration of Legatee. In a will contest, where there are two legatees, evidence that one of them had once said that testator's mind had weakened or failed from the use of medicine, and that he could hardly recollect anything, the effort being to attack the whole will, and to invalidate it as a whole, is incompetent, as affecting the other legatee. McDonald v. McLendon (N. Car.) 1918A-1063.
- (Annotated.)
  77. Irrelevant Evidence. As regards the issue of lack of mental capacity of testatrix, introduction of conveyances by her, and of personal tax returns of propounder, made after testatrix's death, all having no bearing, is harmless. In re Rawlings' Will (N. Car.) 1918A-948.

#### Notes.

Admissibility of declaration of legatee or devisee as to mental capacity of testator. 1918A-1066.

Admissibility of declarations of testator not made at time of execution of will, on question of undue influence. 1917D-717.

Unnatural or unjust disposition of estate as evidence of testamentary incapacity. 1917E-130.

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Right of physician who attended testator before his death to testify as to his mental condition. 1918A-1050.

# (c) Weight and Sufficiency.

- 78. In a will contest, the evidence is held to be sufficient to sustain finding that testatrix had testamentary capacity at the time of executing the will. Points v. Nier (Wash.) 1918A-1046.
- 79. Evidence in support of a petition for an issue devisavit vel non held insufficient to show that the will was executed in consequence of an insane delusion on the part of the testator, the petitioner's father, though testator practically disinherited her and may have been mistaken in his judgment that she had been guilty of unatural conduct toward him and her mother. In re Alexander's Estate (Pa.) 1916C-33. (Annotated.)
- 80. Evidence in a will contest held insufficient to show testamentary incapacity, in that testator had an insane delusion that certain of his nieces and nephews had mistreated him. Coffey v. Miller (Ky.) 1916C-30. (Annotated.)
- 81. Evidence of Incapacity Insufficient. In a will contest, a finding that a testator 72 years of age was wanting in testamentary capacity held against the great weight of the evidence. Carnahan v. Hamilton (III.) 1916C-21.
- 82. Foolish Conduct as Evidence of Incapacity. That an old man, a widower 72 years of age, after his daughter's death, proposed marriage to two different women, is not very strong proof of unsoundness of mind, especially where he was unhappy with his home life with his son-in-law. Carnahan v. Hamilton (Ill.) 1916C-21.
- 83. Disease as Evidence of Incapacity. Hardening of the arteries is no proof of testator's mental incapacity without a showing that it actually did affect the mind. Carnahan v. Hamilton (III.) 1916C-21.
- 84. Excitability as Evidence of Incapacity. The fact that testator shed tears when conversing about his deceased daughter, or grew excited when talking about business affairs that were troubling him, does not in itself prove testamentary incapacity. Carnahan v. Hamilton (III.) 1916C-21.
- 85. Unequal Division as Indicating Incapacity. The unequal division of property among his heirs does not itself justify a finding of want of testamentary capacity, as the testator has the right to dispose of his property as he thinks best. Carnahan v. Hamilton (III.) 1916C-21.
- 86. Disease. To sustain an allegation of want of testamentary capacity, something

more than mere physical disease and old age on the part of the testator must be shown. Carnahan v. Hamilton (Ill.) 1916C-21.

- 87. Mental Capacity Established. In a will contest, the evidence is held to be sufficient to warrant a jury finding that the testator had the mental capacity to make a will. Mason v. Bowen (Ark.) 1917D-713.
- 88. Lack of Capacity Established. The evidence on a will contest is held to sustain a finding of lack of mental capacity. In re Rawlings' Will (N. Car.) 1918A-948.

# (4) Instructions.

- 89. Comprehension of Estate "Without Prompting." An instruction in a will case basing mental capacity on understanding the nature and extent of his property "without prompting" is erroneous, where there is no evidence that he was prompted. Carnahan v. Hamilton (Ill.) 1916C-21.
- 90. Injustice of Will. An instruction on mental capacity of a testator that testator, if mentally unsound, did not have the right to cut off his grandchild with \$100, was erroneous as assuming that only \$100 was given, where there was evidence that she received personal property in addition to the money. Carnahan v. Hamilton (III.) 1916C-21.
- 91. An instruction on testamentary capacity that if testator was of sound mind he had the right to cut off his grandchild, as only heir at law, and had the right to give his property to persons who would not have been heirs at law had he died without a will, but if he did not possess a sound mind or memory then he had no right to cut her off and give his property to persons not his heirs, is erroneous as having a tendency to permit the jury to decide whether the will was just or unjust as to the various relatives. Carnahan v. Hamilton (III.) 1916C-21.
- 92. Instruction not Warranted by Evidence. Where at the time a testator made a will there was no evidence that he was suffering from mental derangement, anger, or jealousy, an instruction based on those facts is erroneous. Carnahan v. Hamilton (Ill.) 1916C-21.
- 93. Instructions as to Capacity. An instruction that, if testator was of unsound mind when he executed the will, they should find that it was not his will, though they might believe that he could enter into conversation with some witnesses on the day of making the will, is error. Ravenseroft v. Stull (III.) 1918B-1130.
- 94. Use of Intoxicants by Testator. It is proper to instruct that the jury may consider the use of intoxicating liquors by testator for the purpose of determining

whether he had mental capacity to make a will. Ravenscroft v. Stull (III.) 1918B-1130.

95. Confidential Relations. In a will contest, a requested instruction that confidential relations between proponent and testator, and the fact that she was substantially benefited by the will, did not change the burden of proof, is properly refused. Ravenscroft v. Stull (Ill.) 1918B-1130.

96. As to Burden of Proof. The jury being distinctly charged that the burden of proving lack of mental capacity of testatrix was on caveators, and that they must satisfy the jury that testatrix did not have sufficient mental capacity, the concluding sentence, "If they have failed to so satisfy you, and the propounder has satisfied you that she did not have sufficient capacity, you will answer . . . "Yes" to the issue did she have sufficient mental capacity, cannot mislead the jury to understand that the burden of proving mental capacity is on the propounder. In re Rawlings' Will (N. Car.) 1918A-948.

## 6. UNDUE INFLUENCE.

97. What Constitutes. The "undue influence" which will avoid a will is that, directly connected with its execution, resulting from fear, coercion, or other cause, that deprives the testator of his free agency in the disposition of his property, and is especially directed toward procuring a will in favor of particular parties, and does not include the legitimate influence from natural affection. Mason v. Bowen (Ark.) 1917D-713.

98. Circumstances Considered. Old age, bad health, and weakness of mind in testator are to be considered upon the issue of undue influence. McDonald v. McLendon (N. Car.) 1918A-1063.

99. Sufficiency of Evidence. In a will contest, the evidence is held to be sufficient to warrant a jury finding that the will was not procured by undue influence. Mason v. Bowen (Ark.) 1917D-713.

100. Evidence Insufficient. Evidence in a will contest held insufficient to raise an issue of undue influence. Coffey v. Miller (Ky.) 1916C-30.

101. Presumption. If the fact that the son of a blind testator, to whom he left property, had remained at home, looking after his father and managing the property, is sufficient to raise a presumption of undue influence, such presumption is one of fact only, merely entitling caveators to the will to have the question submitted to the jury, so that the court's refusal to charge that such presumption, if the facts necessary to establish it are found, is decisive of the issue, is proper. In re Allred's Will (N. Car.) 1916D-788.

## 7. MISTAKE.

102. Mistake of Fact. A "mistake of fact" such as under Ga. Civ. Code 1910, § 3836, will nullify in part the operation of a will is a mistake arising from mere ignorance, and not one resulting from an error of judgment after investigation, or wilful failure to make a proper investigation by means of which the truth could be readily and surely ascertained. Dibble v. Currier (Ga.) 1916C-1.

103. Allegations to the effect that the testatrix desired to have her male relatives maim or kill her former husband, and to have her female relatives urge them so to do, that because they refused to do so she believed that she was disgraced in the eyes of the community by them, and that they did not sympathize with her but with her former husband, and were prompted thereby in refusing her request, and that this constituted a mistake of fact as to the conduct of the heirs at law, were subject to demurrer. Such allegations amounted only to alleging erroneous inferences or conclusions drawn by the testatrix from their refusal to comply with her illegal request. Dibble v. Currier (Ga.) 1916C-1. (Annotated.)

# 8. REVOCATION.

## a. In General.

104. Common-law Rules. As the statutes afford no rule for determining by what "act and operation of law" a will of real estate may be revoked, the rules of the common law must be applied. Herzog v. Trust Co. (Fla.) 1917A-201.

# Subsequent Will or Writing.

105. Subsequent Invalid Will. Under the Ill. statute of Wills (Hurd's Rev. St. 1913, c. 148, § 17) providing that no will shall be revoked otherwise than by destroying it, or by other will, testament or codicil in writing declaring the same, signed by testator in the presence of two or more witnesses, and attested by them in his presence, a former will and codicil are not revoked by an instrument intended as a subsequent will which expressly revoked them, but was invalid because of the incompetency of one of the subscribing witnesses. Moore v. Rowlett (Ill.) 1916E-718.

# c. Subsequent Marriage.

106. Effect of Marriage. At common law marriage alone did not cause a revocation by operation of law of a prenuptial will of a man; the wife having her dower rights, notwithstanding the will. Herzog v. Trust Co. (Fla.) 1917A-201. (Annotated.)

107. Effect of Marriage. As a widow is liberally provided for by her statutory

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rights in her husband's estate, which she may have notwithstanding the execution of a will by her husband, whether executed before or after the marriage, there is no good reason for a judicial change of the common-law rule that marriage alone does not cause a revocation of a man's will, when the rule has not been changed by statute. Herzog v. Trust Co. (Fla.) 1917A-201.

(Annotated.)

108. Rem. & Bal. Wash. Code, § 1323, providing that if, after making any will, the testator shall marry and the wife shall be living at the death of the testator, such will shall be deemed revoked, applies to a will made by a married woman, and revokes such will upon her subsequent remarriage. In re Van Guelpen's Estate (Wash.) 1917C-1037. (Annotated.)

110. Under Cal. Civ. Code, § 1299, providing that if, after making a will, the testator marries and the wife survives him, the will is revoked, unless provision has been made for her by marriage contract or by the will, or she is mentioned in such way therein as to show an intention not to make such provision, an antenuotial will standing alone containing no provision for, nor mention of, testator's wife, is revoked by his marriage and death leaving her surviving him. Estate of Cutting (Cal.) 1917D—1171.

#### Notes.

Revocation of will of woman by subsequent marriage. 1917C-1039.

Effect on will of marriage of testator without issue. 1917A-203.

# d. Revival.

111. An instrument "hereby affirming my will," except as herein modified, and declaring the following to be a codicil to testator's last will, followed by the provisions modifying the will, republishes the will, though it was an antenuptial will making no provision for testator's wife, and he died leaving his wife surviving. Estate of Cutting (Cal.) 1917D-1171. (Annotated.)

112. By Codicil. Under Cal. Civ. Code, \$ 1287, providing that the execution of a codicil referring to a previous will republishes the will as modified by the codicil, an antenuptial will may be republished by the execution of a codicil, notwithstanding section 1299, providing that an antenuptial will making no mention of testator's wife is revoked by his marriage and death leaving her surviving, and that no other evidence to rebut the presumption of revocation must be received. Estate of Cutting (Cal.) 1917D-1171. (Annotated.)

113. Destruction of Revoking Will. The destruction by the testator of a will whereby the former will was revoked operates to revive the former will. Moore v. Rowlett (Ill.) 1916E-718.

(Annotated.)

#### Note.

Revival of will revoked by marriage. 1917D-1175.

## 9. PROBATE.

- Jurisdiction and Nature of Proceedings.
- 114. Jurisdiction. The city court of Mattoon has jurisdiction of a will contest by bill in chancery, such suit being of the same nature as the common-law right to a contest. Ravenscroft v. Stull (III.) 1918B-1130.
- 115. Statute Authorizing Contest—Strict Construction. The right of action to contest a will, being purely statutory, is in derogation of common law, and subject to the rule that its provisions must be strictly construed. Braeuel v. Reuther (Mo.) 1918B-533.
- 116. Cancellation During Life of Testator. An action will not lie during the lifetime of testator to compel the surrender and cancellation of a will in the custody and control of defendant, on the ground that testator does not possess testamentary capacity. Pond v. Faust (Wash.) 1918A-736. (Annotated.)
- 117. Probate and Contest—Jurisdiction—Exclusiveness of Statute. No court has jurisdiction of any kind over wills, except as provided by Rem. & Bal. Wash. Code, §§ 1289, 1293, 1294, 1297, 1307—1311, touching the production of wills for probate and their contest, which are comprehensive and exclusive. Pond v. Faust (Wash.) 1918A-736.
- 118. Conclusiveness of Probate. The probate of the will in solemn form is conclusive of its validity. In an action against the devisee, to impress a trust upon the property devised, because of the testator's violation of his contract to devise the property to the plaintiff, it is irrelevant to inquire into the testamentary capacity of the testator, or any undue influence alleged to have been exerted by the devisee in procuring the execution of the will, and under the facts of the case an instruction on these subjects is prejudicial error requiring a new trial. Gordon v. Spellman (Ga.) 1918A-852.
- 119. Requisites of Jurisdiction—Notice to Nonresidents. Both under N. Y. Code

Civ. Proc. § 2629 et seq., authorizing issuance of ancillary letters upon foreign probate of a will, and under general rules of law, a proceeding in another state for the probate of a will is in rem, and, if the court otherwise has jurisdiction, it may make a decree binding on nonresidents, though no notice is required or given on the original probate and the probate becomes conclusive in the absence of contest within a given period. Matter of Horton (N. Y.) 1918A-611.

(Annotated.)

120. Effect in Other Jurisdictions. The decision by the court of another state in probate proceedings that the domicil of the testator at his death was in that state is not conclusive upon persons in New York who were not parties to the proceeding, and may be contested in the New York courts. Matter of Horton (N. Y.) 1918A-611.

#### Note.

Conclusiveness in domestic courts of foreign will duly probated abroad. 1918A-614.

Right to annul or establish will before death of testator, 1918A-738.

#### b. Abatement of Contest.

121. Death of Contestant. If a will contest is no different from an ordinary civil proceeding, it will survive and may be revived under Mo. Rev. St. 1909, §§ 1916-1925, in the name of the successor to the parties plaintiff, in view of section 1916, providing that no action shall abate by the death, marriage, or other disability of a party if the cause of action survives. Braeuel v. Reuther (Mo.) 1918B-582

# c. Parties.

122. Who may Contest—Legatee. Under Code Ala. 1907, § 6196, giving the right to contest a will to any person interested therein, or who, if the testator had died intestate, would have been an heir or distributee of his estate, and section 6207 giving the right to contest a will by a bill in chancery to any person interested in any will who has not con-tested it under the provisions of section 6196, the right to contest is given only to one who has some direct legal or equitable interest in decedent's estate, which will be injuriously affected by the establishment of the will, and legatees, who are children of a living heir of testator, are not entitled to contest. Braasch v. Worthington (Ala.) 1917C-903.

'(Annotated.)

123. Persons Entitled to Contest—Interest. A will contest as authorized by an

interested person under Mo. Rev. St. 1909, § 555, can be brought only by one having a direct pecuniary interest in the final determination. Braeuel v. Reuther (Mo.) 1918B-533.

124. Joinder of Complainants Without Interest—Dismissal for Misjoinder. Where some complainants in a bill to contest the will and to remove the estate into chancery for administration had no interest in the will, except as legatees, and were therefore not entitled to contest, and the court had already, on another petition, assumed jurisdiction over the administration of the estate, it is proper to sustain a demurrer as to the entire bill for misjoinder of parties complainant. Braasch v. Worthington (Ala.) 1917C-903.

125. Parties. The executors of a widow, to whom a testator had devised his property in fee by a will previously probated, are interested in an application for the probate of an alleged subsequent will which gave the widow only a life estate and are proper parties to the probate proceedings, though not heirs of the husband or legatees under the will offered for probate. Conzet v. Hibben (III.) 1918A-1197.

#### Note.

Right of person who is merely legatee or devisee to contest will. 1917C-905.

## d. Pleadings and Issues.

126. Monomania. A caveat to the propounding of a will alleged that the testatrix made an unfortunate marriage; that her husband deserted her, and she obtained a divorce from him; that she brooded so much over the unhappy events and outcome of the marriage that her mind became unbalanced and incapable of ratiocination with reference to it and events associated with it or arising from it; that, under an insane delusion with reference to the relationship and the continuation of the affection between herself and her heirs at law, she sought to have her former husband killed or maimed by them, and, because of their refusal to comply with such request, she became imbued with the hallucination that they were not of her blood or family, were not related to her, and were not entitled to her affection and treatment as kinsmen; that she became possessed of an insane delusion that she was disgraced in the eyes of the community by her relatives, because they would not maim or kill her former husband; that she was mistaken as to their condemning her or not sympathizing with her, and in believing that they did not condemn her former husband; that they assured her of that fact, but she was pos-sessed of the insane hallucination that WILLS. 875

nothing short of the maining of her former husband would relieve her of the supposed contempt in which she thought she was held because of her unfortunate marital experience and because her heirs at law refused to comply with her request; and that, because her heirs at law refused to violate the law at her demand, under the influence of said insane delusion, she conceived and maintained a wholly insane and mistaken idea as to their conduct in the matter and as to their relations and feelings toward her; and that this delusion existed prior to and at the time of the making of the will and caused her to make it, leaving a large part of her property to different charities. instead of to next of kin. It is held that such allegations sufficiently averred monomania to withstand a demurrer. Dibble v. Currier (Ga.) 1916C-1. (Annotated.)

127. Manner of Determination-Scope of Proof. The article of the La. Civ. Code (1655) applies to the probate of a testament which is not opposed. But a different rule obtains when the probate of the testament is opposed ab initio on the ground that it is a fraud and a forgery. In such a case the denial of the genuineness of the testament removes the contest from the domain of article 1655 of the Code, and it presents an issue which must be determined under the rules which govern all contests involving the genuineness of a signature which is denied. Under such an issue the doors of justice are opened wide for the introduction of any legal evidence in accordance with all the forms which prevail in all contested facts or cases. The textual provisions of Civ. Code, art. 2245, and Code Prac. art. 325, recognize the mode of testing signatures by a comparison of writing or by experts. Succession of Lefort (La.) 1917E-769.

128. Permitting Unnecessary Plea—Harmless Error. Error, if any, in sustaining a so-called plea by such executors setting up the probate of the former will was not prejudicial to the proponents of the latter will, since the record of the former probate could have been called to the court's attention without a plea. Conzet v. Hibben (Ill.) 1918A-1197.

## e. Evidence.

129. Where two wills containing inconsistent dispositions bear the same date, evidence is admissible to show which was executed last. Peace v. Edwards (N. Car.) 1918A-778. (Annotated.)

# f. Hearing and Order of Proof.

130. Sufficiency of Ruling on Offer of Will. In a will contest case, where, after the will is received in evidence and formally offered for probate, the court submits the contest to the jury and enters an

order reciting that the instrument offered for probate is rejected as not being the last will and testament of deceased, proponents cannot complain that the court never passed on their offer of the instrument for probate. In re Williams' Estate (Mont.) 1917E-126.

131. Necessity of Leave of Court for Deviation. In a will contest, the privilege to recall a witness to offer testimony at the close of the rebuttal evidence of the propounders cannot be exercised by the caveators without the consent of the trial court. McDonald v. McLendon (N. Car.) 1918A-1063.

# g. Findings.

132. Consistency of Findings. In a will contest, where the jury returned special findings, there is no inconsistency between findings that testatrix was not of sound and disposing mind; that she did not subscribe the instrument as her last will and testament; that she did not publish it; that she did not request witnesses to sign as such; and that she was acting under undue influence, there being no inconsistency between a finding of undue influence and want of testamentary capacity. In re Williams' Estate (Mont.) 1917E-126.

# h. Appeal.

133. Harmless Error—Evidence as to Fact Conclusively Shown. It was error to permit a legatee under the will to testify to statements made by the testator at the time he executed the will, but the validity of the will was conclusively established outside such testimony, and the error was without prejudice. Madson v. Christenson (Minn.) 1916D-1101.

134. Marriage to Insane Person. That a witness on the issue of testatrix's mental capacity was allowed to testify that she married one who had previously been two or three years in an insane asylum is harmless, being at most immaterial. In re Rawlings' Will (N. Car.) 1918A-948.

135. Appeal to District Court-Parties. Upon appeal to the district court from an order or judgment of the county court admitting a will to probate, the only necessary parties are the executor, or administrator with the will annexed, who was the petitioner or proponent of the will, and the contestants, who opposed its admission; and, they being parties, the judgment of the district court admitting or refusing to admit a will to probate has the same effect as if all persons interested in the establishment of the will were made formal parties to the proceedings; and while such judgment remains in force, subject only to reversal by this court and the statutory remedy of contesting the will after probate, it is conclusive upon the world. Bell v. Davis (Okla.) 1917C-1075.

136. Hearing of Contest—Receiving Evidence Out of Order. In a will contest, whether the judge shall allow a witness for the caveators, whose testimony had been successfully objected to, to be recalled at close of the rebuttal evidence of the propounders, one of whom waived all objection to the evidence, is entirely within the court's discretion, which, when exercised without any gross abuse, the supreme court will not review. McDonald v. McLendon (N. Car.) 1918A-1063.

137. Argument of Counsel—Cure by Instruction. Such error is not cured by instruction that for an attorney to testify was a reprehensible practice, and the jury should not indulge in presumption against the validity of the will. Ravenscroft v. Stull (III.) 1918B-1130.

#### Note.

Power of executor or administrator with will annexed to appeal from judgment refusing probate. 1917C-1079.

#### i. Costs.

138. Where a will was procured by fraud and undue influence, and the executrix who propounded it for probate was the chief beneficiary, and was responsible for the fraud, she is not entitled to costs on the theory that she propounded the will in good faith. Smith v. Haire (Tenn.) 1916D-529.

139. An executor who in good faith propounds a will for probate is entitled to his costs and attorney's fees whether the will is set aside or not. Smith v. Haire (Tenn.) 1916D-529.

# j. Effect of Death of Contestant.

140. A proceeding to contest a will is peculiar, in that, when filed, the proponents have the burden of proving affirmative facts essential to validity of the will, and therefore, after the contest is filed, the court will determine the validity of the will, and no reviver is necessary if the contestants die. Braeuel v. Reuther (Mo.) 1918B-533.

## k. Probate of Later Will After Former Probate.

141. Necessity of Revoking Probate of Former Will. Where a will has been admitted to probate by consent of all interested parties, an application by some of them for the probate of an alleged subsequent will revoking the former will should be joined with an application to set aside the probate of the former will so that the questions of estoppel and fraud can be determined as well as the execution of a subsequent will, and where no application is made to set aside the probate of the former will the admission of the sub-

sequent will to probate is properly denied. Conzet v. Hibben (Ill.) 1918A-1197.

142. Estoppel to Seek Probate. Parties to the proceedings for the probate of a will who consented to the probate are estopped to ask for the probate of a later will, unless their consent was procured by mistake or fraud. Conzet v. Hibben (III.) 1918A-1197. (Annotated.)

143. In proceedings to probate a subsequent will after the former one had been probated by consent of all parties, proof that the consent of the parties to such property was given by mistake or through fraud is competent either in the probate court or in the circuit court on appeal. Conzet v. Hibben (III.) 1918A-1197.

(Annotated.)

144. In proceedings to probate a subsequent will the burden is on parties who consented to the former will to prove that their consent was obtained by mistake or through fraud. Conzet v. Hibben (Ill.) 1918A-1197. (Annotated.)

#### Note.

Estoppel to seek probate of will. 1918A-1200.

# 10. CONSTRUCTION.

- a. General Rules of Construction.
  - (1) Intention of Testator.

145. The cardinal rule in the construction of wills is to ascertain the intent of the testator from the language used. Smith v. Chester (III.) 1917A-925.

146. The intent of the testator must be sought by a construction of the entire will. Porter v. Union Trust Co. (Ind.) 1917D-427.

147. Testator's Intent to be Effectuated. In construing a will, the court should aim to give effect to the testator's intent, upholding, if possible, each item of the instrument. Lewis v. Reed's Executor (Ky.) 1917D-1155.

148. A will must be construed not by the intention which existed in testator's mind, but according to that which is expressed in the will. Faison v. Middleton (N. Car.) 1917E-72.

149. A will must receive the most favorable construction to accomplish the result intended by the testator. Chew v. Sheldon (N. Y.) 1916D-1268.

150. Where the intention of the testator can be gathered from his will, it will always be carried into effect, unless to do so would violate some rule of law. Sherlock v. Thompson (Iowa) 1917A-1216.

151. The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some posi-

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tive rule of law, it must prevail. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443

## (2) Giving Meaning to All Parts.

152. Effectuating All Provisions. Effect should be given, if possible, to every provision of a will. Porter v. Union Trust Co. (Ind.) 1917D-427.

153. Under Cal. Civ. Code, § 1321, providing that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole, an instrument executed by a testator affirming his will, except as therein modified, and declaring the following to be a codicil, followed by the provisions modifying the will, but not again referring to the will, is sufficient as a republication of the antenuptial will, notwithstanding the designation in the instrument of the latter part thereof as a codicil. Estate of Cutting (Cal.) 1917D-1171. (Annotated.)

154. Effectuating All Words. Words in a will are not to be treated as a nullity, but are to be construed if possible in a way to give them effect. In re Irish's Will (Vt.) 1917C-1159.

155. Intent Gathered from Entire Will. The court in construing a will must ascertain the intention of testator as gathered from his entire will, and give effect to it, when not in conflict with recognized rules of law. Heiseman v. Lowenstein (Ark.) 1916C-601.

## (3) Meaning of Words.

156. Fair Import of Language. In construing a will, the language thereof governs unless there are clear indications of a contrary meaning to be found in the will considered as a whole, and the court may not speculate as to testator's intent, and can only interpet a will fairly and according to established rules of law, and without supplying omissions by reading into the will something that testator did not insert. Ham v. Ham (N. Car.) 1917C-301.

157. Words Construed in Ordinary Sense. The words of a will are to be taken in the ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected. Matter of Estate of Tooley (Cal.) 1917B-516.

## (4) Inconsistent Provisions.

158. Repugnancy — Effect. Where two clauses are equally specific and clearly repugnant, the latter controls, though, when the effect of the latter gift is merely to enlarge the former, there is no repugnancy. Porter v. Union Trust Co. (Ind.) 1917D-427.

159. All Provisions to be Harmonized. The courts will, if possible, harmonize provisions of a will, and only if inconsistent

will the latter prevail over former provisions. Lewis v. Reed's Executor (Ky.) 1917D-1155.

## (5) Avoiding Partial Intestacy.

160. A will should be construed so as to avoid partial intestacy. Porter v. Union Trust Co. (Ind.) 1917D-427.

#### (6) Construction to Sustain Will.

161. Construction in Favor of Validity. If one construction of a will will make a bequest illegal as a perpetuity, while another will render it valid, the latter will be accepted, if both constructions are permissible. Allen v. Almy (Conn.) 1917B-112.

162. Construction in Favor of Vesting of Estate. The law favors a testamentary construction which vests the estate. Allen v. Almy (Conn.) 1917B-112.

163. Disinheritance not Favored. An heir will not be excluded or disinherited, except by express words or necessary implication and if the will is doubtful, that construction favorable to the heir will be adopted. Lewis v. Reed's Executor (Ky.) 1917D-1155.

164. Avoiding Conflicts. In construing a will, conflicts should be reconciled, and that construction which will give effect to all provisions should be preferred. Porter v. Union Trust Co. (Ind.) 1917D-427.

### (7) Error Cured by Other Recitals.

165. Effect of Error in Recital. The mere fact that testator described a mortgage as of the face value of \$2,500 when he never owned one of that value, but did own one of \$2,200, is unimportant if the mortgage is otherwise identified. McDermett v. Scully (Conn.) 1917E-407.

166. Where a will provided "I give to R. M. \$5, having heretofore deeded to her my house, and a mortgage of \$2,500," when the testator in fact had not given the mortgage to the beneficiary and even when he owned a similar mortgage, the will nevertheless provides for a nominal bequest and does not devise the mortgage owned. McDermott v. Scully (Conn.) 1917E-407.

## (8) Later and Earlier Wills.

167. Construction Together of Two Wills. When a posterior testament does not expressly revoke a prior one, both must be executed, unless the last will tacitly revokes the first as a whole. When they conflict only in part, the provisions of the last will must prevail. Succession of Lefort (La.) 1917 E-769. (Annotated.)

168. Several Undated Wills—Admission of One to Probate. Where four paper writings, found folded together among the papers of the deceased, each executed as

required by statute, and each a valid exercise of testamentary capacity, are not harmonious, so as to be upheld as one will, but are inconsistent and mutually destructive, and three of them are undated and there is no evidence to show which was the latest expression of his intent, neither can stand. Peace v. Edwards (N. Car.) 1518A-778. (Annotated.)

#### Notes.

Construction together as one will of several testamentary instruments partially inconsistent. 1917E-781.

Admission to probate of several wills which are of same date or of which one or more are undated. 1918A-780.

#### (9) Codicils.

169. An antenuptial will, as modified by a postnuptial codicil, stands as if it were but one testamentary intention expressed in a single will made after marriage as of the date of the codicil. Estate of Cutting (Cal.) 1917D-1171. (Annotated.)

170. A provision in a codicil directing the executors to provide for testator's wife from the remainder of his estate an annual income of \$3,000, payable monthly, in accordance with an antenuptial contract whereby he promised to cause her to be paid \$250 per month if they married and she survived him, is a testamentary disposition of property, and not merely a direction to pay a debt under an antenuptial agreement, and accordingly the codicil is sufficient to republish a will previously revoked by the testator's marriage. Estate of Cutting (Cal.) 1917D-1171.

(Annotated.)

## (10) Enumeration Following General Words.

171. This, however, is only a rule of presumption and must yield to the testator's intent as gathered from the whole instrument, but where the presumption is favored and supported by the evident intention of the testator as developed from a consideration of all the parts of the instrument, then such rule of presumption should be applied to the matter in question. Creamer v. Harris (Ohio) 1916C-1137. (Annotated.)

172. Bequest of Property and "Contents" Thereof. In the construction of wills a presumption prevails, especially in items not residuary, that where a bequest of certain property and its "contents" is coupled with an enumeration of things, the word "contents" shall cover only things ejusdem generis. Creamer v. Harris (Ohio) 1916C-1137. (Annotated.)

173. Persons Taking Under Bequest. The sixth clause of a will recited that the residue of the testator's estate should be held by his executors in trust for the bene-

fit of all his nieces and nephews hereinafter named, paying to each, who should survive the testator for fifteen years, equal instalments of the income, and that at the end of such period the property should be sold and divided among the nieces and nephews and their children. The clause further recited that it was the testator's intention that all his nieces and nephews and their children should take an equal portion of the estate. The enumeration of the nieces and nephews omitted the name of plaintiff's mother, a niece who died before the testator. It is held that, notwithstanding the use of the expression "all," the enumeration of the nieces and nephews showed the intent on the part of the testator that only those enumerated should take; consequently plaintiff was not entitled to take on the theory that the name of her mother was omitted through mistake, the testator intending to put his nieces and nephews and their descendants on equal footing, such a conclusion being strengthened by the declaration, in a subsequent clause of the will, that no advancements should be charged against the interests of any of the beneficiaries. Lewis v. Reed's Executor (Ky.) 1917D-1155.

## (11) Supplying Omitted Word.

174. Testator devised real estate to his sons, to be equally divided between them, but should either die before attaining full age or without children, his share should go to the others that were living, and devised other real estate to them, and should either die before attaining full age "or leaving children surviving him," his share should be taken equally between those that were living. It is held that the word "without" was clearly omitted in the quoted phrase, and the court must construe the will as if the word was inserted, and, so construed, the will showed that the children of any son should take by descent from their father, and not as purchasers under the will. Ham v. Ham (N. Car.) 19170-301.

## (12) General Words Controlled by Special.

175. Specific language generally controls that of a general nature. Porter v. Union Trust Co. (Ind.) 1917D-427.

### (13) Evidence in Aid of Construction.

177. Proof of Error in Recital in Will. Evidence that testator had already deeded land to one beneficiary as recited in the will, but that he had never deeded a mortgage, as recited, to the beneficiary, is admissible to determine the quantity of interest intended to be conveyed. McDermott v. Scully (Conn.) 1917E-407.

178. Relation Between Testator and Beneficiary. The scrivener may be asked what were the relations between the tes-

tator and beneficiary at the time of executing the will if tending to prove a condition, a fact always admissible when relevant and material and when the intent of the testator is doubtful. McDermott v. Scully (Conn.) 1917E-407.

179. Testator's Instructions to Scrivener. Where testator through mistake described one mortgage, intending to describe a totally dissimilar mortgage, there was no equivocation, and evidence of his instructions to the scrivener is inadmissible. McDermott v. Scully (Conn.) 1917E-407.

(Annotated.)

180. It cannot be shown that the testator directed the scrivener to write the will in a form or with a meaning different from what the will appears, unless there is a latent ambiguity or equivocation as to the person or subject meant to be described, or unless the evidence is offered to rebut a resulting trust. McDermott v. Scully (Conn.) 1917E-407. (Annotated.)

181. Testator's declarations of intention or of the meaning of words used by scrivener are not admissible except in cases of equivocation or latent ambiguity, and then only as explanatory of or connected with the language used. McDermott v. Scully (Conn.) 1917E-407. (Annotated.)

182. Parol Evidence to Identify Legatee. Where a testatrix made a bequest to her niece by name, of a certain place, and it appeared that she had a grandniece of that name living at that place and also a niece whose maiden name was similar and who lived near by, there is a latent ambiguity in the will, and parol evidence is admissible to establish the identity of the legatee. Baumann v. Steingester (N. Y.) 1916C-1071.

- b. Construction of Particular Words.
- (1) "Heirs" or "Heirs at Law," or "Lawful Heirs."

183. Construction of Term "Heirs." In the absence of a contrary meaning shown by a will, the words "heirs" will be taken to be used in its primary meaning as designating those who, in the absence of a will, are entitled by law to inherit a decedent's realty. Allen v. Almy (Conn.) 1917B-112.

whether to one's own heirs or to the heirs," whether to one's own heirs or to the heirs of another, is a gift to those who would be entitled to take' under the statute of distribution, and in the same manner, and in the same proportions, as though the property had come to them as intestate estate, in the absence of any words in the will, showing that the word "heirs" is used in a different sense, and the use of the word "lawful" before the words "heirs" makes no difference in legal effect. In 're Irish's Will (Vt.) 1917C-1154.

(Annotated.)

185. Estate Created—Executory Devise. Under a will giving a sum in trust to pay the income to testator's daughter, and at her death to pay over and deliver the same to her issue, but, if she died without surviving issue, then to testator's "heirs at law exclusive of my said daughter," the heirs take a vested interest by way of executory devise defeasible in the contingency of issue named; the limitation over having a double aspect, and vesting alternative remainders with conditions subsequent. Allen v. Almy (Conn.) 1917B—112.

186. A will, after devising the property in trust for the life use of testator's widow in a third thereof, directed that the property be divided into certain equal parts, and gave three of such parts to trustees to hold the same and pay the income to testator's daughter during her life, "and at her decease to pay over and deliver the same to her issue; but in case of her death leaving no issue surviving her, then to my heirs at law, exclusive of my said daughter." Held, that the words "heirs at law" in the quoted part referred to those who were testator's heirs at his death, viz., his five children. Allen v. Almy (Conn.) 1917B-112.

187. Time as of Which Heirship is Determined. Where a testamentary limitation over is to the heirs of testator, that class is determined as of testator's death, in the absence of an intention to the contrary shown by the will. Allen v. Almy (Conn.) 1917B-112.

188. Persons Entitled to Take-"Lawful Heirs." A testator gave property in trust for his mother during her lifetime, and provided that at her death the balance of the trust fund remaining should be paid one-half to a granddaughter, and one-half to "my lawful heirs." When the will was executed, he was confined to his bed with the sickness which caused his death twenty-five days later. He left no widow, and the grandchild was his only descend-The grandchild's father was living, and was her only heir. The will also gave property in trust for the granddaughter, and provided that if she died before reaching the age of forty years, and left no issue or children of issue, the trust fund should be paid one-half to the lawful heirs of the grandchild, and the other one-half to "my lawful heirs," and the residuary clause gave the remaining estate in trust for the granddaughter during her lifetime with a similar provision as to its disposition after her death. It is held that as under the eleventh and residuary clauses, the gift over was contingent on the death of the granddaughter, the words "my lawful heirs" meant those who by the laws of distribution would in such contingency be the testator's heirs, and under the rule that words occurring more than once in a will should be presumed to be

(Annotated.)

used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject, such words had the same meaning in the twelfth clause, and thereunder those who would have been the testator's heirs had he left no issue were entitled to one-half of the trust fund. In re Irish's Will (Vt.) 1917C-1154.

189. A will gave property upon the trust that the fund and the income and interest arising thereon should be used as required for the support of the testator's mother during her life, and to defray her funeral expenses. At her death, the testator gave one-half of so much of the fund as should be remaining to his lawful heirs. It is held that as the principal of the trust as well as the income and interest was to be used as required for the support of the mother, and it was only so much as remained that was given to the heirs, futurity was annexed to the substance of the gift, the vesting was suspended until the time when the bequest would take effect, and the bequest was only in favor of those within the description of lawful heirs at that time. In re Irish's Will (Vt.) 1917C-1154. (Annotated.)

190. "Heirs." Where testator devised to plaintiff, his son, the use of an undivided half interest in certain land during the life of J., subject to an annuity charge in favor of J., and on J.'s death conferred on plaintiff the right to purchase such half interest for a specified sum, the money or land on J.'s death to vest in the heirs of his body, or, if none, then in testator's heirs at law, the term "heirs at law" includes all others who after their ancestor's death were entitled to inherit all lands, tenements, and hereditaments belonging to him or of which he was seized, and hence plaintiff is entitled to share in the distribution of the purchase price of such interest on his election to purchase on J.'s death without heirs of his body. Tevis v. Tevis (Mo.) 1917A-865.

191. "Heirs" as Including Widow. Testator bequeathed his residuary estate to his executors in trust for his widow and sons during the widow's life, and, in case of the death of the sons before their mother, for the benefit of their children widows, and, if they died leaving neither issue nor widows, the entire resi-due was given for the use of the widow for life. The will gave testator's wife a power of appointment, and provided that, if such power be not exercised, "I . . . bequeath the entire reversion to my lawful heirs and distributees as provided by the intestate laws." A codicil revoked the power of appointment, except as to \$30,000. and provided: "And as to the . . . remainder of my estate and as to the whole of it, in case my wife makes no such appointment, I . . . bequeath the same to my

executors and trustees and the survivor and heirs of the survivor of them, as named in my will, in trust, to distribute the same-in case my sons are both dead, leaving at the time of the death of my wife no lawful issue surviving-to my own right heirs and distributees as provided by the intestate laws..." The will provided that the gifts of income to testator's wife should be "in lieu and satisfaction of dower and her interest in my estate as if under the intestate laws of Pennsvlvania." The sons died prior to their mother, leaving no lawful issue surviving them. Held, that the "right heirs and distributees" of testator were to be ascertained as of the date of his death, and not as of the date of the death of the widow, that the widow was excluded from the class by necessary implication from the language of the will, and that the residue should be awarded to the estates of the two sons to the exclusion of collateral heirs. Tatham's Estate (Pa.) 1917A-855.

#### Note.

Meaning of term "lawful heirs" as used in will. 1917C-1156,

## (2) Other Words.

192. Construction of "Desire." Cal. Civ. Code, § 1322, provides that a distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear, or by inference from other parts of the will, or by an in-accurate recital of, or reference to, its contents in another part of the will. A will provided: "I give all my property at my death to my daughter Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother." It is held that the word "desire" indicated the wish of testatrix regarding the disposition of the property, and was a dispositive and testamentary provision, binding upon the court in the distribution of the estate, so that, where the daughter survived the tes-tatrix and died unmarried, the property was to be distributed to the brother and sisters of the testatrix. Matter of Estate of Tooley (Cal.) 1917B-516.

(Annotated.)

193. Such provision is a command sufficient to effect a testamentary disposition of the property, and not an expression of a wish or preference directed to the daughter, so that there is no precatory trust reposed in her. Matter of Estate of Tooley (Cal.) 1917B-516. (Annotated.)

194. In the will of one who died and left surviving him a wife, one son, and six daughters, he devised a life estate to his wife and added that after her death "I will and desire that the said property shall revert to my beloved son Artie Atkinson provided that in such event he shall

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pay to each of his sisters, Annie Hendrickson, Nancy Hooks, Ida Mastellar, Sarah Jackson, Lydia Wilson and Daisy Teach, the sum of two hundred dollars (\$200.00). Said two hundred dollars to be paid in yearly payments of sixty-six and two-thirds dollars (\$66%) to each sister as above enumerated. The first payment to be made on the first day of September, following the first day of April after the death of my wife, Ellen Atkinson." In a proceeding to determine the ownership of the property and to partition the same it is held that the fee of the land vested in the son upon the death of the testator but that the enjoyment of possession is postponed until the life estate is terminated, and that the son takes the fee charged with the payment of the legacies given to the daughters of the testator, and that any one who succeeds to the estate and interest of the son prior to the completion of the payments takes the land subject to such charges. Mastellar v. Atkinson (Kan.) 1917B-502. (Annotated.)

195. As used in a will expressing a will and desire to make certain disposition of property, the word "will" is mandatory, comprehensive, and dispositive in nature, and is broad enough to dispose of both real and personal property, and is as effective as the expression "devise and bequeath," and the word "desire," though frequently used as a precatory term, must be construed, in view of its use in connection with the word "will," as mandatory rather than as advisory, where it is evident that testator undertook to dispose of his entire estate. Mastellar v. Atkinson (Annotated.) (Kan.) 1917B-502.

196. Construction of "Revert" in Will. In a loose way the term "revert to" is sometimes used in a will as the equivalent of "go to," and, where the language of a will so indicates, it will be construed as used to designate the person to whom the testator wished the land to be given. Mastellar v. Atkinson (Kan.) 1917B-502.

197. Persons Entitled to Gift-Taking by Representation - Construction of Express Provision. Testator devised real estate to his four sons, to be equally divided between them, but should either die before arriving at full age or without children surviving him, "then his or their share" should "go to the others that are living, but not to any of my other children." He devised other real estate to the same sons, and provided that should either die before arriving at full age "or [without] leaving children surviving him . . his or their share" should be taken and divided equally between those that were living. He made ample provision for his other children. It is held that the word "others" referred to the sons, while the word "other" referred to the other children of testator; and where all the sons attained full age, each acquired an absolute share which did

not pass to the children of a deceased son on the death of other sons without issue. Ham v. Ham (N. Car.) 1917C-301.

198. "Or" Construed as "And." Testator devised described real estate to his four sons, to be equally divided between them, but should either die before attaining full age, "or without children surviving him," his or their share should go to the others that were living, but not to any of his other children, and devised other real estate to the four sons, and should either die before attaining full age, "or [without] leaving children" surviving, his or their share should be divided equally between those that were living. It is held that the word "or" must be construed as "and," and hence the share of each son became absolute on attaining full age. Ham v. Ham (N. Car.) 1917C-301. (Annotated.)

199. "Children" as Including Posthumous Child. Deceased devised land to his wife, with directions that if she should leave the land or remarry, it should be rented out for the benefit of his "children," and, on their coming of age, equally divided between them. At deceased's death, he had two children; a posthumous child being born thereafter. Held, that the posthumous child took by virtue of the will, being in esse and included in the expression "children," and hence was not entitled to claim as a pretermitted child, under Ky. St. § 4848. Lamar v. Crosby (Ky.) 1916E—1033. (Annotated.)

200. "Bric-a-brac" and "Pictures." A bequest of all the testator's silver, bric-a-brac, and pictures does not necessarily include such articles as tapestries; for they cannot be classed either as bric-a-brac or pictures. Matter of Kellogg (N. Y.) 1916D-1298.

#### Notes.

Meaning of "contents" or similar expression as used in will in connection with property bequeathed or devised. 1916C-1139

Construction of "and" as "or," and vice versa, in construing will. 1917C-306.

"Father" as including stepfather.

Meaning of "desire" as used in will. 1917B-503.

## c. Construction of Particular Provisions.

## (1) Residuary Clause.

201. Residuary Clause—Lapsed or Void Legacies. A residuary clause of general terms ordinarily covers lapsed or invalid legacies, unless the testator's intent appears otherwise.

Where a testator clearly showed his intention that his relatives should receive none of his bounty, and he mentioned only one of them, giving him family heirlooms, a devise which lapsed because of the de-

visee's refusal will pass under the general residuary clause, that made a large gift to a charity in which testator was interested. Albany Hospital v. Albany Guardian Society (N. Y.) 1916D-1195.

202. Meaning of "All the Rest, Residue, and Remainder." General words in a residuary clause of a will, such as "all the rest, residue, and remainder," will embrace every species of property, real or personal, unless restricted by the context, as land can be passed by such a clause without specific description. Faison v. Middleton (N. Car.) 1917E-72. (Annotated.)

203. General words in a residuary clause carry every estate or interest of the testator which is not expressly or by necessary implication excluded from its operation, as by being disposed of in other parts of the will. Faison v. Middleton (N. Car.) 1917E-72.

204. A general residuary bequest carries lapsed and void legacies, and property which is the subject of a devise which fails by reason of a misdescription. Faison v. Middleton (N. Car.) 1917E-72.

205. Under present statutes, realty owned by the testator at the time of his death and not otherwise disposed of passes under a general residuary clause if the language is broad enough to include real estate. Faison v. Middleton (N. Car.) 1917E-72.

206. Where it is manifest from the expressed words of the will that a gift of the residuum is confined to a particular fund or description of property, or some certain residuum, the residuary legatees will be restricted to what is particularly given. Faison v. Middleton (N. Car.) 1917E-72.

207. It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, unless there is an apparent intent to the contrary, so that, to exclude a portion of testator's property not otherwise disposed of, a plain and unequivocal intention on the part of the testator must be manifested. Faison v. Middleton (N. Car.) 1917E-72.

## Note.

Meaning of "all" as used in will in connection with "rest," "residue," or "remainder." 1917E-75.

## (2) Designation of Executor.

208. Executor Designated by Office Only. When a testator appoints as executor "the priest of his church," without naming him, the court will interpret his testament to mean the person who will be the priest at the time of the testator's death. Succession of Lefort (La.) 1917E-769.

## (3) Vested or Contingent Estate.

209. Executory Devise. An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: (1) That it needs not any particular estate to support it; (2) that by it a fee simple or other less estate may be limited after a fee simple; (3) that by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. Miller v. Miller (Kan.) 1917A-918.

210. Estate Created—Life Estate. Where a testator, after devising property in fee, added a codicil, declaring that the devise should be for the sole and separate use of the devisee, and that in case of his death without lawful issue, to others, the devisee took a life estate with remainder over. Love v. Lindstedt (Ore.) 1917A—802

## (4) Remainders.

211. Repugnancy of Provisions. Testator bequeathed one-half of a tract of land to plaintiff, his son, with the right to the use of the other half during the life of testator's other son, J., subject to a charge or annuity in J.'s favor of \$288, providing that, upon the death of J., plaintiff or his heirs should have the right to pur-chase such other half for \$2,400, which sum, or, in case plaintiff or his heirs elected not to purchase, then such undivided half interest, should vest in the heirs of J.'s body, or, if none, the money or undivided interest in the land should pass to testator's heirs at law. Testator thereafter provided for the equalization of certain advancements, and then directed that all of the property except that "here-in before specifically devised" should be divided between four of his children specified. Held, that the provision for the disposition of J.'s share of the real estate so devised was not contradictory, repug-nant, or uncertain, but constituted real property "specifically devised," and hence the remainder could not pass under the residuary clause. Tevis v. Tevis (Mo.) 1917A-865.

212. Taking by Representation—Gift of Remainder to "Children." A will provided: "I give and devise . . . to my son [naming him] for . . . life, and at his death I devise the same to his child or children . . . and in default of such, then to my other children [naming three] in equal parts in fee." All of testator's children survived him. The life tenant died without children, being predecessed by his sister, one of the three children named. It is held that the two children of testator surviving the life tenant were each entitled to one-third of the fund, and that

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the remaining one-third should be divided among the children of their deceased sister. Patterson's Estate (Pa.) 1917B-1243. (Annotated.)

#### Note.

Right of representative of predeceased child to share in remainder given to children as a class. 1917B-1245.

## (5) Presumption as to Tenancy in Common.

213. A will devising certain shares of the estate to trustees to pay the income to testator's daughter for life, and at her death to pay over and deliver the same to her issue, but, if she should die without surviving issue, then to testator's heirs at law, does not, by the intention disclosed, rebut the presumption that the heirs at law took as tenants in common rather than as joint tenants. Allen v. Almy (Conn) 1917B-112. (Annotated.)

## (6) Per Capita or Per Stirpes.

214. A bequest to persons who are living and to children of another who is dead presumptively refers to the children as individuals and not as a class, and the children take the same share per capita with those persons who are living, and the relations between the beneficiaries and the operation of the statute on those relations in case of intestacy do not overcome the presumption that a per capita distribution was intended. Perdue v. Starkey's Heirs (Va.) 19160-409. (Annotated.)

will whereby they made specific legacies, and then gave to persons named and the daughters of another person their estate, "to be equally divided between them." The beneficiaries bore different degrees of relationship to each other and to the husband and wife. Held, that the estate must be divided per capita among the beneficiaries. Perdue v. Starkey's Heirs (Va.) 1916C-409.

Note.

Bequest to be divided equally among persons standing in different relationships to testator as requiring division per capita or per stirpes. 1916C-411.

## (7) Implied Devise or Bequest.

216. Gifts by Implication. Gifts by implication are not favored, though they will be given effect when clearly appearing. Porter v. Union Trust Co. (Ind.) 1917D-427.

217. Erroneous Recital as Implied Gift. A bequest may be implied from an erroneous recital in a will of a previous specific gift in the will but not from a recital in reference to a disposition by an instrument other than the will. Porter v. Union Trust Co. (Ind.) 1917D—427. (Annotated.)

#### Note.

Implied devise or bequest from recital in will, 1917D-431.

## (8) Gift.

218. Language Importing Gift—"Pay Over and Deliver." A provision of a will, that the testamentary trustees should "pay over and deliver" the property to a daughter's issue at her death, imports a gift. Allen v. Almy (Conn.) 1917B-112.

## (9) Trust Estates.

219. Certainty as to Subject-matter—Residuum of Estate. A bequest in trust of "all the rest, residue and remainder of my property of every kind and nature whatsoever" is not uncertain as to the subject-matter. In re Dewey's Estate (Utah) 1918A-475.

220. Bequest With Direction to Distribute. A will which gives to D and M \$500 each, or if there be not enough to pay both legacies, then to each one-half of what is available, directs that if there be a surplus after paying such legacies in full, \$500, or such portion thereof as said surplus will pay, be paid to T, and gives "all the rest, residue and remainder" to T, with provision, "It is my desire that he shall distribute the same . . . among my nephews and nieces," creates a trust as to the residue, to be distributed among testatrix's nieces and nephews, other than T. In re Dewey's Estate (Utah) 1918A-475.

221. Trusts — Creation — Sufficiency of Language. A will need use no particular words to create a trust, but it is enough that, from all the language in it, a trust is fairly implied. In re Dewey's Estate (Utah) 1918A-475.

## (10) Power of Disposition and Control.

222. Where one willed a farm in fee to his wife, directing that his daughter should have a home thereon, and that, if the wife should find it necessary to move, the daughter should be entitled to support by her, between the provisions of the will giving the property to the wife and those charging such property in her hands with the maintenance of the daughter, there was no such repugnancy as would render the charge for her maintenance void. Chew v. Sheldon (N. Y.) 1916D-1268.

223. Power to Sell Land — Implication. No technical or express words are necessary in a will to create a power of sale, but if the intention is apparent such power will be implied, and it may be inferred from the general tenor of the instrument, or from the fact that a trustee is empowered and directed to do certain things, to which the sale of the trust property is

necessarily a condition precedent. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443. (Annotated.)

224. A testator devised and bequeathed all of his residuary estate to his widow for life, and provided that all of the property remaining at the time of her death "shall constitute a fund for the support and maintenance of my daughter . . . and her children during her life, and at the death of my said daughter . . . the same shall be equally divided between her children." There was a further provision that, should the daughter's husband die or become incapacitated during the widow's life, the daughter should have the use of a house and grounds free of rent. The property consisted largely of unproductive real estate. Held, following a decision of the supreme court of the state in a suit between other parties, that the fund created by the property remaining at the death of the widow included all the property, real and personal, and that both principal and income were charged with the support and maintenance of the daughter and her children during her lifetime, including the reasonable education of her children; also that to that end, which was clearly the paramount object of the testator, the daughter took a life estate subject to the trust with an implied power to sell and convey real estate when she deemed it necessary. Holden v. Circleville Light, etc. Co. (Fed.) 1916D-443. (Annotated.)

225. The court, in construing the provisions of a will conferring power on the executor, must seek to give effect to the intention of testator, and, where the will merely authorizes by implication the executor to sell real estate, the court may not construe the provisions to authorize a mortgage. Heiseman v. Lowenstein (Ark.) 1916C-601. (Annotated.)

226. Where testatrix bequeaths the remainder of her property to her husband for his sole use and benefit, with power to use and dispose of all or any part therefore during his lifetime, and on his death that remaining, if any, to be divided among certain individuals named, the husband is only entitled to exercise such power by a conveyance in his lifetime, and cannot exercise it by will. Mooy v. Gallagher (R. I.) 1916D-395. (Annotated.)

227. Estate Created—Life Estate With Power of Disposition. Where testatrix bequeaths to her husband an estate for life in the remainder of her real and personal property "for his sole use and benefit," with power as to certain of her real estate to use and dispose of the same during his lifetime, and on his death that which remained in the husband's possession to be divided among certain persons designated, the husband takes a life estate with power of disposition only, and not a fee. Mooy v. Gallagher (E. I.) 1916D-395.

(Annotated.)

## Note.

Testamentary restriction on right of tenant in common to partition. 1916D-1270.

#### d. Suit for Construction.

228. Jurisdiction of Equity to Construe. A court of equity has jurisdiction to construe a will creating a trust. Heiseman v. Lowenstein (Ark.) 1916C-601.

## 11. VALIDITY OF PROVISIONS.

## a. Restraint of Marriage.

229. A condition of a will preventing vesting of the absolute title of a devisee if she is married to a certain individual, or until such individual's death, is not invalid as violating any constitutional right of such individual to security of life and liberty. Matter of Seaman (N. Y.) 1918B—1138. (Annotated.)

230. A condition in a will preventing vesting of the estate absolute in a devisee, if she marries a certain individual, or in any event until his death, will not be held invalid as contemplating illegal performance of the condition; it being presumed that the testator intended the condition to be legally and naturally performed. Matter of Seaman (N. Y.) 1918B-1138.

(Annotated.)

231. At common law conditions in general restraint of marriage were regarded as contrary to public policy. Matter of Seaman (N. Y.) 1918B-1138.

(Annotated.)

232. The common-law rule that conditions in a will in general restraint of marriage are contrary to public policy still prevails in New York. Matter of Seaman (N. Y.) 1918B-1138. (Annotated.)

233. At common law there was no prohibition against testamentary conditions in restraint of marriage with particular classes of persons or specific persons. Matter of Seaman (N. Y.) 1918B-1138.

(Annotated.)

234. A condition in a will preventing vesting of the estate absolute in a devisee, if she marries a certain individual, or in any event until his death, is not invalid as tending to incite her to cause his death, but is a valid restriction. Matter of Seaman (N. Y.) 1918B-1138.

(Annotated.)

235. Legacy Conditioned on Obtaining Divorce. While a condition, attached to a legacy, in restraint of marriage generally is invalid as against public policy, a condition that the legatee shall not marry a certain person, or a legacy to a widow to divest if she marries, is valid. Daboll v. Moon (Conn.) 1917B-164. (Annotated.)

236. The condition of a legacy to testator's son to be paid to him on the death

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of his present wife, or if he should obtain a divorce from her, or should become separated from her, or if within a year after divorce or separation he should become married to a good respectable woman, is not contrary to public policy as a restraint of marriage. Daboll v. Moon (Conn.) 1917B-164. (Annotated.)

#### Notes.

Validity of legacy or devise conditioned on recipient obtaining divorce or separating from spouse. 1917B-167.

Validity of testamentary disposition in restraint of marriage. 1918B-1142.

## b. Gift Subversive of Religion.

237. A testamentary gift to an incorporated society whose purposes are to promote the principle that human conduct snould be guided by natural rather than revealed religion and to secure the elimination of sectarian and ecclesiastical influences in the law is valid. In re Bowman (Eng.) 1917B-1017. (Annotated.)

238. A testamentary gift to an incorporated society, whose purpose is to promulgate the doctrine that human conduct should be based on natural knowledge and not on supernatural belief and that human welfare in this world is the proper end of all thought and action, is valid. Bowman v. Secular Society (Eng.) 1917D-761.

(Annotated.)

Validity of testamentary disposition subversive of religion. 1917B-1024.

## c. Gift to Witness.

239. Colo. Rev. St. 1908, § 7074, provides that, where a will leaves any interest to a subscribing witness, it shall be invalid, unless it is attested by a sufficient number of other competent witnesses, and Rev. St. 1908, §§ 4181-4191, makes a legacy to a husband his own property separate from that of his wife. Held, that the wife of a beneficiary who attested a will had no such interest thereunder as would forfeit the interest of the husband. White v. Bower (Colo.) 1917A-835. (Annotated.)

## d. Trust Provisions.

240. Discretion as to Distribution— Effect. That the will, giving property in trust to be distributed among testatrix's nephews and nieces, gives the trustee discretion as to which of them he shall distribute it among, and in what proportions, does not invalidate the trust. In re Dewey's Estate (Utah) 1918A-475.

## e. Effect of Invalid Provisions.

241. Property Falling into Residue—Invalid Devise. Under N. Car. Revisal 1905, § 3142, providing that unless a contrary in-

tent shall appear by the will, such real estate as shall be comprised or intended to be comprised in any devise in such will. which shall fail or be void by reason of the death of the devisee in testator's lifetime, or by reason of such devisee being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise, if any, where testator's will provided that he gave and devised to "my [leaving a blank space]" the tract of land on which he resided, consisting of 648 acres, for life, and after his death to his heirs, thereafter making a residuary bequest of any surplus over debts and expenses, it is held that the residuary legatees were entitled to the land, whether it was not devised at all for failure to name a devisee, or whether it was a devise which failed because incapable of taking effect, since if the land was not devised, it was part of the residuary estate when the will took effect, and if it was devised, and the devise was incapable of taking effect for failure to name the devisee, it went to the legatees by virtue of the statute. Faison v. Middleton (N. Car.) 1917E-72.

## 12. LEGATEES AND DEVISEES.

## a. Nature of Legacy or Devise.

242. While a testamentary gift will be construed as creating a tenancy in common rather than a joint tenancy, unless a different intention appears in the will, the intention disclosed by the instrument will govern, whichever it creates. Allen v. Almy (Conn.) 1917B-112. (Annotated.)

#### b. Acceptance.

243. Testamentary Trustees — Right to Rescind. A testamentary trustee derives his authority from the will, and, while he may refuse to accept the position, yet, if he does any act indicative of acceptance, he may not thereafter rescind without consent of the cestui que trust or the court. Matter of Kellogg (N. Y.) 1916D—1298.

244. Refusal by Trustee to Accept—Vesting of Estate in Others. Where one of two or more trustees refuses to accept, the estate vests in the others as though the trustees refusing were dead or had not been named. Matter of Kellogg (N. Y.) 1916D—1298.

245. Renunciaton by Trustee—Right to Retract. One of several testamentary trustees who had already renounced as executor filed and delivered his renunciation as trustee before any action with respect to the trust was taken. N. Y. Code Civ. Proc. § 2814, provides for the resignation, but not for the renunciation of trustees. It is held that, in view of section 2639, which is declarative of the common law, and provides that a person named as executor may renounce, which renuncia-

tion may be retracted any time before letters have been granted, the trustee who renounced could not, after the remaining trustees had received part of the trust property and entered upon their duties, re-

tract his renunciation. Matter of Kellogg (N. Y.) 1916D-1298. (Annotated.)

246. Presumption of Acceptance of Devise or Bequest. Where a devise or bequest is beneficial, there is a presumption of acceptance, though such presumption is not conclusive, and the devisee may reject. Albany Hospital v. Albany Guardian Society (N. Y.) 1916D-1195.

247. Rejection of Devise—Effect. Where a devise rejects a devise, he has no title to the realty devised, whether it be found that none passed, or that his rejection divested all interest. Albany Hospital v. Albany Guardian Society (N. Y.) 1916D—1195. (Annotated.)

248. Where a church, by resolution, declined a devise, the written resolution was sufficient; reconveyance being unnecesary. Albany Hospital v. Albany Guardian Society (N. Y.) 1916D-1195.

(Annotated.)

#### Notes.

Right of executor or trustee to retract renunciation of trust. 1916D-1301.

Effect of refusal of devisee to accept devise of realty. 1916D-1199.

## c. Lapsing and Ademption.

249. Lapsed Legacy—Descent—Right of Ancestor of Deceased Legatee. Where a father devised land to his children, and one died without issue while still an infant, the surviving children take as heirs, under Ky. St. § 1401, prescribing the rules of descent, to the exclusion of the mother. Lamar v. Crosby (Ky.) 1916E—1033.

250. Bequest Dependent on Devise—Lapse. Where one willed a farm in fee to his wife, directing that his daughter should have a home thereon, and that, if the wife should find it necessary to move, the daughter should be entitled to support by her, the bequest to the daughter of the charge on the farm was not so dependent on the devise of the wife as to lapse with it when the wife predeceased the testator. Chew v. Sheldon (N. Y.) 1916D-1268.

#### d. Election.

#### (1) Acts Constituting.

251. Election by Husband to Take Under Wife's Will—Acts Constituting Election. In order that acts or a course of conduct of the surviving consort of a deceased testator should operate to equitably estop such consort from claiming dower and a distributive share of the personal property under the law and to amount to an election to take under the will, such acts must be of such an unequivocal char-

acter as will clearly and distinctly demonstrate a purpose to accept the provisions of the will. Colored Industrial School v. Bates (Ohio) 1916C-1198. (Annotated.)

#### Note.

Sufficiency of acts to constitute election by husband to take under wife's will. 1916C-1204.

## (2) Effect.

252. Election by Widow—Rights as to Intestate Property. A widow who elects to take under her husband's will thereby bars herself and her heirs from inheriting property of the husband undisposed of by the will. Compton v. Akers (Kan.) 1918B-983. (Annotated.)

#### Note.

Election by widow to take under will as affecting her right to intestate property. 1918B-986.

## e. Right to Accumulation and Income.

253. Bequest of Income-Accumulation. A testator devised and bequeathed all his property to a trustee, with directions that the trustee should collect the income, and out of the net proceeds pay his wife \$300 per month. At the time the will was made, two of the testator's three daughters, who were his only children, were married, while the youngest lacked a number of years of reaching her majority. The testator expressed his confidence that his wife would maintain the youngest daughter, and provided that, in case of emergency or insufficiency of the income, the trustee might sell the principal to meet immediate necessities. There was no intimation that the testator intended the daughters to share in the property during the life of their mother, and the last clause of the will recited that it was his wish that the wife during her life should have the entire benefit of his estate. It is held that, in view of Burns' Ind. Ann. St. 1914, § 9724, prohibiting accumulations, unless for the benefit of a minor, and to terminate with the expiration of the minority, the wife was entitled to take all of the income from the property. Porter v. Union Trust Co. (Ind.) 1917D-427.

#### f. Agreement for Division.

254. Rights of Parties. Where testator bequeathed all his silver, bric-a-brac, and pictures to his three children, and they entered into a tentative agreement under which each selected articles of personal property, agreeing that, if they were classed as furniture, they would purchase such articles at the inventory prices, appellant, who refused to abide by the classification of the executor, is entitled to a return of all sums paid for articles which thereafter were found to be bric-a-brac; the others not demanding a new division. Matter of Kellogg (N. Y.) 1916D-1298.

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## 1. COMPETENCY.

#### a. Knowledge of Witness.

- 1. A witness who knows the cost of an annuity and can identify the mortuary tables in use by insurance companies is competent to testify thereto though he is unable to explain the manner in which the cost is estimated or the basis on which the table is prepared. Canadian Pacific Ry. v. Jackson (Can.) 1916C-912.
- 2. Age-Evidence-Right to Testify to Age of Another. A witness may, partly in view of the corroborative facts known to him, testify as to his own age from hearsay; but he may not be permitted to testify as to the age of another person upon the basis of hearsay or reputation. Freeman v. First National Bank (Okla.) 1918A-(Annotated.)

#### Notes.

Competency of witness to testify as to his own age. 1918B-427.

Competency of witness to testify to knowledge of another. 1918A-947.

Competency of witness to testify to age of another person. 1918A-262.

## b. Juror on Former Trial.

3. Jurors on a former trial may testify on a subsequent trial as to physical facts coming to their knowledge during a view made by them on the former trial. It is not material that the former verdict was set aside because of the misconduct of the jury in conducting unauthorized experiments during the view. State v. Ward (Minn.) 1916C-674. (Annotated.)

#### Note.

Competency as witness of juror on former trial. 1916C-676.

## c. Person Jointly Indicted.

4. On a trial for murder, one jointly indicted with defendants, but not on trial, is a competent witness. State v. Griffin (S. Car.) 1916D-392.

## d. Infant.

- 5. A finding that a witness, 11 years old, who testified that if he swore to a lie they would put him in jail, that he intended to tell the truth, and was going to tell what he knew, and a witness, 12 years old, who testified that he had never been in court before, that when he kissed the book it meant that he would tell the truth, and that if he should tell a lie they would put him in the lockup, were competent witnesses, is conclusive as to their competency, both as to their moral and religious sensibility and their intelligence. State v. Pitt (N. Car.) 1916C-422.
- (Annotated.)
  6. Young Child. When a child seven years of age is offered as a witness it is the duty of the court to examine her, alone if necessary, as to her competency, and this sound judicial discretion of the court in allowing or refusing to allow her to relate to the jury the facts within her knowledge will not ordinarily be interfered with by this court. It is erroneous to take the unsworn statements of an interested party as to the qualifications of such witness and exclude her testimony without examination by the court. Roberts v. State (Neb.) 1917E-1040.

## e. Husband and Wife.

- 7. Competency—Testimony of Wife to Nonaccess. Though Kirby's Ark. Dig. § 492, makes the mother a competent witness in bastardy proceedings, she may not testify to nonaccess of her husband. Kennedy v. State (Ark.) 1917A-1029.
- (Annotated.)
  8. Husband Prospective Beneficiary Under Wife's Will. The fact that a husband may become a beneficiary under his wife's will, or that, if she died intestate, he will

- succeed to her personal property, subject to her debts, does not disqualify him as a witness in her behalf as to dealings and communications with a decedent with whom the wife had contracted to furnish board in return for decedent's promise to will her realty. McCurry v. Purgason (N. Car.) 1918A-907.
- 9. Effect of Death of One Spouse. Under the proviso to Ill. Evidence Act (Hurd's Rev. St. 1913, c. 51), § 5, that nothing in the section shall permit husband or wife to testify to any admissions or conversations of the other, whether made by one to the other or to a third person, except in causes between the husband and wife, which is but a recognition and re-enactment of the common law, the wife cannot, even after death of her husband, and in an action between others in which she had no interest, testify to a conversation between her husband and others. Mahlstedt v. Ideal Lighting Co. (Ill.) 1917D-209.

  Notes.

Husband or wife as competent witness in prosecution for bigamy. 1916C-1060.

Effect of death of one spouse on competency of other as witness. 1917D-216.

## f. Determination of Question.

10. Mental Capacity—Question for Court. In a prosecution for rape, the question of the mental capacity of prosecutrix is one of fact, to be decided by the court before permitting her to testify. State v. Tetrault (N. H.) 1918B-425.

## g. Expert.

- 11. Discretion of Trial Court. The question of the qualification of an expert rests largely in the discretion of the trial court, depending somewhat on the subject and the particular witness. Mahlstedt v. Ideal Lighting Co. (Ill.) 1917D-209.
- 12. Qualification of Expert—Installation of Gas Engines. A witness, who had been employed for 27 years in the selling of gas engines for boats, is competent to testify as to the duties of such agents in respect to the supervision of the installation of engines sold. Shoop v. Fidelity, etc. Co. (Md.) 1916D-954.
- 13. As to Value. A witness is not qualified to testify as to the value of apples in a certain market, where his only information on the subject was derived from inquiry made by him among certain fruit dealers in that place without any independent knowledge of the subject. Dunlap v. Great Northern R. Co. (S. Dak.) 1916D-805.
- 14. The plaintiff purchased materials, machinery, and other articles and constructed and equipped the factory, paying the cost, freight, labor, and expense of installation. Schedules of the items were attached to the petition. The plaintiff

testified to the value of the plant, taking into consideration, with other things, the items and aggregates of the schedules. Held, he was a competent witness and his testimony was properly received. Hollinger v. Missouri, etc. R. Co. (Kan.) 1916D-802.

- 15. Qualification of Expert Value of Medicine. An experienced chemist is held, under the facts shown, to have been qualified to testify as an expert as to the therapeutic value of a medicine which he had analyzed. Samuels v. United States (Fed.) 1917A-711.
- 16. Proof of Value of Assets. Where the assets of a corporation are shown to include various items of property, a witness should not give an opinion as to the aggregate value, until he has shown qualification to estimate the value of the several items. Hawkins v. Mellis, Pirie & Co. (Minn.) 1916C-640.

#### Note.

Competency of witness to testify to information acquired by aid of microscope. 1916D-930.

- h. Privileged Communications.
  - (1) Attorney and Client.
    - (a) In General.
- 17. Testamentary Matters. Where a testatrix gives instructions to her attorney relative to her will in the presence of a third person, the communications are not confidential so as to be privileged, and it is error, in an action to construe the will, to exclude the attorney's testimony as to such instructions. Baumann v. Steingester (N. Y.) 1916C-1071.
- (Annotated.)
  18. Illegal Transaction not Privileged.
  A communication to an attorney concerning an intention on the part of the client to do some illegal act in the future is not privileged. Ex parte McDonough (Cal.) 1916E-327.
- 19. Disclosure of Name of Client. An attorney who had been employed by certain clients to represent them in matters connected with the investigation of election frauds, and who appeared to defend three other individuals who were indicted for such frauds and put up a cash bail for one of the indicted men, cannot be compelled to state to the grand jury the names of the clients who employed him to represent the three indicted men, and who furnished the cash for the bail, under Cal. Code Civ. Proc. § 282, subd. 5, requiring an attorney to maintan inviolate the secrets of his client, and section 1881, providing that an attorney cannot without the consent of his clients, be examined as to any communication made by the client, "communication" in that section not being restricted to mere words but including

acts as well. Ex parte McDonough (Cal.) 1916E-327. (Annotated.)

- 20. Communication in Presence of Third Person. N. Y. Code Civ. Proc. §§ 835, 836, providing that an attorney shall not be allowed to disclose communications made by his client to him, apply only to confidential communications, and not to those made in the presence of others. Baumann v. Steingester (N. Y.) 1916C-1071.
- 21. Communication to Prosecuting Attorney. In a trial for murder where a special deputy sheriff, who had been instrumental in gathering evidence against the defendant, testified for the state, and on cross-examination denied his alleged statements to an attorney employed by the county, made in the presence of others, to the effect that he wished to get evidence against defendant's employer, and that defendant was a man who was easily controlled, the attorney, called by the defendant to contradict the witness, may disclose the information which he received in his capacity as attorney. People v. Roach (N. Y.) 1917A-410.
- 22. Attorney of Defendant Officer and of Corporation. Where accused is charged with aiding and abetting a bankrupt corporation, of which he was president and manager, to conceal its assets from its trustee, evidence of defendant's attorney that he was retained by defendant as attorney for the corporation, and also to represent defendant individually, is not objectionable as privileged. Kaufman v. United States (Fed.) 1916C-466.

#### Note.

Communications between attorney and client in regard to testamentary matters as privileged. 1916C-1073.

- (b) Knowledge not Obtained in Course of Employment.
- 23. Statements by Prosecuting Witness to Prosecuting Attorney. Where the disclosure of a communication by a prosecuting witness to the state's attorney would not interfere with the proper administration of justice, and is not against public policy, there is no confidential relationship between the parties which prevents the witness from being cross-examined concerning such communication, or the attorney from being called to impeach her if she denies making it. Riggins v. State (Md.) 1916E-1117. (Annotated.

#### Note.

Statement by prosecuting witness to prosecuting attorney as privileged. 1916E-1121.

- (e) Compelling Production of Client's Papers.
- 24. Demand on Accused for Production of Papers. There is no error in permit-

ting counsel to demand of defendant, accused of larceny, that he produce papers alleged to be incriminating, where the judge instructed the jury to disregard it and the discussion of its propriety. People v. Gibson (N. Y.) 1918B-509.

(Annotated.)

## (d) Waiver of Privilege.

25. Confidential Communication. Confidential communications between attorney and client, made because of the relationship and concerning the subject matter of the attorney's employment, are privileged from disclosure even in the interest of justice, but the rule is for the benefit of the client and may be waived, either expressly or by implication. Grant v. Harris (Va.) 1916D-1081. (Annotated.)

26. Where a settlement contract and certain deeds executed by complainant, which she sued to set aside, were alleged to have been procured from her by duress and she denied that certain attorneys, who were instrumental in making the settlement, had been employed by her, but claimed instead that they represented the other side of the transaction, and that they, at the instance of others adversely interested, induced her to execute the deed and settlement agreement without knowledge as to its contents, and while she was incompetent to do so, she thereby waived her right to claim her privilege to prevent the attorneys from testifying. Grant v. Harris (Va.) 1916D-1081. (Annotated.)

### (2) Physician and Patient.

## (a) In General.

27. Physician Performing Autopsy. Information acquired in the performance of an autopsy by a physician who bore no professional relation to the deceased in his lifetime is not privileged. Carpital Traction Co. (D. C.) 1916D-706.

(Annotated.)

28. Testimony as to Testamentary Capacity. Where testatrix requested her attending physicians to witness her will, or knowingly assented thereto, the testimony of such physicians as to the execution of the will and testatrix's sanity and mental capacity is not rendered inadmissible, in an action to contest the will, by Rem. & Bal. Wash. Code, § 1214. providing that a physician shall not, without his patient's consent, be examined as to any information acquired in attending such patient, testatrix having waived the privilege. Points v. Nier (Wash.) 1918A-1046.

(Annotated.)

#### (b) Waver of Privilege.

29. Waiver by Patient. While one, by testifying to a consultation by her with, or examination of her by, a physician at

a certain time, waives the privilege to have him not testify in respect therefor, the waiver is not such as to allow him to testify as to an earlier consultation or examination, or the purpose for which at such earlier time he gave her medicine. Nolan v. Glynn (Iowa) 1916C-559.

## (3) Husband and Wife.

30. Interest in Event. Where a husband consented to his wife's contracting with decedent that she should board the latter in return for his agreement to will her certain realty, the wife could recover for her own separate and individual benefit against decedent's estate, he having broken his contract, whatever was due her for board furnished thereunder, so that, having no interest in the wife's separate earnings from the transaction, the husband is a competent witness in her behalf as to his dealings and communications with the decedent. McCurry v. Purgason (N. Car.) 1913A-907.

31. Consent. Under Nev. Rev. Laws, \$5424, providing that a wife cannot testify for or against her husband "without his consent," a wife is competent to testify for her husband in his action for criminal conversation, where the husband and wife had each consented in open court that the other might testify to anything existing between them having a bearing on the case. Rehling v. Brainard (Nev.) 19170-656.

32. Competency of Wife in Bigamy Trial. Under Ore. L. O. L. § 1535, as amended by Laws 1913, p. 351, providing that in criminal actions, where the hushand is the party accused, the wife shall be a competent witness but shall not be compelled or allowed to testify unless by consent of both parties, provided that in criminal actions for polygamy the wife shall be a competent witness as to the fact of marriage, an objection to the testimony of the wife of accused in a prosecution for polygamy, before she gave any evidence except her name and place of residence, is properly overruled; her testimony as to the fact of marriage being admissible. State v. Von Klein (Ore.) 1916C-1054.

Note.

Admissibility of testimony of married woman to prove nonaccess of husband. 1917A-1031.

## (4) Stenographer and Employer.

33. In an action for compensation under a contract to arrange for, advertise, and conduct an auction sale of lands for an agreed price and expenses, the testimony of a stenographer, employed to assist plaintiff and paid out of the expense fund which came out of the proceeds of sales, concerning matters taken from plaintiff's books is not privileged,

as she owed no duty to plaintiff that she did not owe to defendants, and neither she nor plaintiff had any right to withhold information from defendants. Sotham v. Macomber (Mich.) 1916C-694.

(Annotated.)

## (5) Detective and Employer.

33½. Information Acquired in Service of Employer. On a trial for murder the testimony of a private detective, who after the murder had resided at the house of defendant's employer, and had kept defendant and his employer under observation for some time, that neither defendant nor his employer had acted in a manner to indicate consciousness of guilt, is improperly excluded under N. Y. General Business Law (Consol. Laws, c. 20), § 74b, as amended by Laws 1910, c. 515, forbidding a licensed detective from revealing, without his employer's consent, information obtained by him "except as he may be required by law" as such provision has no application to the case. People v. Roach (N. Y.) 1917A-410.

#### (6) Overheard Confidential Communications.

34. Testimony by Person Overhearing. In a prosecution for unlawfully selling liquor, evidence of an officer that at the time of defendant's arrest at his home, his wife stated in his presence that she had tried to keep him up, and he had continued bootlegging, and she was through, was not inadmissible on the ground that a wife may not testify against her husband, since the rule of privilege does not cover conversations between husband and wife being testified to by a third person who overhears them. State v. Randall (N. Car.) 1918A-438. (Annotated.)

### Notes.

Right of person overhearing privileged communication to testify thereto. 1918A-441.

Information communicated in contract, fiduciary or similar relation as privileged from disclosure. 1916C-698.

Competency of attesting witness to deed or mortgage. 1917A-235.

## i. Transaction With Person Since Deceased.

## (1) Evidence Held Admissible.

35. Person Overhearing Conversation. In an action against an administrator for compensation for services rendered to deceased, daughters of plantiff were not incompetent, under Iowa Code, § 4604. to testify as to conversations overheard by them between decedent and plaintiff where decedent promised to compensate plaintiff, since the conversations did not constitute a personal transaction between witnesses

and the deceased. Tucker v. Anderson (Iowa) 1918A-769.

36. Denial of Execution of Receipt. an action against an administrator for compensation for services rendered to deceased, wherein the administrator claimed full payment and settlement, plaintiff was not incompetent to testify that she had not signed the receipt produced, the pro-bative force of which depended entirely upon the genuineness of her signature, but of which receipt it did not appear that decedent had any personal knowledge, under Iowa Code, § 4604, providing that no party to an action shall be examined as a witness as to any personal transactions or communications between such witnesses and a person at the commencement of such examination deceased. Tucker v. Anderson (Iowa) 1918A-769.

(Annotated.)

- 37. Receipt of Letters. Where a plaintiff testified to receiving three letters from deceased, signed by him, one containing a \$20 bill, and that the letters were postmarked at a certain place, that they had on them what purported to be deceased's letter head, and that they were received by her in due course of mail, such testimony does not concern a transaction with the deceased within the meaning of Schedule, § 2, providing that in civil actions no witness shall be excluded because of interest, "provided that in actions. against executors . . . neither party shall be allowed to testify against the other as to any transaction with or statements of the testator . . . unless called . . . by the opposite party." Josephs v. Briant (Ark.) 1916E-741. (Annotated.)
- 38. Deceased Agent of Party. Rem. & Bal. Wash. Code, § 1211, providing that, in an action or proceeding where the adverse party sues or defends as deriving right or title by, through, or from any deceased person, a party in interest shall not be permitted to testify in his own behalf as to any transaction had by him with the deceased, does not exclude the testimony of an officer and stockholder of one corporation from testifying as to a transaction had by him, as such officer, with an officer and stockholder, since deceased, of another corporation. from which the witness' corporation derives a right or title which it seeks to assert. Beaston v. Portland Trust, etc. Bank (Wash.) 1917B-488.
- 39. Evidence at Former Trial. In an action to recover possession of certain real estate on the ground that a deed therefor had been procured by fraud and that the defendant took his title with notice of such fraud the plaintiff testified to transactions and communications had personally by her with one of the defendant's grantors who was charged with the fraud, such grantor being present as an attorney in the case. At a subsequent trial, such grantor having died, the plain-

tiff was, on the defendants' objection, precluded from testifying to the matters covered by such former testimony, and thereupon offered in evidence the stenographer's transcript thereof. Held, that an objection thereto, on the grounds of incompetency and because it concerned transactions and communications had personally with a deceased grantor from whom the defendant claimed title was properly overruled. New v. Smith (Kan.) 1917B-362. (Annotated.)

40. Ground of Objection not Proved. The testimony of a surviving partner seeking to establish claims for contribution against the estate of a deceased partner in answer to a question as to whether a settlement of the firm's affairs had been made is not, standing alone, objectionable as testimony involving a personal transaction with the deceased, where other testimony shows that another partner was the bookkeeper and cashier of the firm and paid the bills and distributed the moneys received between all the partners, and a party desiring to preserve an objection to the testimony must apply for leave and ask the partner whether the settlement testified to by him was made personally with the deceased partner. Estate of Ryan (Wis.) 1916D-840.

#### Notes.

Competency of interested witness to testify as to letter passing between him and person since deceased. 1916E-747.

Right of party to instrument to deny execution thereof by himself after death of other party. 1918A-777.

## (2) Evidence Held Inadmissible.

- 41. Where plaintiff sued to recover an undivided one-half of deceased's property, alleging oral contract on his part to will her such property, her testimony is incompetent to prove the contract under S. Car. Civ. Proc. 1912, § 438, rendering a party incompetent to testify as to a transaction with a person since deceased in an action against the heir of such person. Brown v. Golightly (S. Car.) 1918A-1185.
- 42. Action for Tort. In a suit against a railroad for an assault committed by the road's alleged agent, deceased prior to the action, plaintiff is incompetent as a witness to the assault made upon him, under Mo. Rev. St. 1909, § 6354, providing that, in actions where one of the original parties to the contract or cause of action is dead, the other shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him. Leavea v. Southern R. Co. (Mo.) 1918B-97. (Annotated.)
- 43. Transactions With Deceased Agent of Party. In an action on a policy insuring a stallion, where the brother of the in-

surer's agent who was associated with him as a clerk, had been present while the agent prepared the application, such agent having been taken ill in the course of the transaction, leaving the office, and his brother having completed the filling out of the application, which, as to the circumstances of the acquisition of the stallion, was not in accordance with the facts, the agent having died, his brother's testimony that the insured had told the truth as to such circumstances was not inadmissible on the ground that the facts were equally within the knowledge of the deceased agent. Simmons v. National Live Stock Co. (Mich.) 1917D-42.

## Notes.

Statute against admission of evidence of transaction with decedent as applicable to deposition taken before death. 1917B-490

Rule extending testimony relating to transaction with decedent as applicable to action ex delicto. 1918B-98.

## (3) Waiver of Privilege.

- 44. Effect on Subsequent Trial. Waiver of defendant's incompetency to testify to transactions with decedent makes him competent on subsequent trials. Comstock's Adm'r v. Jacobs (Vt.) 1918A-465.
- 45. Transaction With Decedent. An administrator suing on behalf of decedent's estate, by calling defendant as a witness to a constituent fact, a transaction in decedent's lifetime, though not examining him generally on the question in issue, waives his incompetency, and makes him competent as a general witness. Comstock's Adm'r v. Jacobs (Vt.) 1918A-465. (Annotated.)
- 46. The incompetency of a witness to testify concerning communications or transactions had with a person since deceased is waived by the objecting party showing on cross-examination the fact that such a communication or transaction occurred. Poole v. Poole (Kan.) 1918B-929.

## Note.

Waiver by personal representative of incompetency of witness to testify to transaction with decedent. 1918A-471.

## 2. EXAMINATION.

- a. Mode of Examination.
  - (1) In General.
- 47. Matters Within Scope of Direct Testimony. In an action to recover a broker's commission upon a sale of real estate, the cross-examination of the defendant in regard to the delivery of a plat to the plaintiff is not objectionable, where it relates

strictly to the matter brought out on his examination in chief. Taggart v. Hunter (Ore.) 1918A-128.

- 48. Cross-examination of Detective—As to Name of Employer. In a prosecution for conspiring to demand money to corrupt a city council, where the person from whom defendants were charged to have demanded the money was a detective engaged to entrap them, the right of defendants to show the bias of any particular witness, by asking whether he was one of those who had procured the investigation, being protected by a subsequent ruling of the court permitting the detective to answer whether any of the several designated persons had anything to do with his employment, the refusal of the court to permit the detective to answer who had employed him is proper. Hummelshime v. State (Md.) 1917E-1072.
- 49. Interrogation as to Previous Testimony. Where a party is taken by surprise by the testimony of his own witness, he may, within the sound discretion of the court, interrogate the witness respecting previous statements or testimony inconsistent with his present testimony. State v. Inlow (Utah) 1917A-741.

## (2) Leading Questions.

- 50. Questions asking witnesses on prosecution for illegal sale of liquor, whether they ever had occasion to visit defendant's place of business, and if they saw defendant there, merely directing their attention to the matter being tried, are not suggestive or leading in any proper sense. People v. Elliott (III.) 1918B-391.
- 51. It is within the court's discretion ordinarily to allow leading questions, especially as a question, asked over plaintiff's objection in an action for malpractice, as to whether it is not a fact that "this sort of human disaster" is preventable, led away from, and not to, the desired answer. Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.
- 52. Where in some instances the prosecuting attorney led the witnesses, but in only one such instance was the evidence material, and in that instance there was no objection, the judgment will not be reversed. Belcher v. Commonwealth (Ky.) 1917B-238.
- 53. In an action for death of a child from falling into a ditch containing pools of hot water, questions to witnesses as to whether children habitually played about the pools are leading, and too general. Thompson v. Alexander City Cotton Mills, 1917A-721.
- 54. In a prosecution for larceny of a cow, on the issue of defendant's possession of a cow branded and owned by another, it is error to permit a detective to be asked

whether he saw in defendant's possession cattle branded NXN, that being leading, and no reason for leading the witness being assigned. Harris v. State (Wyo.) 1917A-1201.

## (3) Hypothetical Questions.

- 55. Assumption of Unproved Fact. Plaintiff's hypothetical questions to experts, on which they are asked to give the opinion that had plaintiff's intestate had proper care within one or two hours after his first attack of apoplexy, while a passenger on defendant's street car, it was reasonably certain his life could have been saved, should not assume he was in good condition, or apparently in good condition, on boarding the car, without referring to the hardened condition of his arteries and the condition of his kidneys, as indicated by albumen and granulated casts in his urine, shown by plaintiff's witnesses to have existed. Middleton v. Whitridge (N. Y.) 1916C-856.
- 56. Hypothetical Questions Approved. It is held that the court did not err in permitting, over the objection of appellant, the propounding of certain hypothetical questions and in permitting such questions to be answered. McAlinden v. St. Maries Hospital Association (Idaho) 1918A-380.
- 57. Experts Appointed by Court. In an action for malpractice, where the court required plaintiff to submit to an examination by impartial physicians, either party may examine such witnesses hypothetically as to matters within the issues; the witness not belonging to one part more than another. Just v. Littlefield (Wash.) 1917D-705.
- 58. Evidence to Support. No error is committed in sustaining an objection to a hypothetical question propounded to a witness, where such question is not based upon facts as to which there is such evidence that a jury might reasonably find that they are established. State v. Klasner (N. Mex.) 1917D-824.
- 59. Expert Evidence—Irresponsive Answer to Hypothetical Question. The answer elicited in response to a hypothetical question propounded to a witness on cross-examination was not available as evidence, where it was not based on evidence corresponding with the hypothesis advanced. Holmberg v. Jacobs (Ore.) 1917D—496.
- 60. Assumption of Facts not Proved. In examining an expert witness, questions assuming an hypothesis not supported by any evidence are improper. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60.

#### Note.

Use of scientific books in connection with examination of expert witness. 1916E-356.

## b. Cross-examination.

#### (1) In General:

- 61. As to Changes in Testimony. A witness who testifies that she stated at a former trial that she had had improper relations with one man only, and repeats the statement at the instant trial, but says that at another trial she testified that she had such relations with forty different men at a certain house, may properly be cross-examined as to why she changed her testimony, and whether some one had told her to change it. State v. Gardner (Iowa) 1917D-239.
- 62. Meaning of Unambiguous Writing. Where, in an action for breach of promise of marriage, the meaning of a letter written plaintiff by defendant's sister after the action was commenced, which defendant claimed contained an offer of marriage communicated through his sister, was too plain to be misunderstood, and there was no offer or claim that plaintiff gave it a different interpretation, a question asked her as to what she considered the letter communciated to her is properly excluded. Stacy v. Dolan (Vt.) 1917A-650.
- 63. Question Calling for Matter Partly Irrelevant. It is not error to sustain objections to questions asked a prosecuting witness on cross-examination as to a conversation between her and the state's attorney, which questions are not limited to the relevant parts of that conversation. Riggins v. State (Md.) 1916E-1117.
- 64. It is also proper to sustain an objection to a question as to what the state's attorney had asked the witness on that occasion. Riggins v. State (Md.) 1916E-1117.
- 65. Stopping Irrelevant Cross-examination. Further cross-examination about the height of the fence is properly stopped; witness having testified that he saw the deliveries of beer at defendant's place of business through a gap in the fence. People v. Elliott (Ill.) 1918B-391.
- 66. Cross-examination, which has gone beyond reasonable limits, of a witness, who has testified to seeing cases of beer delivered at defendant's place of business, and the name "Leisy Beer" on the cases, is properly curtailed when an effort is made to ascertain the extent of his education, by asking him to spell "Leisy." People v. Elliott (III.) 1918B-391.
- 67. Circumstances Explaining Declarations Testified to. Where the state sought to show that accused killed decedent by proving that decedent, after receiving the fatal wounds, pointed to them and said "Dago, Dago," questions on cross-examination of a state's witness as to whether accused was the only one about the place referred to as "Dago" and as to how many

- others and who were so alluded to are pertinent. State v. Giudice (Iowa) 1917C-
- 68. Cross-examination Outside Scope of Direct Examination. In an action for death of a street car passenger, where the plaintiff called defendant's conductor only to show that decedent was on the car at the time of the injury, and defendant in cross-examining him attempted to show contributory negligence, the plaintiff is not bound by such evidence, nor can his other evidence then be disregarded, since by cross-examining the witness outside his direct testimony defendant made him his own witness and not plaintiff's. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-488.
- 69. Cross-examination of Assignee of Lease Suing for Trespass. In trespass quare clausum fregit by an assignee of a lease against the lessor, defendants on cross-examination of plaintiff are properly permitted to ask him from whom he had previously rented the land, and for how long, and what he paid for the lease; such being relevant to the issue. Streit v. Wilkerson (Ala.) 1917E-378.
- 70. Of Plaintiff in Action Under Civil Damage Act. In an action against saloon keepers and their surety to recover for injuries inflicted upon plaintiff by her father when drunk, the allowance of cross-examination of the plaintiff's sister, as to trouble plaintiff had had with her father before the incident complained of, it being the claim of defendants that the man was of ugly temper and had beaten the plaintiff when entirely sober, is not an abuse of the court's discretion as to the character of such examination. Yonkus v. McKay (Mich.) 1917E-458.
- 71. Quantity of Idquor Delivered. Where, in an action under Iowa Code, § 2423, to recover payments made for liquor illegally sold by defendant to plaintiff, the testimony of a witness delivering liquor for defendant to plaintiff and collecting the money therefor was indefinite as to the quantity of liquor sold refusal to permit defendant to show on the cross-examination of the witness that he worked for other liquor houses and delivered their liquor to the plaintiff was error. Cvitanovich v. Bromberg (Iowa) 1917B-309.
- 72. Cross-examination of Party as to Wealth. In an action under Iowa Code, § 2423, to recover money paid for liquor illegally sold by defendant to plaintiff, questions on the cross-examination of defendant as to having become rich by taking orders for liquor are improper Cvitanovich v. Bromberg (Iowa) 1917B-309.
- 73. Use of Documents not Admissible in Evidence. Upon cross-examination of a witness who was a deputy of the defendant

insurance association, a copy of the association's by-laws may be received to show under what authority the witness claimed to act, though the copy was not admissible, being secondary evidence, to prove the by-law. Schworm v. Fraternal Bankers' Reserve Soc. (Iowa) 1917B-373.

74. Irrelevant Matters. In a prosecution for polygamy, cross-examination of a witness as to whether he had read newspaper accounts of the arrest of defendant is properly excluded. State v. Von Klein (Ore.) 1916C-1054.

## (2) Credibility of Witness.

75. Testimony as to Repute—Scope of Cross-examination. In mandamus to compel a school committee to admit relators' children to the white school, from which they had been excluded, as being of mixed blood, a witness who testified that the mother of the children was generally reputed to be of mixed blood may be cross-examined as to whether the report had been started through envy and jealousy; such evidence tending to discredit the witness' testimony as to the general reputation. Medlin v. County Board of Education (N. Car.) 1916E-300.

76. Denial of Former Testimony. Where, on proper foundation, testimony of a witness given at a coroner's inquest is read to him, and he denies its correctness, but no further effort is made to impeach him, the admission of the testimony read is not error. Froeming v. Stockton Electric R. Co. (Cal.) 1918B-408.

77. Examination of Expert-Use of Scientific Books. Before the contents of medical books may be introduced in evidence and read to the jury for the purpose of refuting the testimony of a medical expert, it is necessary that the attention of the witness shall be first called to such books, and that he shall have based his opinion upon the same, and it would be a mere evasion of the rule to allow counsel, in the cross-examination of a witness who has not either based his opinion upon the specific book nor upon the authorities generally nor whose opinion in the nature of things must necessarily be based upon authorities, to read to such witness portions of a medical work, and to ask him if he concurs in or differs from the opinions therein expressed. Such a proceeding would be nothing more nor less than impeaching the witness by a text-book on which he has in no way relied, and where no foundation for his impeachment has been laid, and by an authority who is not present in court and cannot be cross-examined. State v. Brunette (N. Dak.) 1916E-340. (Annotated.)

78. Where, however, a medical witness has in his examination in chief based his

opinion upon the medical authorities generally, rather than upon the result of his own personal experience, it is permissible in cross-examination to read to him portions of medical works and to ask if he concurs therewith or differs therefrom, and to thus test his knowledge and reading and accuracy, even though he has not in his direct or cross-examination referred to any specific work. Where this is done, however, the proper practice is for the court to caution the jury that it is the testimony of the witness, and not what is read from the book, that constitutes evidence in the case. State v. Brunette (N. Dak.) 1916E-340. (Annotated.)

79. Showing Animus. As tending to show the animus actuating plaintiff in an action for breach of promise to marry, and as bearing on her credibility as a witness, cross-examination of her should be allowed to show that she sought to have the president of the bank, of which defendant was cashier, discharge a girl employee, on the ground that defendant was under her influence, and later changed her mind on this subject, and sought to have defendant discharged, stating in each instance that if this was done she would be satisfied and would not prosecute her action. Nolan v. Glynn (Iowa) 1916C-559.

80. Railroad Claim Agent. When the claim adjuster of the railroad company visited the plaintiff the day after she was injured in alighting from the defendant's train, she being then in bed, and when he stated in his testimony, among other things, that his purpose in calling on her to see if he could help her, a rigid cross-examination of this witness was proper. Florida East Coast R. Co. v. Carter (Fla.) 1916E-1299.

Cross-examination of Accused—Previous Conviction of Crime. Kirby's Ark. Dig. § 3138, as amended by Laws 1905, p. 143, provides that a witness may be impeached by the party against whom he is produced, by contradictory evidence by showing that he has made inconsistent statements, or by evidence that his general reputation for truth and morality render him unworthy of belief, but not by evidence of any particular acts, except that it may be shown by the examination of the witness, or record of the judgment, that he has been convicted of a felony. that, where accused in a prosecution for assault to rape became a witness in his own behalf, the court properly permitted the state to prove by him on cross-examination that he had been previously convicted of a similar offense, to effect his credibility. Hunt v. State (Ark.) 1916D-533.

## (3) Experts.

82. Expert Witness—Cross-examination—Statements in Medical Books. In an ac-

tion for malpractice, it is proper to permit an expert medical witness to be asked on cross-examination whether it is true, as stated in a medical treatise of high authority, that it is not uncommon even in closed fractures of the femur to find gangrene developing because of laceration or pressure, and that early amputation of the thigh above the fracture is necessary in those cases, and should be done early in order to save life, as this is a statement of surgical theory and practice, and the gist of the question is whether the witness' expert opinion concurs with that of the au-Barfield v. South Highlands Infirmary (Ala.) 1916C-1097.

#### c. Recalling Witness.

83. Discretion of Court. The recalling of a witness for further cross-examination rests in the discretion of the trial court, and so it is not error for the court to reuse to recall one of the state's witnesses for the purpose of examining her as to whether she had not threatened to frame up a case against accused, there being no evidence of any conspiracy. State v. Schuman (Wash.) 1918A-633.

## d. Privilege of Witness.

## (1) Nature and Extent.

84. Privilege Against Self-Crimination—Scope. The personal privilege guaranteed by Const. art. 1, § 6, against self-incrimination cannot be asserted unless the person to whom the privilege is given, is subject to criminal prosecution or a forfeiture, though the constitutional provision must receive a broad construction in favor of the right which it is intended to secure. People v. Cassidy (N. Y.) 1916C-1009.

## (2) Who may Assert Privilege.

85. Immunity as to Self-Criminating Testimony. N. Y. Penal Law (Consol. Laws, c. 40) § 770, declaring that a person committing offenses against the elective franchise is a competent witness against another person so offending, and may be compelled to testify, but the testimony shall not be used in any prosecution or proceeding, civil or criminal, against him, provides for immunity, and one may be compelled to testify, but his testimony cannot be used against him unless he has previously waived his right to claim immunity. People v. Cassidy (N. Y.) 1916C-1009.

## (3) Waiver of Privilege.

S6. Effect of Waiver of Privilege—Subsequent Proceeding. One who voluntarily testified before a supreme court justice, investigating a charge in connection with a nomination of a candidate by a judicial convention for a public office, and who ex-

pressly waived immunity, did not thereby waive his constitutional right to decline to give testimony on the trial of one subsequently indicted for crime in connection with the nomination, because one who is entitled to the constitutional protection is so entitled in each new and independent proceeding, for otherwise he would subject himself to a new cross-examination and be required, under new and changed conditions, to give testimony that might not have been anticipated or intended in subjecting himself to examination in the prior and different proceeding. People v. Cassidy (N. Y.) 1916C-1009. (Annotated.)

87. The personal privilege against self-incrimination guaranteed by Const. art. 1, § 6, may be waived in any case by the person offering himself as a witness, and, when the privilege is waived, the person is subject to cross-examination like any other witness. People v. Cassidy (N. Y.) 1916C-1009.

88. Effect of Waiver—Subsequent Proceeding. A person cannot waive the privilege against self-incrimination guaranteed by N. Y. Const. art. 1, \$ 6, and give testimony to his advantage or the advantage of his friends, and at the same time and in the same proceeding assert his privilege to answer questions to his disadvantage or to the disadvantage of his friends, but a waiver of the privilege cannot extend to new and independent proceedings, where the circumstances, surroundings, and prospective criminal charges are different. People v. Cassidy (N. Y.) 1916C-1009.

(Annotated.)

#### Note.

Waiver by witness of constitutional privilege as extending to subsequent trial or proceeding. 1916C-1012.

## 3. Credibility, Impeachment and Corroboration.

## a. Credibility,

89. Falsus in Uno. The maxim, "Falsus in uno, falsus in omnibus," is permissive only, and not mandatory. People v. Becker (Kan.) 1917A-600.

90. Interest in Event. The testimony of a witness for plaintiff cannot be disregarded because another action for the same injury is pending against him, and he is interested in having the responsibility placed on defendant; but the weight of his testimony is for the jury. Mahlstedt v. Ideal Lighting Co. (III.) 1917D—209

91. Declarations Showing Bias. Such statements by the state's witness are admissible to show his bias or hostility. People v. Roach (N. Y.) 1917A-410.

92. Question for Jury. The credibility of witnesses is for the jury. Louisville, etc. R. Co. v. Chambers (Ky.) 1917B-471.

- 93. Conviction of Crime. The credibility of witnesses, though they have been convicted of crime, is for the jury, and the verdict is conclusive on appeal. State v. Schuman (Wash.) 1918A-633.
- 94. Sustaining Credit of Detective—Showing Practice of Assuming Name. In a prosecution for conspiring to demand money to corrupt a city council, where the person from whom defendants were charged to have demanded the money was a detective engaged to entrap them, testimony of such detective as to whether it was usual for his profession to act under an assumed name when making investigations is admissible in evidence to support his credibility, by showing that he had not resorted to unusual methods of detection. Hummelshime v. State (Md.) 1917E-1072.
- 95. Effect of False Testimony. In prosecution for stealing horses, where impeaching testimony was taken, it is error to instruct that the testimony of impeaching witnesses should be weighed in the same manner as that of other witnesses, and, when impeaching witnesses attack the credibility of others and testify falsely, the jury might disregard entirely the impeaching testimony in so far as false and give to the testimony of the witnesses attacked such weight and credence as is deserved. Babb v. State (Arizona) 1918B-925.

#### Note.

Proof of drug or liquor habit to discredit witness. 1918A-639.

#### b. Impeachment.

## (1) Foundation.

- 96. Necessity of Foundation. The rule requiring foundation for impeachment is not applicable to witnesses testifying by deposition. Comstock's Adm'r v. Jacobs (Vt.) 1918A-465.
- 97. A witness who had examined the boiler which had exploded testified by deposition, giving his opinion as to the cause of the explosion, after which the defendant sought to introduce the deposition of another witness taken by the plaintiff, but not used, for the purpose of showing, by the copy of a coroner's verdict thereto attached, that the witness who had served on the coroner's jury had signed a verdict that the cause of the explosion was unknown to the jurors, thereby tending to contradict his testimony given by deposition. His attention was not called to this copy, but it was offered without his having an opportunity to examine or explain it, and its exclusion was not error. Denver v. Atchison, etc. R. Co. (Kan.) 1917A-1007.

- (2) Prior Inconsistent Statements or Testimony.
- 98. Prior Conflicting Statement—Necessity of Foundation. Where, on cross-examining witnesses, their signed statements were produced and read to them with the design of impeachment, but with no preliminary foundation and without introducing the statements in evidence, the testimony so elicited is inadmissible, as is that of another witness who took the statements, since impeachment by prior conflicting statements of witnesses requires that a foundation be laid before admitting them. Froeming v. Stockton R. Co. (Cal.) 1918B—408.
- 99. Prior Inconsistent Affidavit. The reading on cross-examination of so much of a prior affidavit of a witness as contradicted his testimony on the stand was proper to impeach such witness. Yonkus v. McKay (Mich.) 1917E-458.
- 100. Stenographic Report of Previous Testimony. In a prosecution for murder, where, after cross-examination of the defendants, the prosecution offered in evidence, for purposes of impeachment, a stenographic report of their previous inconsistent testimony before the coroner's jury, it being shown by the stenographer that he had taken down only part of the testimony, but that what he had taken down was correctly reproduced, and where the defendants objected to the admission of the report because it did not contain all the testimony, those parts of the report which tended to contradict defendants' testimony at the trial are admissible. Patterson v. State (Ala.) 1916C-968.
- 101. Testimony Before Grand Jury. In a prosecution for adultery, it is not error to admit the testimony of the clerk of the grand jury that the husband of the woman appeared before the grand jury and testified against his wife and defendant, and that the wife appeared as a voluntary witness, and testified that she had intercourse with defendant on the night of their arrest. State v. Ayles (Ore.) 1916E-738.
- 102. Inconsistent Statements—Foundation. To permit the impeachment of a witness by showing inconsistent averment in a bill filed by him in another proceeding, his attention must have been called thereto when he was on the stand. Partridge v. United States (D. C.) 1917D-622.
- 103. Inconsistent Statement by Prosecuting Witness. A prosecuting witness who has testified to intercourse with the defendant, and who has stated that on her first visit to the state's attorney's office she refused to tell him anything, can be asked on cross-examination whether she

1916C-1918B.

did not on that occasion tell him that the defendant did not have intercourse with Riggins v. State (Md.) 1916E-1117.

104. Prior Claim of Privilege. The court erred in admitting certain documentary evidence showing that the witness in a criminal case had declined to answer before the grand jury certain questions propounded to him on the ground that his answer to those questions might tend to criminate himself. The admission of this evidence tended to destroy or at least abridge the privilege of the witness, guaranteed by the constitution of this state, of refusing to answer questions tending to criminate him, and to deprive him of the protection of that privilege which it was the purpose of the constitution to give. Loewenherz v. Merchants', etc. Bank (Ga.) 1917E-877. (Annotated.)

## (3) Conviction of Crime or Arrest.

105. Former Conviction-How Proved. Under Iowa Code, § 4613, declaring that a witness may be interrogated as to his previous conviction for felony, but no proof is competent, except the record thereof, one testifying in his own behalf may be impeached by introduction of the record of his conviction of a felony in a sister state. State v. Foxton (Iowa) 1916E-727.

## (4) Insanity.

106. Proof of Insanity. The state may, to impeach the credibility of a witness for the defense, establish by cross-examina-tion that the witness had been adjudged insane and that said judgment had never been set aside. Mason v. State (Tex.) 1917D-1094.

## (5) Impeachment by Party Calling Wit-

107. Impeachment by State of Its Own Witness. Where the court allowed the state to contradict its own witness, who changed her testimony from that given on the preliminary hearing, it may be pre-sumed, in support of the ruling, that the state was taken by surprise, and hence had the right to interrogate the witness respecting her previous statements. State v. Inlow (Utah) 1917A-741.

108. By Party Calling Wtiness. A party, by calling a witness, vouches for his credibility, and cannot impeach him; but this does not prevent him from asking to have the truthfulness of the witness' testimony submitted to the jury, if it is inherently improbable or is contradicted. Carlisle v. Norris (N. Y.) 1917A-429.

## (6) Attacking Character or Reputation.

109. Where the evidence merely raises a suspicion that witnesses for the state used narcotics, and there is no evidence that

they are habitual users or under the influence of drugs at the time of testifying, evidence of the effect of drugs on the memory is properly refused. State v. Schuman (Wash.) 1918A-633.

(Annotated.)

110. Where on cross-examination the prosecuting witness denied that she used cocaine, but was not asked whether she told others that she used the drug, she cannot be impeached by extrajudicial statements that she used such drug. State v. Schuman (Wash.) 1918A-633.

(Annotated.)

111. Use of Drugs. Where the prosecuting witness denied on cross-examination that she used cocaine, which question was asked to affect her credibility, the defense is concluded by her answer, the matter being wholly collateral to the offense charged. State v. Schuman (Wash.) 1918A-63.

(Annotated.)

## c. Corroboration.

112. Proof of Good Reputation. Where contestant's principal witness is impeached by proof that at the time of the second trial he was incarcerated in a penitentiary contestant may corroborate the witness by proof of his good reputation, under the common law and Mont. Rev. Codes, § 8026. In re Williams' Estate (Mont.) 1917E-126.

## WOMEN.

See Husband and Wife; Divorce; Marriage. Limiting hours of employment, see Labor Laws, 3-5.

WORDS ACTIONABLE PER SE. See Libel and Slander, 6, 16-21, 24-36.

#### WORDS AND PHRASES.

"Accident," see Master and Servant, 194-202.

"Accidental means," see Accident Insur-

ance, 15, 16, 18.
"Across," see Telegraphs and Telephones.
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1. Act of God-Definition. An "act of God" is the action of an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength, or care. Hecht v. Boston Wharf Co. (Mass.) 1917A-445.

#### Note.

Meaning of "all" as used in prohibitory or regulatory statute. 1917E-39.

2. "All Coal." The grantee's acceptance of a deed conveying the surface, but excepting and reserving "all the coal in, under and upon said tract of land, and the right and privileges of the said parties of the first part, their heirs, and assigns to enter upon said tract of land and excavate and mine, prepare for market, and remove said coal with all the usual mining privileges," does not waive his right of sub-jacent support. Stonegap Colliery Co. v. Hamilton (Va.) 1917E-60. (Annotated.)

## Note.

Meaning of "all damages." 1917E-82.

3. "All Matters." In an action to set aside a deed and recover the rental value of the land and the value of personalty converted by defendant, an agreed order of settlement, entered November 11, 1911, and reciting that "all matters between them are settled, and as to all matters of accounts between said parties, this cause is now dismissed settled," includes the rent for the year 1911, especially where another clause of the agreed order specified a matter other than such rent as being excepted; the word "all" being comprehensive enough to embrace not only such matters of account as were set up in the pleadings and judgment, but also such matters as were incidental to the litigation, or might thereafter have been asserted by either party against the other in the absence of the compromise settlement. Middleton v. Stone (Ky.) 1917E-84.

#### Notes.

Meaning of "all matters." 1917E-87.

Meaning of "all property" as used in instrument, statute, etc. other than will. 1917E-58.

Legal meaning of "any." 1917E-2.

- 4. "Any Other Purpose" Defined. Wis. St. 1913, § 4394, provides that any person who shall set or fix in any manner any gun or other firearm to kill game of any kind by coming in contact therewith, or with any string, wire, or other contrivance attached thereto, by which the same may be discharged, "or for any other purpose, shall be punished, etc., and if the death of any person is caused thereby, he is deemed guilty of "manslaughter in the second degree." Held, that the phrase "or for any other purpose" was not to be construed, under the rule ejusdem generis, as limited to the setting of guns to kill game, etc., but prohibited the setting of a gun for any purpose whatever other than with intent to effect the death of or physical injury to a human being or the wrongful destruction of property, or for a purpose evincing a depraved mind, regardless of danger to human life, so that where defendant set a gun in his orchard to prevent persons from stealing his apples and decedent was shot and killed thereby, the court properly limited the jury to a conviction of murder in the first or second degree and manslaughter in the second degree, and refused to submit manslaughter in the fourth degree or excusable homieide. Schmidt v. State (Wis.) 1916E-107. (Annotated.)
- 5. Business. The word "business" is commonly employed in connection with an occupation for livelihood or profit, but is not limited to such pursuits. Griffin v. Russell (Ga.) 1917D-994.

"Commodity," legal meaning. 1916D-986.

- 6. "Constitutional Right." The expression "constitutional right" means a right guaranteed to the citizens by the constitution and so guaranteed as to prevent legislative interference therewith. Delaney v. Plunkett (Ga.) 1917E-685.
- 7. "Damage by the Elements." Fire is one of the elements included in the expression "damages by the elements excepted," where that phrase is used in a lease of a building. O'Neal v. Bainbridge (Kan.) 1917B-293. (Annotated.)
- 8. "Distinct." As defined by lexicographers, "distinct" means "clear to the senses or mind"; "easily perceived or understood"; "plain"; "unmistakable." Hill v. Norton (W. Va.) 1917D-489.

#### Note.

"From" as word of inclusion or exclusion. 1918A-924.

- 9. Hatch Definition. "Hatch" is a nautical term and generally signifies an opening in the deck of a ship. State v. Armstrong (Neb.) 1917A-554.
- 10. "Horse." The use of the word "horse" as a generic term in pleading includes "mare." McCarver v. Griffin (Ala.) 1917C-1172.
- originally employed to designate the power of a steam engine, has come to mean the unit used in estimating the power required to drive machinery. Eastern Pa. Power Co. v. Lehigh Coal, etc. Co. (Pa.) 1916D-1000. (Annotated.)
- 12. Meaning of "Inherit." R. I. Gen. Laws 1909, c. 312, § 10, provides that administration of the estate of a person dying intestate shall be granted, if the deceased is a married woman, to her husband, if competent, who shall not be com-pelled to distribute the surplus of the per-sonal estate after the payment of her debts, but shall be entitled to retain the for his own use. Testator bequeathed \$5,000 and certain real estate to a trustee in trust for the benefit of C. for life, with power to manage the same generally and to sell and reinvest the proceeds if desirable. A subsequent clause of the will declared that in all cases where testator had given property in trust for the benefit of other persons, and had not specially provided for its disposition on their death, the trustee, on such event, should pay and convey the property in fee, discharged of all trusts, to the persons who, by the laws of Rhode Island would inherit it had the persons, for whose benefit it was given, died seized and possessed thereof in fee. It is held, that the real property having been converted into personalty by the trustee during the lifetime of the beneficiary for life, the word "inherit" could not be construed as having been used by testator in its strict legal sense as designating those persons only who would inherit real property from an intestate ancestor, but the word was used in the sense of "take"; and hence, on the death of the beneficiary for life, the remainder of the trust fund so bequeathed to her passed to her husband and not to her heirs. Quinn v. Hall (R. I.) 1917C-373. (Annotated.)

#### Notes.

Meaning of "inherit," "inherited," etc. 1917C-386.

What constitutes "loss" of eyesight. 1918A-531.

13. Masculine Words as Extending to Females—Rule Inapplicable. Iowa Code,

§ 48, par. 3, providing that words importing masculine gender only may be extended to females, does not operate where its application violates reason and nullifies the intent of the legislature. State v. Gardner (Iowa) 1917D-239.

14. "Natural Rights" and "Civil Rights" Defined. By the term "natural rights" is meant those rights which are necessarily inherent, rights which are innate and which come from the very elementary laws of nature, such as life, liberty, the pursuit of happiness, and self-preservation.

pursuit of happiness, and self-preservation. By the term "civil rights," in its broader sense, is meant those rights which are the outgrowth of civilization, which arise from the needs of civil as distinguished from barbaric communities, and are given, defined, and circumscribed by such positive laws, enacted by such communities as are necessary to the maintenance of organized government, and the term comprehends all rights which civilized communities undertake, by the enactment of positive laws, to prescribe, abridge, protect, and enforce.—Byers v. Sun Savings Bank (Okla.) 1916D-222.

#### Note.

Meaning of term "natural heirs." 1917A-1159.

15. In that act the word "or" between the words "ship" and "convey" should be read "and"; those conjunctions being frequently convertible. Bird v. State (Tenn.) 1917A-634. (Annotated.)

16. "Or Elsewhere" Defined. It is clearly manifest that the general words "or elsewhere," contained in the statute, were used for the purpose of including other places than are suggested by the specific words "at a house of ill fame or at any other place of like character." State v. Sanders (La.) 1916E-105.

## Note.

Legal meaning of "otherwise." 1916C-644.

17. Parens Patriae — Definition. The words "parens patriae," meaning "father of his country," were applied originally to the king, and are used to designate the state, referring to its sovereign power of guardianship over persons under disability. In re Turner (Kan.) 1916E-1022.

#### Notes.

Meaning of "plant" as used with reference to business. 1917A-317.

What is included in term "premises" as used with respect to land. 1916C-1192.

18. Distinction between "Rent" and "Royalty." Where a deed from a grantor who had owned the land for years and knew of the existence of mines, they having been actually worked in his lifetime,

to his sons, provided that, if his wife survived him, she should receive one-half of all rents from the place from all resources whatsoever, she is entitled to share in the income from the mines while operated on a royalty basis, as well as all other income and proceeds from the farm, regardless of the manner and form of payment or the name by which it might be designated; since, while "royalty" is a more appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from a mine, the terms "rent" and "royalty," as the result of usage and custom, are often used interchangeably, and "all resources whatsoever" necessarily include the mines. Saulsberry v. Saulsberry (Ky.) 1916E-1223. (Annotated.)

#### Notes.

Distinction between rent and royalty. 1916E-1225.

Meaning of term "recent" or "recently." 1918A-814.

19. "Revenue"—Meaning of Term. The constitution, in limiting appropriations which may lawfully be made by each general assembly for the ordinary and contingent expenses of the government untit the expiration of the first fiscal quarter after the adjournment of the next regular session to the amount of revenue authorized by law to be raised in such time, does not regard the amount of the state's total revenue as merely the amount of its moneys raised by direct taxation. Fergus v. Brady (Ill.) 1918B-220. (Annotated.)

## Note.

Legal meaning of "revenue." 1918B-200.

20. Meaning of "Said." Where the description of a zone of a paving district, which had referred to block 10, subsequently refers to said lot 110, "said" must be treated as "aforesaid," and the word "lot" as "block"; the error being a mere clerical one. Moore v. Paving Improvement District (Ark.) 1917D-599.

(Annotated.)

## Note.

Legal meaning of "said." 1917D-603.

21. The word "serious" is not generally used to signify a dangerous condition, but rather to define a grave, important, or weighty trouble. Schas v. Equitable Life Assurance Soc. (N. Car.) 1918A-679.

(Annotated.)

- 22. "Strand." The word "strand" signifies the shore or bank of the sea or a river. Harris v. St. Helens (Ore.) 1916D-1073.
- 23. "Unfaithfully," "Improperly" and "Illegally" Defined. The word "unfaithfully" signifies bad faith. The word "improperly" implies such conduct as a man

of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of. The word "illegally" means unlawfully and contrary to law (citing Words and Phrases, Unfaithfully; see also Words and Pharses, First and Second Series, Illegal). State v. American Surety Co. (Idaho) 1916E-209.

24. "Wages" and "Salary" Distinguished, The word "salary," as used in a city ordinance providing for the compensation of firemen, is synonymous with "wages," though the word "salary" is sometimes understood to relate to compensation for official or other services, as distinguished from "wages," which is the compensation for labor. Walsh v. Bridgeport (Conn.) 1917B-318. (Annotated.)

25. "Wharf." A wharf is a bank or other erection on the shore of a harbor, river, or canal, for the convenience of lading and unlading ships or boats. Harris v. St. Helens (Ore.) 1916D-1073.

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- 2. Services by Member of Household-Express Contract-Instructions. In an action against a decedent's estate to recover for services rendered decedent, the in-struction that if the plaintiff established the rendition of services under an express agreement by which she was to be paid therefor, she would be entitled to recover, though such services may have been rendered at a time when she was furnished a home, food, and clothing and was living with decedent in his home and with his family, is not defective as assuming that there was evidence of an express agreement, and that such agreement did not contemplate payment for services by furnishing a home, food, clothing, etc., when considered in connection with other instructions, that the furnishing of a home, food, and clothing to one

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- 3. Recovery not Excessive. Where plaintiff worked on decedent's farm for seven years, the work consisting of household duties and manual labor on the farm, a verdict of \$3,164 is not excessive. Estate of Oldfield (Iowa) 1917D-1067.
- 4. Remedy for Breach—Option to Sue at Once for Damages. In case of a rejection of services by one who has agreed to make compensation by will the promisee may immediately renounce the contract and sue decedent for damages. McCurry v. Purgason (N. Car.) 1918A-907.

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Bills and notes: parol evidence of conditional delivery of bill or note, 1917D-1049.

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